



National Library
of Canada

Acquisitions and
Bibliographic Services Branch

395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale
du Canada

Direction des acquisitions et
des services bibliographiques

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Reproduction in full or in part of this microform is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30, and subsequent amendments.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

La reproduction, même partielle, de cette microforme est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30, et ses amendements subséquents.

ABORIGINAL PEOPLE AND DISCRIMINATION
IN THE JUSTICE SYSTEM:

A SURVEY OF MANITOBA INMATES
AND RELATED LITERATURE

Tom McMahon, September 1992

Submitted in fulfillment of requirements for a
Master of Laws Degree, University of Ottawa

Thesis Supervisor: Professor Bradford W. Morse



Thomas (Tom) McMahon, Ottawa, Canada, 1993



National Library
of Canada

Acquisitions and
Bibliographic Services Branch

395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale
du Canada

Direction des acquisitions et
des services bibliographiques

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

L'auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L'auteur conserve la propriété du droit d'auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-315-82578-2

Canada



UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

**ABORIGINAL PEOPLE AND DISCRIMINATION
IN THE JUSTICE SYSTEM:
A SURVEY OF MANITOBA INMATES AND RELATED LITERATURE**

Tom McMahon, September 1992

Submitted in fulfillment of requirements for a Master of Laws Degree,
University of Ottawa. Thesis Supervisor: Professor Bradford W. Morse

THESIS ABSTRACT

The thesis examines how the criminal justice system treats Aboriginal people. While the survey is principally concerned with examining evidence of systemic discrimination, it points out from the beginning that an ineffective justice system needs reform even if it is fair in all respects. I believe the present justice system generally does not protect Aboriginal victims and communities, and intrudes excessively into the lives of offenders without realizing substantial benefits.

Part One of the thesis is an analysis of a survey of Aboriginal and non-Aboriginal inmates in Manitoba in 1989 conducted for the Aboriginal Justice Inquiry. This may be the first survey in Canada to ask non-Aboriginal inmates how the justice system treats Aboriginal persons. Non-Aboriginal and Aboriginal respondents agreed that the system treats Aboriginal offenders differently and more negatively, although Aboriginal inmates were more likely to hold this perception. The survey asked the inmates about their personal experiences, and these were compared as well as their opinions about how the justice system treats Aboriginal

people. The personal experiences confirmed the inmates' opinions that the justice system treats Aboriginal people differently and negatively.

Chapter 2 examines the profiles of the inmates in the survey, including offense seriousness, prior record, age, employment, education, parents and families, religion, languages spoken, and so on. Significant cultural and socioeconomic differences are confirmed. Chapter 3 reviews experiences from arrest to sentencing, and concludes that Aboriginal over-representation in jails in Manitoba cannot be explained as a simple reflection of higher Aboriginal crime rates, more serious offenses, longer prior records, or more charges. Chapter 4 discusses experiences in jail and with parole. The chapter concludes that Aboriginal inmates are not receiving culturally appropriate programs or assessments, and are being treated differently and negatively by jail staff and the parole board.

Chapter 5 moves away from a strictly Aboriginal/non-Aboriginal comparison to identify differences between special sub-groups within the body of respondents. These are rural/urban differences (with special attention given to differences within the Aboriginal group), male/female differences, and differences between federal and provincial inmates. Each sub-group faces particular problems of their own. Young Aboriginal men making a transition to urban centres comprise a group that is especially at risk of becoming involved with the criminal justice system. Women face especially difficult circumstances when in jail. Inmates in provincial jails receive fewer programs.

Part Two of the thesis is a review of the literature and is divided into three sections. First is a review of the major trends and findings of 25 years of "official" studies (task forces, public inquiries, special committees). These studies have increasingly examined the meaning of discrimination, explained cultural differences

that are relevant to the justice system, revealed how discrimination in the past has effects on the present day relationship between Aboriginal persons and the justice system, and how the treatment of Aboriginal and treaty rights affects that relationship. Increasingly and emphatically, official studies are finding that the justice system discriminates against Aboriginal people and fails their communities. The last part of this chapter traces the evolution towards recommendations for Aboriginal justice systems.

The second part of the literature review examines the very substantial limitations in finding discrimination in the justice system through statistical study. This chapter finds that the limitations are so significant that they call into doubt virtually all such studies of the issue. Conclusions based on personal testimony such as that received during public inquiries have considerable value compared to limited statistical studies. Nonetheless, the statistical evidence, however limited, tends to show that discrimination in the justice system does exist, although the levels at any given decision point may be small.

The third part of the review brings together the evidence that exists, whether "official" or academic and traces the existence of systemic discrimination in the order that offenders experience the justice system, from police surveillance to parole. A major part of the analysis relies on the proposition that discrimination exists if practices in the justice system affect Aboriginal persons negatively and disproportionately, without regard to the nature of the offence. Most often, this kind of discrimination is not based on racial considerations but instead on such factors as poverty, geographic isolation, ability to speak English and so on.

The thesis concludes that discrimination against Aboriginal persons is widespread in the criminal justice system, and that the system is not serving

Aboriginal people well, whether as victims, offenders, or communities. One of the recommendations proposed is for the establishment of Aboriginal justice systems, including criminal law-making powers. Other recommendations are directed at that part of the justice system that will always be governed within the present jurisdictional structures, and calls for blunt measures to make the justice system more effective in protecting victims and reducing discrimination against Aboriginal persons. The thesis concludes that the problems with the justice system are fundamental and in many ways involve inherent contradictions in its operation. The entire Canadian community would be well served if these problems would begin to be addressed, although Aboriginal communities may derive the most immediate benefits from these efforts.

TABLE OF CONTENTS

Acknowledgements

Preface

Chapter 1 - Introduction 1

PART ONE

Chapter 2 - Methodology and inmate profile 21
Chapter 3 - Arrest to sentencing 57
Chapter 4 - Jail and parole 83
Chapter 5 - Important sub-groups: rural offenders, women,
federal/provincial jails 108

PART TWO

Chapter 6 - A review of 25 years of official studies 152
Chapter 7 - Limitations on finding discrimination
in the justice system 218
Chapter 8 - Locating discrimination in the justice system 248

Chapter 9 - Conclusions and recommendations 328
Bibliography 350
Appendix - Detailed methodology 364

ACKNOWLEDGEMENTS

This thesis would not have been possible without the dedicated support and assistance of my wife, Kelly Klick, the guidance of my supervisor, Brad Morse, the tutelage of the Commissioners of the Aboriginal Justice Inquiry (AJI), A. C. Hamilton and Murray Sinclair and the work of the entire AJI staff. I am also deeply appreciative of the support and encouragement my parents have given me in all my endeavours, this one being no exception.

The Manitoba Inmate Survey, which forms the basis of this thesis, was conducted by the AJI in 1989. It had the benefit of a number of contributors all employed by the Aboriginal Justice Inquiry. The survey instrument was prepared by Doris Young and Harry Daniels in consultation with Professor Brad Morse. The instrument was inspired by a similar survey conducted by Professor Morse and Linda Lock for the Canadian Sentencing Commission and by other surveys. The interviews were conducted primarily by Eric Robinson and Jennifer Yarnell, with Jeannie Daniels and Doris Young conducting interviews at the Portage Correctional Institution for women. The raw data coding and tabulation was completed by Prairie Research Associates Inc. of Winnipeg. An initial draft was prepared by Doris Young, with assistance from Laurie Messer, Maryanne Boulton and Marie Lands. The final draft was prepared by Tom McMahon. All of the work was supervised by the Director of Research, Professor Brad Morse. The survey was a fairly straightforward recitation of the data, with relatively little analysis or discussion of other studies.

This thesis is a re-examination of the Manitoba Inmate Survey. The thesis conducts further analysis of the survey data and examines findings of other empirical studies to see whether or not the inmate survey is consistent with other

findings. The thesis goes on to review 25 years of official studies into Aboriginal justice issues (public inquiries, task forces, and special committees), discusses empirical difficulties in identifying discrimination, summarizes a wide range of literature which finds discrimination in most areas of the criminal justice system and concludes with my recommendations based on all of the analysis.

The thesis would not have been possible without the contributions of the inmates themselves. They participated in a survey that could offer no promise of benefit to the respondents, that caused apprehension that information revealed might later create difficulties for them and they participated in spite of being the subject of many similar studies that likely serve the interests of researchers far more than the interests of the inmates.

PREFACE

This thesis concerns a survey of inmates in Manitoba in 1989 that was originally prepared for Manitoba's Public Inquiry into the Administration of Justice and Aboriginal People (Aboriginal Justice Inquiry or AJI). The thesis re-examines the data from the survey and provides an analysis of that data with reference to other literature about criminal justice and Aboriginal persons.

In the course of reading the surrounding literature I was struck by the fact that it is very rare for authors to identify their perspectives for the reader. Maybe it is felt that personal perspective does not bias the analysis or maybe it is felt that any personal bias will be obvious to the reader. I believe that personal perspective is inherent in all analysis and the reader should be cautioned to keep that perspective in mind.

Most of the reading I have done for this thesis is from academics (especially criminologists) on the one hand, and judges, bureaucrats, and lawyers on the other hand. The vast majority of these writers are male and I assume the vast majority are white. I assume criminologists have a vested interest in finding that there is value in the work of criminology, particularly specialized empirical research and that judges, lawyers and bureaucrats generally have vested interests in maintaining good standing in their careers and among their colleagues, which suggests that they should not "rock the boat" too much. Most of the work done in the field of Aboriginal criminal justice issues has been in response to government sponsored inquiries, task forces, and reviews, which have varying degrees of independence.

My perspective is somewhat different as I believe I have a certain detachment from the survey itself, although I am a white male lawyer whose career has so far been with the civil service and I have some aspiration to academic work. The inmate survey is one that I inherited, rather than one that I personally sponsored, and I became involved only after all of the interviews had been completed (although as Executive Secretary to the Aboriginal Justice Inquiry I was certainly close to the survey). Perhaps more importantly, I am not a criminologist and have no special skills in data analysis. While I am a lawyer, I have not practiced criminal law, apart from performing the bulk of my articles-at-law with the Crown Prosecutor's office.

The greatest shaping of my perspective is my work as Executive Secretary for the AJI. Before this, I had never taken a single university course about Aboriginal issues and had no work related experience in Aboriginal issues other than a one week observation of courts in remote Manitoba reserves during my articling year.

The AJI exposed me to an office whose staff was 50% Aboriginal and to two Commissioners who, while being judges, were prepared to "rock the boat" if they felt it was the right thing to do. It exposed me to a wide variety of insightful new research. Most importantly, it exposed me to the views of Aboriginal persons themselves, especially through the public hearings of the Inquiry. I am persuaded by the arguments and recommendations put forward in the report of the Aboriginal Justice Inquiry.

The perspective outlined above means the following: I do not take for granted that the inmate survey or the other criminological research is methodologically

"good" research or that the research has value simply because it exists. Ultimately, the most lasting impressions this thesis has left on me are:

- the research is so limited that its value, if measured by its ability to influence or create positive changes for Aboriginal persons, is highly questionable;
- the official reports, with a few exceptions, and the government responses, have generally been marked by a desire to recommend and make only the smallest changes necessary to relieve current political pressure;
- Aboriginal persons feel adverse impacts of discrimination as victims, accuseds and offenders and as communities at virtually every stage in the justice system;
- the justice system is full of inherent contradictions which harm Aboriginal people and which should bring the administration of justice into disrepute;
- nothing we (non-Aboriginal justice "experts") have done has helped Aboriginal persons to any appreciable degree, so we must give Aboriginal people the chance to take control of justice services in their communities and we must respect the inherent right of Aboriginal persons to be Aboriginal.

Although my assumptions and conclusions are laid bare in the foregoing, the evidence and reasoning supporting my thinking are set out in the rest of the thesis. I have tried to analyze as comprehensively as possible the many statistical studies of Aboriginal treatment in the justice system, and supplement this with a variety of other works. I am hopeful this thesis will be as valuable for the presentation of other studies as it is for any contribution I might make in the following pages.

CHAPTER 1 - INTRODUCTION

In the summer of 1989, Manitoba's Public Inquiry into the Administration of Justice and Aboriginal People (also known as the Aboriginal Justice Inquiry or AJI) directed its staff to conduct a survey of Manitoba inmates. The result was the "Manitoba Inmate Survey",¹ one of approximately 40 research papers prepared for the Inquiry.² The survey involved interviewing 258 inmates, 60 of whom were non-Aboriginal inmates. The sample was drawn from provincial and federal correctional institutions, involving both men and women. The questions were designed to learn about the experience of the inmates and to learn their views about the justice system. What is important to note about the survey is that it may be the first to include a non-Aboriginal group being asked questions about how Aboriginal³ inmates are treated.

I argue it is the responsibility of researchers to identify a number of issues underlying any research effort, including the writer's underlying beliefs (mine are

-
- 1 Persons involved in the design, data collection or analysis of the "Manitoba Inmate Survey" were Doris Young, Eric Robinson, Jennifer Yarnell, Jeannie Daniels, Harry Daniels, Laurie Messer, Maryanne Boulton, Tom McMahon and Brad Morse. The survey was conducted in 1989 and the report released in 1991.
 - 2 A. C. Hamilton and C. M. Sinclair, Commissioners, vol. 1 - *The Justice System and Aboriginal People*, vol. 2 - *The Deaths of Helen Betty Osborne and J. J. Harper*, (Winnipeg: Queen's Printer, 1991). The research papers are listed in the bibliography in vol. 1 and are available from the Provincial Archives of Manitoba.
 - 3 The word "Aboriginal" is used throughout. This is the term used in the *Constitution Act, 1982*, encompassing "Indian, Inuit and Metis peoples" (s. 35(2)) and is the term chosen by the Commissioners of the Aboriginal Justice Inquiry. It means "from the original" inhabitants and conveys a much greater meaning than "native." Also, "Aboriginal" is not used as a noun but as an adjective, parallel to how English, French, and white are traditionally used.

discussed in the preface) and why the research is being conducted. In the case of the Manitoba Inmate Survey, it was conducted at the direction of the Aboriginal Justice Inquiry. This thesis is an attempt to integrate the findings of the survey with other literature, to re-analyze the findings and to come to conclusions and recommendations concerning Aboriginal justice issues based on this examination. Hopefully, the thesis can contribute to a broader discussion of the survey, the Aboriginal Justice Inquiry, and Aboriginal justice issues generally.

The problem

Most basic to why this thesis is being written is my belief that there is something wrong with the operation of the criminal justice system in the way it treats Aboriginal people. I believe Aboriginal society is not being protected and that the system is intruding too much and unfairly into the lives of Aboriginal people.

I am concerned that the excessive rates of incarceration of Aboriginal persons might be the third phase in non-Aboriginal society's attempts to separate Aboriginal children from their families and communities. The first two phases were the residential school system followed by the child welfare system.⁴ While I do not suggest that incarceration is being used to deliberately break up Aboriginal families and communities, the consequences must be acknowledged.

4 G. Bird, "Field Work in South Australia," in *Ivory Scales: Black Australia and the Law*, K. Hazelhurst, ed., (Kensington, New South Wales University Press, 1987), p. 67: "the criminal law is the contemporary version of the early missionaries and white reserve officials engaged in moulding the Aborigine to fit the imposed Christian/capacity culture."

The excessive rates of incarceration harm Aboriginal communities in a number of ways. Most obviously, they are evidence that the criminal justice system is ineffective in reducing unacceptably high crime rates in Aboriginal communities.⁵ This ineffectiveness, and the actual crimes, have many victims, including specific victims, especially women and children.⁶ The community is also a victim because such conditions create a climate of fear and secondly because high crime rates can lead to negative stereotypes. Perhaps most importantly, the incarcerations remove otherwise important contributors from families and the community. Families and communities of incarcerated persons are victimized by the loss of a parent or child, the loss of their incomes or labour and the loss of other contributions to family and community life.

The present justice system does little to promote healing within Aboriginal communities. The Aboriginal Justice Inquiry commented:

With eight out of 10 Aboriginal women reporting having been abused - many of them as young children - the question of child abuse must be addressed forcefully because, in our view, it represents the single greatest threat to the future of Aboriginal people and their societies.⁷

5 For statistics on crime rates see Hamilton and Sinclair, note 2, *supra*, pp. 87-88 and Dansys Consultants, "Manitoba Aboriginal Justice Study," (Winnipeg: Aboriginal Justice Inquiry, 1991).

6 See S. Moyer, "Homicide victimization of Natives and non-Natives in Canada: 1962-1984," (Ottawa: Solicitor General, 1987), at pp. 21. At p. 22: "Our analysis suggests that Natives may be as much as 8 times as likely as non-Natives to be victims of murder or manslaughter ..." See also the discussion in ch. 5, *infra*, concerning women offenders and their experiences with violence.

7 Hamilton and Sinclair, note 2, *supra*, p. 490. See also M. Wilkie, *Aboriginal Justice Programs in West Australia*, (Nedlands: Crime Research Centre, University of Western Australia, 1991), p. 34: There is "inadequate protection against crime and inadequate

However, it must be stressed that the damage inflicted by an ineffective justice system goes far beyond high crime rates. The Aboriginal Justice Inquiry stresses this point as well.

The justice system has failed Manitoba's Aboriginal people on a massive scale. ... It is not merely that the justice system has failed Aboriginal people; justice also has been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded.⁸

... [T]he justice system has contributed to Aboriginal poverty by failing to provide them with the means to fight the oppressive conditions imposed upon them. It has not assisted Aboriginal peoples in defending their claim to their lands or in enforcing their treaty promises. In fact, at one time it was illegal for lawyers to represent Aboriginal persons without the consent of the federal government or for Aboriginal people to raise money to press their land claims. The loss of Aboriginal land is a clear contributor to poverty.⁹

... Nor has the justice system assisted Aboriginal peoples in defending their freedoms of belief, religion and association. The law forced Aboriginal parents, under threat of prosecution from the justice system, to send their children to residential schools. The justice system also failed to protect Aboriginal families from the child welfare practices of the 1960s and 1970s, which continue to create problems off reserves today. The separation of families, the oppression of culture and language, and the lack of Aboriginal control over decisions within their communities have contributed to inadequate education and to community breakdown, which in turn lead to poverty, as community resources are underdeveloped.¹⁰

recourse when [Australian Aboriginal persons] have been victimized. [Police] ignore inter-Aboriginal offending, ... and Aboriginal women have complained that police do not take seriously their complains of rape and domestic violence."

8 Hamilton and Sinclair, note 2, *supra*, p. 1.

9 *Ibid.*, p. 94.

10 *Ibid.*, p. 95.

The justice system contributes further to community poverty and stigmatization because it generally does not employ Aboriginal persons. The Harvard Law Review discussed the use of race as a ground for suspicion by police and says this behaviour

not only irrationally deprives minorities of equal freedom from government intrusion, but also stigmatizes minorities by suggesting on the basis of a shared, immutable characteristic that they are less worthy of equal respect ... [T]hese very attitudes help perpetuate the underclass status of racial minorities.¹¹

I suggest the failure to employ Aboriginal people also stigmatizes them because it leaves an impression that Aboriginal people are not good enough to be hired into it.

I consider the rates of incarceration to be excessive *whether or not* the sentences are fully deserved and fairly imposed. The excessiveness is measured by the harms suffered by the community and by the inability of the criminal justice system to prevent or contain those harms. Proving discrimination in the justice system is not a requirement for proving that it is ineffective. Being fair but ineffective serves no purpose. While this may seem obvious and unnecessary to state, my impression of the justice system's reactions to criticism is to demand proof of "wrongdoing", rather than to examine the harms being suffered separate from any proof of wrongdoing. Beyond the excessive incarceration rates, however, there is discrimination in the operation of the criminal justice system as it treats Aboriginal people (among others).

11 See Note, "Developments in the Law - Race and the Criminal Process," *Harvard Law Review*, 101, 7, (May 1988): 1513, at p. 1515.

Discrimination

In a denotational sense, discrimination simply means to make choices. Every time we make a choice we discriminate between options. In another sense, discrimination has a negative connotation - meaning that a choice is based on an unjustified consideration. Common examples of unjustified considerations are persons' immutable characteristics - their sex, race, national origin, sexual orientation, and so on. Another connotation of discrimination is that it is an action. Thus, prejudice and racism are in the mind but when acted upon are acts of discrimination. This set of connotations means that discrimination requires discriminatory intent.

In recent times, more attention has been paid to the concept of systemic discrimination. The 1987 Manitoba *Human Rights Code* provides that "discrimination" "includes any act or omission that *results* in discrimination ... regardless of the form that the act or omission takes and *regardless of whether the person responsible for the act or omission intended to discriminate.*" [emphasis added] The *Code* further defines "discrimination" to mean "differential treatment of an individual on the basis of" race, colour or national origin (among other factors) and "*failure to make reasonable accommodation* for the special needs of any individual or group if those special needs are based upon" race, colour or

ethnic origin.¹² [emphasis added] The Supreme Court of Canada has ruled that discrimination does not require intent.¹³

If discrimination does not require intent, how else can it be found? For some, if individuals are treated the same, then there is no discrimination, while if people are treated differently this is "special treatment". However, this fails the Manitoba *Human Rights Code* requirement to make reasonable accommodation for special needs. Former Chief Justice Brian Dickson, on behalf of the majority of the Supreme Court, said "[t]he interests of true equality may well require differentiation in treatment."¹⁴ The Supreme Court has also ruled that "[i]t must be recognized ... that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that *identical treatment may frequently produce serious inequality*."¹⁵ [emphasis added] The Court has also rejected that it is a "fundamental principle [under the equality protections of the *Charter of Rights and Freedoms*] that the criminal law apply equally throughout the country."¹⁶

If discrimination is not limited to intent or different treatment, how else can it be found? The Supreme Court said that if a "barrier is affecting certain groups in

12 See Manitoba *Human Rights Code*, ch. H155, CCSM, section 9, clauses (1)(b) and (d) and subsections 2 and 3.

13 *Andrews v. Law Society of British Columbia*, [1989] 2 W.W.R. 289 at 308, per McIntyre J.

14 *R. v. Big M Drug Mart* (1985), 18 D.L.R. (4th) 321 at 362.

15 *Andrews v. Law Society of British Columbia*, note 13, *supra*, p. 299, per McIntyre J.

16 *R. v. Turpin et al.* (1989), 69 C.R. (3d) 97, at 126-28, per Wilson J.

a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."¹⁷ The Aboriginal Justice Inquiry said that "[t]he best evidence of systemic discrimination lies in the adverse impacts that the system has on Aboriginal people."¹⁸

One of the most important cases on adverse impact discrimination is *Griggs v. Duke Power*,¹⁹ a decision of the U.S. Supreme Court, in which education requirements for employment were struck down as discriminatory. They had no true connection to the job requirements but did have a disproportionate impact on African Americans, who were disproportionately educationally disadvantaged. This is a case where discrimination based on education was discrimination against African Americans, whether it was intended as such or not.

In this thesis, I use the word "discrimination" in the adverse impact, systemic discrimination sense. (I discuss how other reports define "discrimination" in Chapter 6.) I do not attribute intent, prejudice or racism to most of the systemic discrimination in the justice system. The test I use for discrimination in the justice system is whether the system adopts laws, procedures and practices which have a disproportionate impact on Aboriginal people. This in itself is not sufficient to establish discrimination. The second part of the test is to determine whether those laws, procedures or practices are related to the guilt or moral wrongdoing of the accused.

¹⁷ *Andrews v. Law Society of British Columbia*, note 13, *supra*, p. 307, per McIntyre J., quoting the *Report of the Federal Royal Commission on Equality in Employment*.

¹⁸ Hamilton and Sinclair, note 2, *supra*, p. 101.

¹⁹ 191 S. Ct. 849 (1971).

What I attempt to show, especially in Chapter 8, is that the justice system has numerous laws, procedures and practices that have a disproportionately adverse impact on Aboriginal people *and* are not related to the criminal behaviour of the persons affected (with the sole exception that it is a criminal act that has brought the person into contact with discriminatory practices). The discrimination is sometimes a failure to make reasonable accommodation (for example, for different language and religious needs) and sometimes it is disproportionate adverse impact based on educational disadvantage, poverty, or place of residency.

Beyond discrimination

My basic premise is that it is not enough for the criminal justice system to show an absence of discrimination. I believe the criminal justice system has a responsibility to account for all its impacts on community life. If the system fails to respect Aboriginal culture, uses procedures that undermine the role of community members, alienates victims, or imposes excessive punishments, these impacts need to be acknowledged and factored into an evaluation of the system.

Aboriginal over-representation in jails is a well-acknowledged fact, for at least the past 25 years. In 1965, Aboriginal inmates represented 22 % of the total inmate population in Manitoba's federal penitentiary, Stony Mountain. In 1984, the proportion was 33 %. By 1989, they represented 46% of the inmate population. In fact, Aboriginal inmates represented 56% of the total inmate population in Manitoba in 1989, including 61 % of young offenders in jail and 67 % of women

in jail.²⁰ In 1991, Aboriginal people comprised just less than 12% of Manitoba's total population.²¹

According to statistics provided by federal and provincial authorities to the Aboriginal Justice Inquiry, there were 8,475 admissions to jail in 1989 in Manitoba (not including persons admitted to pre-trial detention or persons still in jail but admitted before 1989). On any given day in Manitoba, there are approximately 1,600 persons in jails in Manitoba (including pretrial detention).

Figures for youth are particularly dramatic. In a study of a random sample of the surviving files from Manitoba's eastern judicial district juvenile court records between 1930 and 1959. Professor Len Kaminski found that Aboriginal youths represented less than ten per cent of the juvenile court caseload during those years. (It is also important to note that many of these Aboriginal youth may have been "delinquent" youth running away or rebelling at the residential school system, and included youth who were not sent to institutions.)²² On October 1, 1990, 64% of the Manitoba Youth Centre's population and 78% of Agassiz Youth Centre's population were Aboriginal youths²³ (these are the only youth jails in the province).

20 Hamilton and Sinclair, note 2, *supra*, p. 101.

21 *Ibid.*, p. 8.

22 L. Kaminski, "An Historical Survey of Aboriginal Juvenile Delinquency in Manitoba: Court Records of the Eastern Judicial District of Manitoba: 1930-59," (Winnipeg: unpublished, 1991).

23 Figures provided to the Aboriginal Justice Inquiry by the Manitoba Department of Justice.

Table 1 - Total admissions to Manitoba correctional institutions 1989

<u>Institution</u>	<u>Non-Aboriginal</u>		<u>Aboriginal</u>		<u>Total</u>
	N	%	N	%	
1. Headingley ¹	1468	59%	1019	41%	2487
2. Brandon	514	49%	527	51%	1041
3. Dauphin	111	30%	253	70%	364
4. Milner Ridge ²	6	67%	3	33%	9
5. Portage la Prairie ³	79	33%	162	67%	241
6. The Pas ¹	74	10%	650	90%	724
7. Stony Mountain ²	186	54%	156	46%	342
8. Rockwood ²	37	76%	12	24%	49
9. MYC	1163	38%	1882	62%	3045
10. Agassiz	<u>64</u>	<u>37%</u>	<u>108</u>	<u>63%</u>	<u>172</u>
Totals	3689	44%	4772	56%	8474

Source: Manitoba Department of Justice and the Correctional Services of Canada.

1. Headingley figures include the Bannock Point Camp, The Pas figures include the Egg Lake Camp.

2. The figures for Milner Ridge, Stony Mountain, and Rockwood are lower than their actual populations because, in the case of Milner Ridge, many of its inmates are transferred from other institutions and only appear in the admission statistics of their former institutions, and in the cases of Stony Mountain and Rockwood, many of their inmates were admitted in years previous to 1989 but remain in population serving their sentences. A single day count on October 1, 1990 showed 44 Aboriginal and 74 non-Aboriginal inmates at Milner Ridge, 25 Aboriginal and 43 non-Aboriginal inmates at Rockwood, and 156 Aboriginal and 186 non-Aboriginal inmates at Stony Mountain. Note that Aboriginal inmates are far less represented in the lower security facilities of Milner Ridge and Rockwood than they are in the higher security jails.

3. Portage la Prairie is Manitoba's jail for women. These figures do not include Manitoba women at Kingston's federal prison for women.

In federal institutions across Canada in 1981, 8.4% of all inmates were Aboriginal,²⁴ in 1983, it was 8.8%. In 1987, this had increased to 9.6%.²⁵ By 1990, this had grown to over 11%.²⁶ Aboriginal women are even more over-represented than Aboriginal men.²⁷ In provincial jails across Canada in 1989-90, 29% of women and 17% of men are Aboriginal.²⁸

I subscribe to the view of W. Clifford, Director of the Australian Institute of Criminology:

24 C. Canfield and L. Drinnan, "Comparative Statistics Native and Non-Native Federal Inmates - A Five Year History," (Ottawa: Correctional Services of Canada, 1981). figure P1.

25 Task Force on Aboriginal Peoples In Federal Corrections, *Final Report*, (Ottawa: Correctional Services of Canada. 1988), p. 23.

26 Task Force on Aboriginal Peoples in Federal Corrections, "Year-End Implementation Report 1990-91," (Ottawa: Correctional Services of Canada), p. 13.

27 In 1983 it was reported that Aboriginal women comprised 31% of the Inmate population in Kingston's Prison for Women, although a 1988 report says the figure was 15%. It is beyond the scope of this thesis to investigate what could account for such a disparity in such a short period of time. Both these figures pale compared to the 67% at Manitoba's Portage Jail for Women. See C. LaPrairie, "Native Women and Crime in Canada: A Theoretical Model," in *Too Few to Count, Canadian Women in Conflict with the Law*, E. Adelberg and C. Currie, eds., (Vancouver: Press Gang Publishers, 1987), p. 102; Task Force on Aboriginal Peoples in Federal Corrections, note 17, *supra*, p. 27.

28 Canadian Centre for Justice Statistics, "Adult Female Offenders in the Provincial/Territorial Corrections Systems, 1989-90," *Juristat* 11, 6, (1991): 1 at p. 5, cited by the Reform Commission of Canada in *Aboriginal Peoples and Criminal Justice*, Ottawa: 1991, note 245 at p. 92. The article reports that these proportions have remained stable since 1986-7.

These are dramatic rates of imprisonment by any standard for any community. *Just to quote them is to question their justification.* You have to believe either that Aboriginals are the most criminal of minorities in the world or that there is something inherently wrong with a system that chooses imprisonment so liberally.²⁹ [emphasis added]

It is important to note that the above cited figures are based on admission statistics. Admission figures *under-estimate* the number of Aboriginal persons in jail.³⁰ They may under-report the number of Aboriginal offenders for a variety of reasons, including admission officers who report racial identity based on their own perception of the offenders. Many Aboriginal persons have an appearance that can be mistaken for a white person. Also, the statistics may rely on accused persons to identify their race and many Aboriginal persons may not identify themselves as Aboriginal, especially if they believe they will suffer adverse treatment if they make such an admission, or for other reasons.

Errors are evident in the way Aboriginal status is treated. When the Aboriginal Justice Inquiry asked the Manitoba Department of Justice for statistics concerning Aboriginal inmates, they provided figures sorted by a number of categories. The categories were Treaty On-Reserve, Treaty Off-Reserve, non-Status, Metis, and non-Aboriginal. These categories fails to accurately differentiate Treaty and Status Indians (not all Status Indians are Treaty Indians - in Manitoba the Dakota are not Treaty Indians but they are Status Indians. Further, non-Status Indians can be Treaty Indians). Thus, the categories used are to be viewed with caution.

29 Quoted by J. Crawford, P. Hennessey, M. Fisler, "Aboriginal Customary Law: Proposals for Recognition," in Hazelhurst, note 4, *supra*, at p. 195.

30 Task Force on Aboriginal Peoples in Federal Corrections, note 17, *supra*, p. 5.

Even if there were no problems identifying Aboriginal inmates, there are other difficulties calculating the number of Aboriginal inmates as a proportion of the total population or as a proportion of the Aboriginal population. The AJI, due to inadequate sources of information elsewhere, and inadequacies with the 1986 census was forced to produce its own estimate of the Aboriginal population in Manitoba in 1991. Research commissioned for the Inquiry estimated that in 1991 Aboriginal people made up 11.8% ($N=129,994/1,099,301$) of the population of Manitoba.³¹ Nationally, the figure frequently cited as an estimate of Canada's Aboriginal population is two per cent.

The disproportionate Aboriginal incarceration rates are shocking and they are getting worse. They demand immediate government action. This statement was true more than twenty-five years ago and nothing has yet been done that has reversed the trend.

The organization of the thesis

This thesis is in two parts. Part One is a review and analysis of the Manitoba Inmate Survey. It begins with a review of the methodology of the survey, followed by a discussion of the profile of the inmates, including seriousness of offenses, prior record, length of sentence, factors contributing to the offense, education, employment, language, religion, age, family background, and so on. This part of the survey shows convincingly that Aboriginal inmates have special needs.

31 *Ibid.*

Chapter 3 discusses the inmates' experiences from arrest to sentencing. This chapter reviews data concerning whether rights were explained to inmates, the frequency and duration of pre-trial detention, the extent to which inmates understood their court proceedings, what kinds of legal representation the inmates had and how the inmates pleaded. The chapter also compares how the inmates were sentenced. Included is a question as to whether the inmates believe Aboriginal offenders are sentenced differently than non-Aboriginal inmates. This part of the survey suggests that Aboriginal inmates generally receive second class treatment in the justice system and that the large majority of both Aboriginal and non-Aboriginal inmates believe Aboriginal inmates are treated differently in sentencing.

Chapter 4 studies the inmates' experience with the prison and parole systems. Prison programming, inmate complaint procedures, Aboriginal views on respect for their spirituality and parole are discussed. This includes questions as to whether Aboriginal inmates are treated differently by jail staff and by the parole board. This chapter concludes with suggestions for changes made by the inmates and their views about Aboriginal justice systems. The vast majority of both groups of inmates supported the concept of Aboriginal justice systems.

Chapter 5 examines the special problems of particular sub-groups of inmates, examining differences between rural and urban offenders, men and women, and inmates in provincial and federal jails. The rural born offender has two kinds of problems - if the offender stays in the community, there are the problems associated with less access to legal services and poorer socio-economic circumstances generally. On the other hand, if the person migrates to the cities, the transition appears to cause special difficulties. Most Aboriginal offenses occur in urban areas. Women have special needs as prisoners and their experiences as victims must be

addressed. Federal and provincial inmates appear to have fairly different crime histories and certainly face different circumstances once in jail.

Part Two asks the question: what do we do with this new information? Of greatest interest to me is to determine what support exists for the view expressed by inmates that Aboriginal inmates are treated more negatively by the justice system. To begin to find the answer to this question the thesis reviews 25 years of empirical and "official" studies sponsored by government.

The "official" reports began with the 1967 report of the Canadian Corrections Association.³² The report of the Aboriginal Justice Inquiry was published on the eve of the 25th anniversary of government study into this issue. While studies have been undertaken on a regular basis over that period, in the last five years there has been an explosion of the volume of "official" government sponsored research.

The result of all this research is that, for Aboriginal people, the change in their treatment has been negligible or worse - Aboriginal proportions of jail populations continue to escalate, a trend that has become worse, not better, over those 25 years.

Moreover, there are fears the numbers will continue to get worse before they get better because the "at risk" Aboriginal population, persons who are in the age bracket that most often comes into conflict with the law (approximately 16 to 30 years of age), is a considerably larger proportion of that age group in Manitoba. The age demographics of Aboriginal and non-Aboriginal persons are significantly

32 Gilbert Monture, Project Committee Chair, Canadian Corrections Association, *Indians and the Law, a survey prepared for the Hon. Arthur Laing*, (Ottawa: Department of Indian Affairs, 1967).

different. In 1991, the AJI estimated 38% of Manitoba's Aboriginal population to be under 15 years of age, compared to just 22% for the non-Aboriginal population.³³

The 25 years of study have produced 25 years of repetitious and largely unimplemented recommendations. The recommendations stressed that there must be more Aboriginal involvement in the system - through community consultation, hiring of Aboriginal persons, and service delivery by Aboriginal groups. The system must find ways to put fewer people in jail, and must become more sensitive to Aboriginal culture.

Despite the apparent futility of the research, there has been some limited progress. The "official" research has generally moved from "we are told" and "Aboriginal people feel" to stating conclusions, often "we believe what we are told" and "we find discrimination." The reports have generally gone from "it's all to do with broader socio-economic conditions outside the justice system" to in depth examinations of how the justice system contributes to and produces injustice.

The task forces are starting to explore the meaning of equality and, hopefully, are playing an important role in explaining what systemic discrimination is and why identical treatment of all does not ensure equality, and why in some cases identical treatment actually creates inequality. The research may have contributed to

33 Hamilton and Sinclair, note 2, *supra*, p. 93.

increased recognition by Canadians of injustice and a desire to redress those wrongs.³⁴

One of the most important trends in the "official" reports is to discuss Aboriginal cultural differences, the history and present day impact of past discrimination against Aboriginal people, and Aboriginal rights (treaty rights, Aboriginal title, self-determination) as important and related issues to criminal justice issues. By considering Aboriginal rights and the failures of the criminal justice system, "official" reports are now addressing the question of Aboriginal justice systems in all their dimensions.

If the research has made a contribution, it has been that 25 years of both official and academic study, following more than a century of ignoring these issues, have resulted in Canadians beginning to consider seriously what Aboriginal people have been saying the entire time.

While these trends in the "official" reports show a clear, albeit slow, progression of thought and ideas, the statistical research has moved very little. Data continue to be extremely limited and the limitations of the data have often not been adequately acknowledged, although the statistical research has become more sophisticated.

Cross-tabular analysis has given way to correlate analysis and multiple regression analysis which tries to identify, isolate, and "control for" specific variables. More and more variables are being identified as important to a full understanding of the

³⁴ This new attitude was found in Law Reform Commission of Canada, note 20, *supra*, p. 94, citing the work of the Citizens' Forum on Canadian Unity.

data. On the whole, the research suggests that discrimination does exist in the justice system, although its extent and location is still unclear. The major issue that seems to be developing is the notion of "cumulative" effect, which multiple regression analysis at any one stage cannot identify.

At best, what the statistical research has done is to assist some persons to come to conclusions about the operation of the justice system. I suggest the people being persuaded by this research are primarily non-Aboriginal persons who were not willing to accept what Aboriginal people (including inmates) have been saying about the justice system. The statistical research is merely augmenting, marginally at that, what Aboriginal people have been saying for 500 years.

I conclude that the research, despite its limitations, omissions and flaws shows discrimination in the justice system. More importantly, there is virtually no evidence that the research has served a purpose for Aboriginal people or for improving the justice system. Indeed, one of the main omissions of the research is even to state a purpose beyond the implicit one of furthering knowledge for its own sake.

Aboriginal peoples, through their organizations, determination, and, in some cases, defiance, have been the most important impetus for whatever change in attitude has occurred.

A particular advantage for the Manitoba Inmate Survey is that Manitoba has produced a number of important studies in recent years that provide comparison data. It is likely that given the studies commissioned by the Aboriginal Justice Inquiry and the Manitoba Department of Justice's Provincial Court Study, Manitoba has the most extensive data by which to evaluate how the justice system treats

Aboriginal persons compared to non-Aboriginal persons. However, in the larger scheme of things, the Manitoba Inmate Survey is only one more study on a very large pile of studies that probably never should have been needed - all that was required was to listen to Aboriginal persons in the first place.

In the conclusion of the thesis I provide a series of recommendations. The recommendations are based on my views that the time to act is now, that further study is unnecessary and that incremental or discretionary measures will not achieve what is required to protect society. My recommendations are predicated on views that Aboriginal people have a right to be Aboriginal, that this right has not been respected in the criminal justice system and that there is much that is wrong with the present justice system for everyone, regardless of race.

PART ONE
THE FINDINGS OF THE MANITOBA INMATE SURVEY, 1989

CHAPTER 2 - METHODOLOGY AND INMATE PROFILES

Methodology¹

Between May and July, 1989, a survey containing 78 questions was administered to 258 Manitoba inmates. Each interview lasted approximately one hour.² Table 2 (below) shows the inmate population of the institutions surveyed as reported by the wardens in the summer of 1989, the size of the survey sample, and the approximate proportions of the inmate population included in the survey. Seven survey sites were selected for inmate interviews: Stony Mountain Penitentiary and Rockwood Institution (the only federal facilities in Manitoba), Headingley, Brandon, Dauphin and The Pas jails and the Portage la Prairie jail for women. These are the main jails in Manitoba.³

-
- 1 For a more in depth look at the methodology see the Appendix. which reproduces part of the methodology discussion from the Manitoba Inmate Survey.
 - 2 The primary interviewers were Eric Robinson of the Aboriginal Justice Inquiry staff and Jennifer Yarnell, suggested by both the Native Clan Organization Inc. (an agency providing services to offenders) and the Native Brotherhood Organization at Headingley Jail (the Aboriginal inmates' organization). Doris Young and Jeannie Daniels, both of the AJI staff, conducted the interviews at the Portage la Prairie Jail for Women. Each of the interviewers were briefed in advance by Prairie Research Associates on standard interview procedures. Doris Young, Jeannie Daniels, Eric Robinson are Aboriginal persons. It is important to note that while Aboriginal peoples have been the subject of many studies, it is rare indeed that the persons conducting the study are themselves Aboriginal.
 - 3 Some facilities were excluded from the survey. These are Bannock Point work camp, which is administered in conjunction with Headingley Jail, Egg Lake work camp, which

The proportion of the inmate population included in the survey is calculated as a proportion of the institutional capacity on any one day (using the total number of inmates in the various institutions reported by the wardens). This is an artificial figure because the interviews were spread out over a period of time, such that it cannot be said what precise percentage of inmates on a given day were surveyed. The proportion of inmates surveyed would be less if compared to all inmates who passed through the various institutions during the period of the interviews.

is administered by The Pas Jail and Milner Ridge Correctional Centre a new minimum security facility whose inmates are referred there from other institutions. These institutions are designed for inmates requiring less security and they provide some special programs. These satellite facilities were excluded due to time and cost factors for the survey and because they are small and not representative of the typical inmate experience. Also excluded were the Provincial Remand Centre, the Manitoba Youth Centre and the Agassiz Centre for Youth as this study was limited solely to adult offenders sentenced to periods of incarceration.

Table 2: Jail populations/survey sample - summer 1989

<u>Institution</u>	<u>Total Population</u>	<u>Non- Aboriginal</u>	<u>%</u>	<u>Aboriginal</u>	<u>%</u>	<u>% of Non- Aboriginal sample</u>	<u>% of Non- Aboriginal inmates in that jail</u>	<u>% of Aboriginal sample</u>	<u>Aboriginal inmates in that jail</u>
<u>Federal</u>									
Stoney Mountain	462	282	61%	180	39%	22	8%	66	37%
Rockwood	106	77	73%	29	27%	11	14%	13	45%
Sub-total (fed.)	568	359	63%	209	37%	33	9%	79	38%
<u>Provincial</u>									
Headingley	355	196	55%	159	45%	11	6%	32	20%
Brandon	130	72	55%	58	45%	1	1%*	27	46%
Dauphin	50	16	32%	34	68%	2	12%	18	53%
The Pas	74	19	26%	55	74%	0	0%	15	27%
<u>Women</u>									
Portage la Prairie	40	2	5%	38	95%	13	100%**	27	100%**
sub-total (prov.)	649	305	47%	344	53%	27	9%	119	35%
<u>Totals</u>	1217	664	55%	553	45%	60	9%	198	36%

Source of population totals: wardens of each institution.

* All percentages are rounded to the nearest whole number.

** The figures of 100% are based on 1989 Manitoba Department of Justice figures showing 67% of inmates at Portage were Aboriginal and 32.8% were non-Aboriginal.

While the original plan was to have approximately equal numbers of Aboriginal and non-Aboriginal inmates and to select respondents in a purely random fashion, these objectives were not entirely achieved for a variety of reasons (discussed at length in the Appendix). Inmates were not required to participate and the requests to participate were put forward by the guards of the various jails.

A number of the respondents volunteered to participate following an explanation of the survey by the interviewers to the Native Brotherhood Organizations in some of the institutions. To the extent that this could introduce a bias, it might encourage inmates who are more active with the Brotherhood to be included in the survey.

The non-Aboriginal and Aboriginal inmates are represented in different proportions according to type of institution and sex. Fifty-five per cent (N=33/60) of the non-Aboriginal sample is from federal institutions and 22% (N=13/60) of the non-Aboriginal sample are women. By contrast, only 40% of the Aboriginal sample is from federal institutions and 14% (N=27/198) are women. Again, one might speculate as to what biases these differences introduce. On the other hand, Table 2 shows that these federal-provincial samples are consistent with the actual jail populations, with 54% of male non-Aboriginal inmates and 38% of male Aboriginal inmates in 1989 in federal institutions. At the very least, the different compositions of the Aboriginal and non-Aboriginal samples requires caution in comparing statistics about seriousness of crime, length of sentence, and prior record.

Aggregated Aboriginal and non-Aboriginal comparisons were compared to results within federal and provincial and male and female institutions. Where there are significant differences between aggregate responses and responses in specific

institutions, these differences are discussed in Chapter 5 (although a few of the differences are noted in this chapter, such as the discussion below concerning the make-up of the sample, seriousness of offenses and length of sentences). Unless there is such a note, the institutional make-up of the Aboriginal and non-Aboriginal samples did not appear to be a determining factor for the answers given.

As with any other sample, small sample sizes and non-random selection limit the extent to which these results can be generalized to entire prison populations. Moreover, the analysis provided here is based on cross-tabulations and does not control for specific variables such as type of offense, prior record, education or employment. Despite these apparent limitations, the survey does provide interesting results, and for many questions there are significant degrees of agreement within and between the Aboriginal and non-Aboriginal samples.⁴

Inmate profiles

This section begins by examining what are often considered to be "legal" variables - seriousness of offense, prior record, length of sentence, and factors contributing to the offense. This is followed by examining a variety of "extralegal" variables such as education, employment, language, religion, sex, age, family background, and Aboriginal status.⁵

4 The results of the questions are presented in whole integers, such that percentages have been rounded: 0.5 and above has been rounded to 1.0. In all cases, the numeric (N) is presented to allow a more precise calculation. Also, for almost every question, some inmates did not provide an answer. These non-responses were not included in the base figure of respondents, with the result that percentages reported are based on the total number of inmates who did give a response to the question. The lower the number of responses, the less reliable the results will be.

5 See the discussion of "legal" and "extra-legal" variables in ch. 7.

The preceding section explained that the sample is drawn from different jails, with different proportions of the Aboriginal and non-Aboriginal samples coming from federal and provincial institutions and from jails for men and women. Therefore, differences in seriousness of offenses, lengths of sentence, and prior records should be expected.

Seriousness of offense

The inmates were asked what was the most serious charge that led to their most recent incarceration. The charges were grouped into four categories of increasing seriousness. These categories are taken from the Manitoba Community and Youth Services Probation coding sheet. The coding for the different offenses is shown at the end of the Appendix. The seriousness of charges was put into different groups, with 100 and 200 levels of offenses as the least serious category, followed by three other groups: 300 and 400; 500 and 600; and 700, 800 and 900 levels, which are the most serious offenses.

One hundred and 200 level offenses include summary proceeding assaults, violations of provincial statutes, property offenses of less than \$1,000 and breach of court orders (parole, probation, fail to appear, etc.).

Three hundred and 400 level offenses include dangerous driving, impaired driving, property offenses greater than \$1,000, possessing a prohibited weapon, indictable assaults, robbery without use of force or a weapon, assault of a peace officer and criminal negligence in the operation of a motor vehicle.

Five hundred and 600 level offenses include possessing a weapon dangerous to the public peace, minor sexual offenses, arson, assault with a weapon, assault

causing bodily harm, dangerous driving causing bodily harm, break and enter other than a house and sexual assault without a weapon.

Seven hundred, 800 and 900 level offenses include aggravated assault, break and enter of a dwelling house, aggravated sexual assault, robbery with force or a weapon, causing death by criminal negligence or by dangerous driving, manslaughter and murder.

As expected, federal inmates committed more serious crimes than provincial inmates. Non-Aboriginal federal inmates appear to have committed more serious crimes.

Table 3 - Federal inmates' seriousness of offenses (males)

<u>Offense Level:</u>	<u>100-200</u>		<u>300-400</u>		<u>500-600</u>		<u>700-900</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	1	1%	12	15%	12	15%	54	68%	79
Non-Aboriginal	2	6%	3	9%	2	6%	26	79%	33
<u>Total</u>	3	3%	15	13%	14	13%	80	71%	112

The offense patterns between Aboriginal and non-Aboriginal males are very similar in provincial institutions. However, the only persons incarcerated in provincial institutions for 100 and 200 level offenses are Aboriginal inmates.

Table 4 - Provincial inmates' seriousness of offenses (males)

<u>Offense Level:</u>	<u>100-200</u>		<u>300-400</u>		<u>500-600</u>		<u>700-900</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	5	6%	27	30%	44	4%	13	15%	89
Non-Aboriginal	0	0%	5	36%	7	5%	2	14%	14
<u>Total</u>	5	5%	32	31%	51	5%	15	15%	103

Also as expected (especially given that Portage is a provincial jail), women committed less serious crimes than men. Non-Aboriginal women committed more of both the most and least serious crimes.

Table 5 - Female inmates' seriousness of offenses

<u>Offense level:</u>	<u>100-200</u>		<u>300-400</u>		<u>500-600</u>		<u>700-900</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	6	24%	9	36%	6	24%	4	16%	25
Non-Aboriginal	4	31%	5	38%	0	0%	4	31%	13
<u>Total</u>	10	26%	14	37%	6	16%	8	21%	38

In addition to examining seriousness of offense, length of sentence can also provide information about the kinds of crime and the seriousness of crime being committed.

Length of sentence

In considering the results concerning length of sentence, it is important to remember the non-Aboriginal sample is mostly from jails run by the federal government (more than two year sentences), while the Aboriginal sample is mostly from jails run by the provincial government (less than two year sentences). As expected, sentences for federal inmates were longer than for provincial inmates. However, a greater proportion of Aboriginal inmates had the longest sentences (despite their preponderance in the provincial institution sample).

Table 6 - Federal inmates' length of sentences (males)

<u>Sentence:</u>	<u>< 1 yr.</u>		<u>1- 2 yrs.</u>		<u>2 - 4yrs.</u>		<u>4 yrs. +</u>		<u>Total</u> N
	N	%	N	%	N	%	N	%	
Aboriginal	0	0%	3	4%	26	34%	47	62%	76
Non-Aboriginal	0	0%	1	3%	14	42%	18	55%	33
<u>Total</u>	0	0%	4	4%	40	37%	65	60%	109

Differences in sentences of provincial inmates did not appear.

Table 7 - Provincial inmates' length of sentences (males)

<u>Sentence:</u>	<u>< 1 yr.</u>		<u>1 - 2 yrs.</u>		<u>2 - 4yrs.</u>		<u>4 yrs. +</u>		<u>Total</u> N
	N	%	N	%	N	%	N	%	
Aboriginal	30	35%	50	59%	4	5%	1	1%	85
Non-Aboriginal	5	36%	8	57%	1	7%	0	0%	14
<u>Total</u>	35	35%	58	59%	5	5%	1	1%	99

Also as expected, women had shorter sentences than men. Eighty-six per cent (N=19/22) of Aboriginal women reported terms of less than one year and the remainder reported terms between two and four years. Forty-six per cent (N=6/13) of non-Aboriginal women reported terms of less than one year, and 38% (N=5/13) reported terms between one and two years, while the other two respondents reported terms of more than two years.

The sample did not show strong differences in sentence length. However, Aboriginal inmates in federal institutions appeared to have longer sentences even though this analysis of seriousness of crimes suggested Aboriginal inmates had committed somewhat less serious offenses. There is evidence to show Aboriginal inmates on the whole have shorter

sentences.⁶ Also, there were no differences in the prior incarceration record of the inmates. Differences in sentencing is considered in more detail in Chapter Three.

Types of crimes

Because of the small sample sizes, it is difficult to draw conclusions about the types of crime for which Aboriginal and non-Aboriginal persons are convicted and incarcerated. Generalizations that have been made in the literature are that Aboriginal inmates are incarcerated for more minor offenses, and Aboriginal inmates commit more offenses against the person.

The Task Force on Aboriginal Peoples in Federal Corrections reported that, at December 31, 1987, 73% of Aboriginal inmates were guilty of crimes of violence compared to 60% of non-Aboriginal inmates. Excluding robbery, 55% of Aboriginal offenders committed offenses against the person compared to less than 35% of the other inmates. McCaskill, in his study comparing two Manitoba inmate surveys in 1970 and

6 C. Canfield and L. Drinnan, "Comparative Statistics Native and Non-Native Federal Inmates - A Five Year History," (Ottawa: Correctional Services of Canada, 1981), p. 11: "There is twice the proportion of natives serving sentences under two years than non-natives. For sentences of two years and under five years, there are also a higher proportion of inmates. In 1981, forty-nine percent of native inmates were serving sentences between two and five years, while only forty-four percent of non-natives were." At p. 20: "[S]ix years up to ten years ... accounts for 8.9 percent of non-native admissions, and only 3.8 percent of native admissions. ... Sentence length distributions for each cohort shows much longer sentences for non-natives than natives over the five year period [of statistics examined]. A likely explanation of this difference is the higher proportion of simple warrant of committal admissions among non-natives and higher proportion of mandatory supervision violators among native admissions."

D. Schmeiser, H. Hermann, and J. Manning, "The Native Offender and The Law", (Ottawa: Law Reform Commission of Canada, 1974), note at p. 56: "apparently shorter sentences of Native inmates in provincial jails" because of fine default and provincial and municipal offence admissions. At p. 59: "Native inmates in the Prince Albert Penitentiary obviously have a higher proportion of sentences in the short sentence categories than non-Native Inmates ..."

1984, also noted a trend to more offenses against persons by Aboriginal offenders, from 32% in 1970 to 46% in 1984.⁷

However, the Task Force Report notes that at December 31, 1987, 47.8% of Aboriginal offenders and 37.4% of non-Aboriginal offenders were serving sentences of less than four years, which suggests their offenses were less serious or that they were benefiting from more lenient sentencing. The report stated: "the apparent discrepancy between the prevalence of violent offenses and sentence lengths may also be the result of variations in the likelihood of apprehension or charging practices."⁸

7 D. McCaskill, "Patterns of Criminality and Correction among Native Offenders in Manitoba: A longitudinal Analysis," (Ottawa: Correctional Service of Canada, 1985), p. 33. See also D. McCaskill, *Studies of Needs and Resources Related to Offenders of Native Origin in Manitoba*, (Ottawa: Department of the Solicitor General, 1971).

See also Canfield and Drinnan, note 6, *supra*, who found there were nearly twice as many Aboriginal offenders incarcerated for crimes against persons than crimes against property. P. 10: "Manslaughter conviction is about three times more frequent among native inmates as for non-natives. Sexual offenders make up a larger proportion of the native population than do non-native sexual offenders." P. 17: "... 54.2 percent of all native admissions and 43.4 percent of all non-native admissions were for offenses against persons, including robbery. If robbery is excluded, the contrast between cohorts is much more dramatic - 43.1 percent of native admissions and only 23.6 percent of non-native admissions are made up of offenders convicted of murder, attempted murder, manslaughter, sexual offenses, kidnapping, abduction, wounding, assault, and habitual criminals, dangerous sexual offenders or dangerous offenders ..."

P. 18: "[F]or both natives and non-natives, robbery is by far the most frequent offence among crimes against persons. ... [N]atives and non-natives are equally represented in admissions for break and enter ... Robbery, fraud and drug offence groups account for 42.7 percent of non-native admissions and only 23.5 percent of native admissions. Alternately, manslaughter and assault account for 20.4 percent of native admissions and only 6.1 percent of non-native admission."

8 Task Force on Aboriginal Peoples in Federal Corrections, *Final Report*, (Ottawa: Correctional Services of Canada, 1988), p. 27.

Statistics from the 1981-82 fiscal year from the Ontario Ministry of Correctional Services revealed that in that province, while Aboriginal persons made up only two per cent of Ontario's total population, they made up eight per cent of the total male and 17 per cent of the total female admissions. Aboriginal persons were even more over-represented among those with sentences of less than three months - 11 per cent of males and 29 per cent of females with short sentences were Aboriginal.⁹

McCaskill, based on interviews with members of Aboriginal communities, organizations, and inmates, reported that

there was strong support for the contention that Native offenders are now committing more serious and more violent crimes than in 1970. There was a consensus that Native crime, particularly in urban areas, had increased and was more similar to 'typical' offenses committed by non-Natives than was previously the case. That is, some urban Native crime appears to be more 'sophisticated' with a preponderance of break, enter, and theft. On the other hand, many observers claimed that there had been an overall decrease in Native offenses, particularly in rural areas. Some suggested that the increase in crimes against persons and sex-related crimes was particularly striking in rural communities. The typical pattern on reserves involves violent crimes related to drinking sprees on the weekends.¹⁰

McCaskill said that in 1970 Aboriginal offenses were "largely unpremeditated, poorly executed, committed in a group and involved alcohol directly or indirectly."¹¹ while in 1984 "Native offenders cannot be viewed as a homogeneous group with easily generalizable patterns of criminality."¹²

9 S. Jolly, "Native People in Conflict with the Criminal Justice System: The Impact of the Ontario Native Council on Justice," (Toronto: Native Council on Justice, 1982), p. 2.

10 McCaskill, 1985, note 7, *supra*, p. 36.

11 *Ibid.*, p. 35.

12 *Ibid.*, p. 39.

Lisa Hobbs Birnie, a former member of National Parole Board, described Aboriginal crime in her recent book *A Rock and A Hard Place* as follows:

The native crime that I saw seemed to spring out of spontaneous rage and fury, as if the heart and mind had been one long-smouldering fire that had finally been ignited into an explosion. The planning, the conspiracies, the calculated risk, the cool and deliberate scheming that characterize so many white crimes are usually absent from the average native pattern. In fact, many native crimes occur in bars, or at parties, or in the middle of the street, and often in the middle of the day when all the world is around to see. There is nothing hidden about them. The offender has no hope of avoiding detection, no hope of getting away with it. There is in much native crime a terrible element of self-destruction, a certitude of punishment to follow, hopeless despair, and a loathing of self. No one who felt his or her life was worth living would act in this way.¹³

The Aboriginal Justice Inquiry's analysis of Provincial Court Study¹⁴ data is that on the reserves surveyed,

35% of crime fell into a group of four offenses: common assault, break and enter, theft under \$1,000 and public mischief. Aboriginal persons were charged with fewer property offenses, and more offenses against the person and provincial statute violations than non-Aboriginal persons.

13 L. Hobbs Birnie, *A Rock and A Hard Place: Inside Canada's Parole Board*, (Toronto: Macmillan, 1990), p. 205.

14 The Provincial Court Study is a study of court files involving 1,802 persons appearing before the Provincial Court of Manitoba in 1986. The files were drawn from Winnipeg courts and a number of northern Manitoba communities. See Dansys Consultants, "Manitoba Aboriginal Justice Study," (Winnipeg: Aboriginal Justice Inquiry, 1991), and B. Hendrickson, *A Study of the Operation of the Manitoba Provincial Court in Winnipeg and Selected Northern Communities with Reference to the Treatment of Aboriginal Offenders*, (Winnipeg: Department of the Justice, 1989).

These trends were also found by criminologists Mary Hyde and Carol LaPrairie whose study showed that Aboriginal crime was quite different from non-Aboriginal crime. For Aboriginal people, their study found more violent offenses, fewer property offenses, more social disorder offenses, higher overall rates of crime, and a strong relationship between alcohol abuse and crime. Almost conspicuously absent were crimes for profit, such as drug trafficking, prostitution, fraud and armed robberies. Although there were more violent offenses than non-Aboriginal people committed, the majority of crime committed were petty offenses.¹⁵

To the extent that the statistics Aboriginal persons committing more serious offenses than in past years, it should be kept in mind that different jurisdictions have changed their laws on public drunkenness and fine default, which reduces the number of persons who appear in jail admission statistics for these offenses. It is a frequent observation that Aboriginal persons are considerably over-represented in the group incarcerated for public drunkenness and fine default. As the number of Aboriginal persons who appear in jails admission statistics for public drunkenness and fine default decreases, the fact that Aboriginal incarceration rates are *increasing* is all the more shocking.

15 A C. Hamilton and C. M. Sinclair, Commissioners, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 1 - *The Justice System and Aboriginal People*, (Winnipeg: Queen's Printer, 1991), p. 88. See also Schmeiser, Hermann and Manning, note 6, *supra*, who observed at p. 81 that "Native offenders usually are involved in less serious crimes than non-Native offenders."

See H. Finkler, "North of 60 - Inuit and the Administration of Criminal Justice in Northwest Territories: The Case of Frobisher Bay," (Ottawa: Department of Indian Affairs and Northern Development, 1975), pp. 44-46: "[T]he majority of incidents involving Inuit that constitute crimes are really petty or quasi-criminal offences. The majority concurred with the thinking of one defence counsel [that] while these acts are illegal or in violation of specific ordinances, statutes or sections of the *Criminal Code*, they are generally devoid of criminal intent, motivation, or marked degree of premeditation. While the circumstances of some offences may reveal a degree of criminal intent, crimes such as breaking and entering or theft are rarely planned more than a day, evening or several hours in advance. The level of sophistication of these crimes in contrast to the range existing in southern Canada is very low."

Other offense discrepancies that have been identified in the literature are that Aboriginal inmates convicted of homicide are more likely than non-Aboriginal inmates to be convicted of manslaughter rather than murder. As well, non-Aboriginal inmates are more likely to be convicted of serious property and narcotics offenses (which can lead to longer incarceration terms because the penalty for importing narcotics is an automatic seven years incarceration).¹⁶

To summarize, of the evidence available about the types of crime for which Aboriginal and non-Aboriginal persons are convicted and incarcerated, it seems that Aboriginal offenders are involved in more non-*Criminal Code* offenses (but not highway traffic or drug offenses), more offenses against the person and Aboriginal crimes are generally more spontaneous, less planned and less for personal gain. These conclusions suggest that seriousness of offense does not adequately explain Aboriginal over-representation in jail, which is discussed in greater detail in chapter 3.

16 See Canfield and Drinnan, note 6, *supra*, p. 22: "The offence group including murder, attempted murder and manslaughter shows differences between native and non-native cohorts primarily because of the higher proportion of manslaughter admissions among natives." See also S. Moyer, "Homicides involving adult suspects 1962-1984: a comparison of Natives and non-natives," (Ottawa, Solicitor General, 1987), p. 23, and H. Johnson, "Getting the Facts Straight: A Statistical Overview," in *Too Few to Count, Canadian Women in Conflict with the Law*, E. Adelberg and C. Currie, eds., (Vancouver: Press Gang Publications, 1987), p. 42:

"... Native women admitted to federal terms of incarceration are more likely than non-Native women to have served a federal sentence previously, and are twice as likely to be incarcerated for crimes of violence. Sentences, however, were shorter overall for Native women owing to the minimum mandatory sentences given for the drug offence of importing (often a white woman's offence) and the greater likelihood of Native women to be convicted of manslaughter, which does not carry a minimum life sentence, compared to murder, which does."

Previous times in jail

The inmates were asked if this incarceration had been their first time in jail. Seventy-three per cent of both the Aboriginal (N=144/197) and non-Aboriginal (N=44/60) respondents answered that this was not their first time in jail, with 27% of both groups responding it was their first time in jail. This is a slightly higher figure than Morse and Lock found in their survey of federal inmates in 1985 - 21% with no incarceration record.¹⁷

The respondents were asked how many times they had been in jail following an arrest. To this more specific request, there were 77 non-responses. However, the responses that were received are important for showing that more than half of both Aboriginal and non-Aboriginal offenders had been in jail more than 5 times before, that there is close similarity in the responses between Aboriginal and non-Aboriginal inmates¹⁸ and that incarceration is no deterrent for these persons.

Table 8 - Times in jail following an arrest

<u>No. of Times:</u>	<u>None</u>		<u>1st</u>		<u>2nd</u>		<u>3-5</u>		<u>6+</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N	%	N
Aboriginal	1	1%	5	4%	9	7%	40	29%	83	60%	138
Non-Aboriginal	0	0%	2	5%	7	16%	10	23%	25	57%	44
<u>Total</u>	1	1%	7	4%	16	9%	50	27%	108	59%	182

17 B. Morse and L. Lock, "Native Offenders' Perceptions of the Criminal Justice System," research paper prepared for the Canadian Sentencing Commission, (Ottawa: Policy, Programs and Research Branch, Department of Justice, 1988), p. 25.

18 A. C. Birkenmayer and S. Jolly, "The Native Inmate in Ontario," (Toronto: Ontario Native Council on Justice, 1981) found that 84% of the Aboriginal inmates in their survey had prior convictions and of those, the inmates had an average of 9.4 prior convictions, although 46% of the total Aboriginal sample had served less than a year in jail before the most recent incarceration. (pp. 11-12)

McCaskill notes that in 1970 only 13% of Aboriginal inmates had six or more previous convictions, compared to 48% in 1984.¹⁹ The Manitoba Innate Survey sample did not ask about prior convictions (it asked instead about prior incarcerations).

The figures suggest that the previous incarceration records between Aboriginal and non-Aboriginal people are not very different. In fact, the Manitoba Provincial Court Study, which examined a sample of files involving 1,802 persons, selected from Winnipeg and several northern reserve courts, found that half of the cases had no prior convictions and the remaining half had one or more. The analysis prepared for the Aboriginal Justice Inquiry by a statistical analysis consulting firm concluded that prior records were not a variable that could help explain different treatment of Aboriginal and non-Aboriginal persons in the courts. "The distributions were very similar for the two groups ... On the basis of this finding, the effects of previous conviction were not considered in subsequent analyses."²⁰

The evidence of recidivism, with 73% of inmates having prior incarcerations and 59% more than five prior incarcerations, suggests that incarceration does not

19 McCaskill, 1985, note 7, *supra*, p. 30.

20 Dansys Consultants, "Manitoba Aboriginal Justice Study," (Ottawa: Aboriginal Justice Inquiry, 1991), p. 53. See also Canfield and Drinnan, note 6, *supra*, who found at p. 12: "A higher proportion of the native inmate population has been in penitentiary before their present period of incarceration than non-natives. ... However, the distinction ... is becoming much less pronounced."

Schmeiser, Hermann, and Manning, note 6. *supra*, found at p. 75: "It is clear that in all categories more Natives incarcerated in the Saskatchewan Penitentiary at Prince Albert as of June 20, 1973, had prior records than non-Natives." P. 79: "... [T]he recidivism rate among Native people admitted to provincial jails in Saskatchewan in 1971-72 is higher than among non-Natives."

deter or rehabilitate a significant number of offenders and whatever conditions lead these inmates to become incarcerated are simply not being addressed.

Factors involved in crime

One of the main factors identified by inmates with respect to Aboriginal crime was alcohol. When asked the question directly, 83 % (N=164/197) of Aboriginal respondents in the survey and 50 % (N=30/60) of non-Aboriginal inmates reported that they were under the influence of alcohol at the time of their offense.

The survey also asked the inmates what factors were involved in their most recent incarceration. This question allowed the inmate to identify a number of factors and no responses were suggested to them. Here are the responses:

Table 9 - Factors involved in present incarceration (open-ended question)

	<u>Aboriginal</u>		<u>Non-Aboriginal</u>		<u>Total</u>	
	N	%	N	%	N	%
Alcohol/Drugs	123	65 %	25	43 %	148	60 %
Anger/No control	19	10 %	5	9 %	24	10 %
Family Problems	11	6 %	5	9 %	16	6 %
Personal Problems	4	2 %	4	7 %	8	3 %
Money	15	8 %	15	26 %	30	12 %
Support Habit	3	2 %	4	7 %	7	3 %
Lawyers/Legal Aid	2	1 %	0	0 %	2	1 %
Other Persons	3	2 %	2	3 %	5	2 %
Other	59	31 %	14	24 %	73	30 %

Note: there were 247 respondents, but they were allowed to respond more than once. The percentages are based on 189 Aboriginal and 58 non-Aboriginal respondents.

The inmates were also asked what factors explain why Aboriginal people in general commit crimes and listed a number of factors for the inmates to choose, allowing multiple answers. Here are the results of this question:

Table 10 - Factors involved in Aboriginal crime (question with suggested factors)

	<u>Aboriginal</u>		<u>Aboriginal</u>		<u>Total</u>	
	N	%	N	%	N	%
Alcohol Abuse	166	85%	53	93%	219	87%
Drug Abuse	128	66%	46	81%	174	69%
Substance Abuse	128	66%	44	77%	172	68%
Desire to leave home community	76	39%	15	26%	91	36%
Peers/Friends	109	56%	41	72%	150	60%
Poverty	146	75%	44	77%	190	75%
Unemployment	161	83%	50	88%	211	84%
Didn't know act was a crime	79	41%	21	37%	100	40%
Adventure/Thrill	84	43%	29	51%	113	45%
Wanted to be incarcerated	37	19%	16	28%	53	21%
Other	12	6%	6	11%	18	7%

Note: there were 252 respondents, but they were allowed to respond more than once. The percentages are based on 195 Aboriginal and 57 non-Aboriginal respondents.

In expressing their opinions about Aboriginal motivations in crime, more non-Aboriginal inmates than Aboriginal inmates indicated a desire by Aboriginal offenders to be incarcerated when that factor was included in a list but none of the inmates identified this as a factor when the question was open-ended. A different inmate survey by Jolly and Seymour found that only two of 119 inmates wanted to be incarcerated.²¹ Birkenmayer and Jolly found the top three factors in

21 S. Jolly and J. Seymour, "Anicinabe Debtors' Prison - A Survey of Fine Defaulters and Sentenced Offenders incarcerated in the Kenora District Jail for Provincial Offences," (Toronto: Ontario Native Council on Justice, 1983), p. xii. This finding is confirmed by Birkenmayer and Jolly, note 18, *supra*, p. v. The persons surveyed by Jolly and Seymour are those individuals one might think would be most likely to want to be incarcerated - persons with frequent incarcerations for public drunkenness. If these persons do not want

Aboriginal crime in their survey of Aboriginal inmates in Ontario were alcohol abuse, unemployment and poor living conditions.²²

Concerning alcohol, when asked directly whether they were under the influence of alcohol at the time of their most recent offense, 83 % (N=164/197) of Aboriginal respondents replied yes. However, when asked to identify the various factors leading to their incarceration, only 67 % (N=126/189) identified alcohol as a factor. When asked about factors in Aboriginal crime generally, 85 % (N=166/195) of Aboriginal respondents named alcohol as a factor. Jolly and Seymour found:

58 per cent of the fine defaulters and 42 per cent of the sentenced offenders, all of whom were serving time for at least one liquor offence and most of whom had served time for a liquor offence during the previous year, contended that they did not have an "alcohol problem."²³

McCaskill stated that in 1970, 89 % of the sample of Aboriginal offenders had an alcohol problem, while in 1984, this had increased to 94 %.²⁴ Conversely, McCaskill reports that alcohol involvement in Aboriginal offenses had decreased from 90 % in 1970 to 75 % in 1984.²⁵

to be incarcerated, one would expect it is even less likely for anyone else.

22 Birkenmayer and Jolly, note 18, *supra*, p. vi found 26 % of their sample identified lack of a home as a leading cause of incarceration.

23 *Ibid.*, p. xiv.

24 McCaskill, 1985, note 7, *supra*, p. 17.

25 *Ibid.*, p. 35.

For non-Aboriginal inmates, McCaskill reported an alcohol abuse rate of 24%.²⁶ In the Manitoba Inmate Survey, 50% of non-Aboriginal inmates said they were under the influence of alcohol at the time of the offense.

Aboriginal and non-Aboriginal use of alcohol/drug programs was reported at the same rate in the survey. In response to the question as to which programs the inmates were using in jail, 56% (N=111/198) of Aboriginal inmates reported using Alcoholics Anonymous or Substance Abuse programs (only 9 of 198 in the drug abuse program), while the non-Aboriginal respondents reported 54% using Alcoholics Anonymous or Substance Abuse programs (16 for A.A. and 16 for substance abuse out of 59 respondents).

The above results confirm a particularly high rate of alcohol use in connection with Aboriginal crime,²⁷ that Aboriginal people do not want to go to jail and that alcohol programs are not reaching Aboriginal inmates to the extent they might (56% were in programs compared to 83% who were under the influence at the time of the offense). They also raise the question of whether Aboriginal inmates are under-reporting their alcohol problems (67% named alcohol as factor compared to 83% who said they were under the influence at the time of the offense).

Education

26 *Ibid.*, p. 18.

27 This finding was confirmed by the Metis and Non-Status Indian Crime and Justice Commission, the Osnaburgh-Windigo Tribal Council Justice Review Committee and the Task Force on Aboriginal Peoples in Federal Corrections. For a summary of these findings, see S. Zimmermann, "The Revolving Door of Despair: Native Involvement in the Criminal Justice System." (Ottawa: Law Reform Commission of Canada, 1991). See also Schmeiser, Hermann, and Manning, note 6, *supra*, p. 81.

Findings that were expected were that the majority of the inmates had little education attainment, Aboriginal inmates were even more at a disadvantage than non-Aboriginal inmates and women more at a disadvantage than men.

The survey found 46% (N=91/198) of the Aboriginal respondents had less than grade 10 education at the time of the interview, with 81% (N=160/198) having less than grade 12. Only seven per cent (N=14/198) had some education beyond public school. Morse and Lock found that 63% of the respondents in their sample had less than a grade 10 education.²⁸ McCaskill found in his Manitoba surveys of Aboriginal inmates that in 1970, 88% had less than grade 10 education, and in 1984, 57% had less than grade 10 education.²⁹ The differences between the Manitoba Inmate Survey, Morse and Lock's, and McCaskill's indicates that Aboriginal levels of education are improving. However, a Department of Indian Affairs study of 1981 census data of Manitoba's Registered Indians found that education attainment did not provide Indians with the same employment benefits as the general population.³⁰

It is interesting to note that Morse and Lock found levels of education had apparently no effect on whether an Aboriginal person would be likely to be employed.³¹ A correlation Morse and Lock did find was that higher education leads to more not guilty pleas.³² Although this direct analysis was not done for

28 *Ibid.*, p. 19.

29 McCaskill, 1985, note 7, *supra*, p. 15.

30 J. Hull, "An Overview of Registered Indian Conditions in Manitoba," (Ottawa: Department of Indian and Northern Affairs, 1987), p. 116.

31 Morse and Lock, note 17, *supra*, p. 20.

32 *Ibid.*, p. 21.

the Manitoba Inmate Survey, the survey did indicate that Aboriginal inmates had lower levels of education and were more likely to plead guilty than non-Aboriginal inmates (discussed later).

By contrast to the Aboriginal figures, 52% (N=31/60) of non-Aboriginal respondents had grade 12 education or better. In the entire sample of 258 inmates there was only one university graduate (non-Aboriginal).

These differences in education between Aboriginal and non-Aboriginal inmates exist in the general population as well. Hull, in his study of Registered Indians in Manitoba, found that "Non-Indians were almost three times as likely as Indians to have completed high school or better."³³

Employment

Another expected result is low levels of employment, particularly for Aboriginal inmates. Sixty-two per cent (N=37/60) of non-Aboriginal respondents were employed full-time prior to their most recent arrest. By contrast, only 30% (N=58/196) of the Aboriginal inmates were so employed. The following table shows the responses received on employment at time of arrest.

Table 11 - Employment at time of arrest

	<u>Full-time</u>		<u>Part-time</u>		<u>Seasonal</u>		<u>Unemployed</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	58	30%	24	12%	33	17%	81	41%	196
Non-Aboriginal	37	62%	4	7%	7	12%	12	20%	60
<u>Total</u>	95	37%	28	11%	40	16%	93	36%	256

33 Hull, note 30, *supra*, p. x.

The above results should not be surprising as they reflect the fact that Aboriginal people are generally much more likely to be unemployed than non-Aboriginal people. Aboriginal persons in Manitoba have unemployment rates at least four times higher than the rates for non-Aboriginal persons.³⁴

It should be noted that "employment" was not rigourously explored in the Manitoba Inmate Survey, such that some "employment" - work that produces economic benefit or provides self-sufficiency but is not wage work - was probably discounted. It is open to speculation how comparison of employment rates would change if non-wage work were included for consideration. As well, the survey did not explore employment stability in the time preceding arrest.³⁵

Morse and Lock found only 36% of their sample of Aboriginal inmates in 1985 were employed,³⁶ while McCaskill found 24% of his 1984 Headingley Aboriginal sample were employed prior to the time they were convicted.³⁷ The results from the Manitoba Inmate Survey are consistent with these figures if "full-time employment" responses are relied upon, but less consistent if the figure of 59% who reported some kind of employment is considered. The differences between the surveys may well be in the questions asked and how they were interpreted by the

34 *Ibid.*, p. xi, 97, 116, and Hamilton and Sinclair, note 15, *supra*, p. 9.

35 A good example of more detailed exploration of employment can be found in Jolly and Seymour, note 21, *supra*, at p. 47, which discovered that among those respondents stating they had been employed at the time of arrest, a significant proportion had spent most of the six months preceding arrest unemployed. Birkenmayer and Jolly, note 18, *supra*, p. iii, found the unemployment rate of their Aboriginal sample in the year preceding incarceration to be three times the national average, few inmates had permanent employment and few had specific plans. As well, they found 45% had never enjoyed a period of uninterrupted employment for longer than six months.

36 Morse and Lock, note 17, *supra*, pp. 18-19.

37 McCaskill, 1985, note 7, *supra*, p. 11.

respondents. On the other hand, the results may suggest Aboriginal employment has been increasing. McCaskill reported improvement in Aboriginal employment since 1970.

Eighty-five per cent of Aboriginal inmates were reported as being unskilled in 1970 compared to 45 % in 1984. ... For those inmates and parolees for which data was available, over 80 % possessed an employment record which was rated as either "fair" or "poor" in 1970 compared to 65 % in 1984.³⁸

Even if there has been improvement, economic and employment hardships continue to be a serious problem for Aboriginal people.

Language

Sixty-two per cent (N=121/196) of the Aboriginal inmates said they spoke an Aboriginal language at home. When asked which languages were spoken at home, 38% (N=75/196) reported English, 30% (N=58/196) reported Cree, 27% (N=53/196) reported Ojibway or Saulteaux and 4% (N=8/196) reported Dakota. No other languages were reported. This result shows the importance of making reasonable accommodation for the use of Aboriginal languages at every stage of the criminal justice system.

Religion

Thirty-seven per cent (N=64/175) of Aboriginal inmates and 38% (N=77/201) of all inmates in the present sample cannot be served by major Christian churches in prison programming because they identify their religion as "Aboriginal Spirituality" or "Other."

38 *Ibid.*, p. 16.

The survey instrument gave the inmates the following choices in responding to a question about their religion: Aboriginal Spirituality, Roman Catholic, Anglican, Baptist, United, Other. Twenty-six per cent (N=46/175) of Aboriginal respondents identified their religion as 'Aboriginal Spirituality.' Twenty-eight per cent (N=13/26) of the non-Aboriginal inmates reported "Other" for their religion. Forty-seven per cent of the Aboriginal sample (N=83/175) and 44% of the non-Aboriginal sample (N=20/46) identified Roman Catholicism as their religion.

Sex

The methodology section above discussed the male-female distribution of the sample. One of the more obvious findings from the numbers is that women are incarcerated in far smaller numbers than men. According to Table 2 above, only 3.3% (N=40/1217) of Manitoba's inmates at any given time in the summer of 1989 were women. The Manitoba Inmate Survey sample had 16% women (N=40/258). Chapter 5 examines issues of particular importance to women offenders.

Age

Another expected finding is that inmates are mostly young. The age of the inmates in the survey sample did not show clear differences between Aboriginal and non-Aboriginal inmates when compared by institutional sampling. More than half of all inmates were less than 30 years old. Inmates in federal institutions were older than inmates in provincial institutions. Forty-six per cent (N=52/112) of the male inmates in federal institutions, compared to 68% (N=72/106) of male inmates in provincial institutions, were under the age of 30. Aboriginal inmates in the sample tended to be somewhat younger than the non-Aboriginal sample in male

provincial institutions (68%, N=63/92 vs. 64%, N=9/14), although the small numbers suggest caution. The women in the sample, all in the provincial institution, were older, with only 55% (N=22/40) being less than 30 years of age.

Table 12 - Age of respondents

	<u>18-24</u>	<u>%</u>	<u>25-29</u>	<u>%</u>	<u>30-39</u>	<u>%</u>	<u>40+</u>	<u>%</u>	<u>Total</u>
Aboriginal	59	30%	56	29%	64	32%	19	10%	198
Non-Aboriginal	16	27%	15	25%	18	30%	11	18%	60
<u>Total</u>	75	29%	71	28%	82	32%	30	12%	258

What the sample does not show but full jail records do (see Table 2) is that 54% of male non-Aboriginal persons in jail in Manitoba in the summer of 1989 were in federal institutions, compared to only 38% of male Aboriginal persons in jail. Combining this with the younger provincial institution population, it can be suggested that Aboriginal inmates on the whole are younger than non-Aboriginal inmates. Canfield and Drinnan reached a similar conclusion in their study of national jail statistics for 1977-1981.³⁹

McCaskill found in 1970 that 57% of his sample of Aboriginal inmates was 24 years of age or younger, compared to only 34% in 1984⁴⁰ and the Manitoba Inmate Survey found 30% between the ages of 18 and 24 in 1989. This suggests

39 Canfield and Drinnan, note 6, *supra*, at p. 8, found on April 1, 1981, two thirds of Aboriginal offenders were under the age of 30, compared to just half of non-Aboriginal offenders. On the other hand, they also found at p. 16 that "because the number of native admissions is so much smaller than the number of non-native admissions, a shift of only twenty-two native offenders each year from the under thirty-five age groups to the older age groups would equalize the age profiles between natives and non-natives. Admissions by simple warrants of committal show nearly identical age profiles for the five years [1977-1981] combined." At p. 21: "[O]ver two-thirds of all native admissions with sentences of six years and longer are under thirty years of age. For non-natives, the equivalent proportion is fifty-nine percent."

40 McCaskill, 1985, note 7, *supra*, pp. 11-12.

a trend to older Aboriginal inmates. However, Morse and Lock found 40% of their Aboriginal sample in 1985 was between the ages of 16 and 24.⁴¹ This is a somewhat surprising result especially given that most of the Morse and Lock sample was from federal institutions. The Manitoba Inmate Survey also differs from Morse and Lock who found female inmates tended to be younger than male inmates. The differences between these two surveys may be explained by their relatively small sample sizes and because Morse and Lock's was a "national" survey (Ontario to B.C.), not confined to Manitoba.

A different way to examine age is to ask at what age the person was first arrested and charges laid. In the Manitoba Inmate Survey 68% (N=96/142) of Aboriginal respondents were arrested and charged before the age of 18, compared to only 48% (N=21/44) of non-Aboriginal inmates. In fact, 44% (N=63/142) of the Aboriginal sample was first arrested and charged before the age of 16. Other studies also found Aboriginal offenders become involved at earlier ages. This suggests that Aboriginal inmates will tend to be younger because they likely acquire longer records at earlier ages.

The figures cited in Table 2 above show that Aboriginal young persons are even more over-represented in jails than Aboriginal adults.⁴²

41 Morse and Lock, note 17, *supra*, p. 16.

42 W. Jamieson and C. LaPrairie, "Native Criminal Justice Research Issues and Data Sources," (Ottawa: Department of the Solicitor General, 1987), report in their survey of empirical literature at p. 6: "[T]here are indications that Native youth become involved in the criminal Justice system at an earlier age than their non-Native counterparts." See also C. LaPrairie, "The Young Offenders Act and Aboriginal Youth," in *Justice and the Young Offender in Canada*, J. Hudson, J. Hornick, B. Burows, eds., (Toronto: Wall & Thompson, 1988), p. 161.

Parents and families

The survey asked the inmates who they lived with at various periods of their lives. Of Aboriginal inmates, two-thirds (65%, N=125/191) lived with both parents in their first six years, while 83% (N=48/58) of non-Aboriginal respondents lived with both parents. Less than half of Aboriginal respondents were raised by both parents between seven and 12 years of age, 47% (N=89/ 190), compared to more than three-quarters (78%, N=45/58) of non-Aboriginal respondents. One third (N=61/186) of Aboriginal respondents lived with both parents between the ages of 13 and 18, compared to half (N=29/58) of the non-Aboriginal respondents.

Also considered was the extent to which the extended family played a role in the lives of the inmates. The survey found that 91% (N=181/198) of Aboriginal respondents lived with one or both parents, one or both grandparents, or another relative in their first six years. This does not include 12 others who lived with foster parents (only one reported being in the custody of children's aid). Seventy-seven per cent (N=151/196) of Aboriginal respondents lived within their extended family (including both parents) from the ages of seven to 12. Sixty-three per cent (N=121/192) lived within their extended family from the ages of 13 and 18, and a further 10 respondents were in residential school.

For non-Aboriginal inmates, the responses were 97-98% who lived within their extended families when they were less than 6 years of age (N=58/59) and between the ages of seven to 12 (N=57/59), but only 70% (N=41/59) lived within their extended families between ages 13 and 18.

When figures such as these are discussed, it is important to note that a finding that Aboriginal children are more likely to have been away from their extended family during childhood does not necessarily give information about Aboriginal child welfare conditions. For example, residential schools took children away from parents because of the Canadian government's sweeping policy, having nothing to do with child welfare concerns. In addition, it is only in the early 1980's that Aboriginal communities were allowed to start delivering child welfare services for themselves. The 1985 report of Manitoba Provincial Court Judge E. Kimmelman, *No Quiet Place*, found that Aboriginal children were unnecessarily taken away from their communities and all too often placed for adoption outside of the province. Judge Kimmelman wrote:

Cultural bias in the child welfare system is practised at every level from the social worker who works directly with the family, through the lawyers who represent the various parties in a custody case, to the judges who make the final disposition in the case. [U]nequivocally ... cultural genocide has been taking place in a systemic, routine manner.⁴³

The Manitoba Metis Federation recently reported that this problem continues to be a major concern, five years after *No Quiet Place*.⁴⁴

McCaskill found that Aboriginal inmates suffer greater family instability. The present survey found the same result, but the difference with non-Aboriginal inmates was not to a great degree if extended family is the basis of comparison. McCaskill used incidence of single-parent families or being raised by someone

43 Edwin Kimmelman, Chairperson, Manitoba, Final Report of the Review Committee on Indian and Metis Adoptions and Placements, *No Quiet Place*, (Winnipeg: 1985). pp. 185, 328-329.

44 *Winnipeg Free Press and Globe and Mail*, August 3, 1990.

other than the parents as part of his criteria for assessing family instability.⁴⁵ Given Aboriginal reliance on the extended family, it is not clear these indicia are the best criteria to show family instability.

Family members who have been in jail

The survey asked the respondents if any of their family had been in jail. Eighty-one per cent (N=157/193) of Aboriginal respondents reported they had relatives who had been in jail. By contrast, only 33% (N=20/60) of non-Aboriginal respondents reported family members who had been in jail.

Just because the survey shows more family members had been in jail among the Aboriginal respondents that does not give information about why this is happening. It may be that a variety of systemic or other factors result in Aboriginal people going to jail for circumstances that would not result in incarceration for non-Aboriginal people. This is discussed in detail in chapters 7 and 8. Aboriginal people appear to have closer connections to their extended families. Aboriginal people also generally live in small communities, which suggests that they would have better knowledge of the situation of their relatives than non-Aboriginal inmates. Of course, it may be that Aboriginal rates of criminal offenses are higher and contribute to the above result as well.

45 McCaskill, 1985, note 7, *supra*, p. 18. Birkenmayer and Jolly, note 18, *supra*, found at p. iv: "[t]he Native inmates in the sample were seriously isolated from their families, the Native community and each other ..."

One of the differences McCaskill found between Aboriginal inmates and the general Aboriginal population is that inmates tend to come from larger families than the general Aboriginal population.⁴⁶

More than two-thirds (72%, N=142/198) of Aboriginal respondents were Status Indians. The sample also had 23 Non-Status Indians (12%) and 33 Metis (17%) inmates (of 198 Aboriginal inmates surveyed). Approximately 59% of Manitoba's total Aboriginal population are Status Indians.⁴⁷ McCaskill found 66% of Aboriginal inmates and parolees in 1984 were Status Indians. For Headingley jail in 1984, McCaskill found that only 57% of the Aboriginal inmates there were Status Indians. McCaskill noted a decline in the representation of Status Indians in prison statistics. In 1970 his sample found 75% were Status Indians.⁴⁸

Morse and Lock's 1985 sample of federal inmates found 59% of the sample were Status Indians. Morse and Lock also noted that the 1985 amendments to the *Indian Act*, whose effect will be to increase the number of Status Indians generally (and decrease the number of Non-Status Indians), will likely increase the Status population in jails accordingly.⁴⁹ Morse and Lock's data differed with McCaskill by finding that Status Indians are equally present in both federal and provincial institutions.

46 *Ibid.*, p. 13. The Manitoba Inmate Survey did not ask about family size.

47 Dansys Consultants estimate that in 1991 there were 76,208 Status Indians (58.6% of Manitoba's Aboriginal population), 47,230 Metis (36.3%), 6,081 Non-Status Indians (4.7%), and 475 Inuit (0.4%) in Manitoba. Dansys Consultants, "Aboriginal People In Manitoba: Population Estimates for 1986 and 1991." (Winnipeg: Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, 1990).

48 McCaskill, 1985, note 7, *supra*, p. 11.

49 Morse and Lock, note 17, *supra*, p. 18.

All this suggests that while the figure of 72% of Aboriginal inmates being Status Indians must be viewed cautiously, all of the figures are consistent that Status Indians make up significantly more than half of the Aboriginal inmate population.⁵⁰ It is likely that this proportion will continue to increase with the changes to the *Indian Act* through Bill C-31 in 1985, whose effect is to entitle many (but not all) non-Status Indians to become registered. This may explain the move from 57-59% in the mid-80s to the 72% of the present survey.

Biographical profile summary

Aboriginal inmates in this sample tend to become involved in the criminal justice system at an earlier age than non-Aboriginal inmates and tend to have more family members who have been in conflict with the law. As a group, Aboriginal inmates appeared to have less serious offenses but longer sentences within federal institutions than non-Aboriginal inmates. All inmates, but especially Aboriginal inmates, reported frequent conflict with the law and involvement from an early age.

The Aboriginal respondents reported a very high incidence of being under the influence of alcohol at the time of the offense, although Aboriginal and non-Aboriginal use of alcohol and substance abuse prison programs was at very similar rates. Alcohol, unemployment and poverty are the factors most often identified by the prisoners to explain Aboriginal crime.

Aboriginal inmates tend to have less education, less employment and more differences through language and religion (and culture more generally) than non-

⁵⁰ Birkenmayer and Jolly, note 18, *supra*, found 74% of their survey of Aboriginal inmates were Status Indians, p. 1.

Aboriginal inmates. Aboriginal inmates were much more likely to be raised within an extended family than non-Aboriginal inmates who were more likely to be raised in a nuclear family. Family stability differences narrowed between the ages of 13 and 18 with 74% of non-Aboriginal and 70% of Aboriginal inmates living within either a nuclear or extended family.

In comparing trends in Aboriginal offenders from 1970 to 1989, direct comparisons with the two McCaskill's studies were difficult, primarily because questions were worded differently using different age groupings, different analyses of seriousness of offense, different employment and education questions and so on.

McCaskill's 1984 study found that the Aboriginal offender was older, slightly more educated and had a better employment background than the 1970 Aboriginal offender. The Manitoba Inmate Survey offers some support for the finding that Aboriginal inmates have become older since 1970, but there continues to be very early involvement with the justice system among Aboriginal offenders. Aboriginal sentences in 1984 were longer, their crimes were more serious and involved more personal violence than in 1970. The evidence reviewed in this chapter offers support for the view that Aboriginal offenses have become more violent, but the evidence also reveals the majority of Aboriginal offenses are petty offenses.

The 1984 offenders showed a marked migration to urban areas, with fewer offenders born in rural areas (44% in 1984 compared to 62% in 1970)⁵¹ and more offenses committed in urban areas (67% in 1984, 40% in 1970)⁵². The Manitoba Inmate Survey found 74% of the Aboriginal respondents lived their first

51 *Ibid.*, p. 6.

52 *Ibid.*, p. 7.

six years in rural areas while 69% of Aboriginal offenders lived in urban areas at the time of their most recent incarceration. These results appear to contradict the finding of a trend to more urban-born offenders, but confirm that rural-urban migration is a particular problem for Aboriginal offenders and that most Aboriginal inmates commit their offenses in urban areas. A more detailed discussion of rural-urban figures is provided in chapter 5.

Aboriginal inmates continue to have particularly high rates of crimes involving alcohol, have more family members who have been in conflict with the law, have had a less stable family environment, and are predominantly young, unemployed, uneducated, male Status Indians.

Despite the slight advances in employment and education that appear evident from the 1970, 1984 and 1989 surveys, Aboriginal offenders are still far behind non-Aboriginal inmates in these areas. Also, despite the gains made in these areas, Aboriginal inmates continue to make up an increasing proportion of the prison population.

McCaskill's comparison of trends from 1970 to 1984 begins with a description of Aboriginal offenders taken from the 1969 report of the Canadian Committee on Corrections, which described a typical Aboriginal offender as

likely to be between 19-24 years of age and has come from a rural area. He is frequently a member of a large family and very often one of his siblings has been in previous conflict with the law. Having left school prior to completing grade eight, he tends to possess no particular employable skills, nor does he have the prerequisites to obtain one. He has probably been in conflict with the law some time between 14 and 21 years of age and quite likely before he was 19 years old. His present offence is probably related

to his use and misuse of alcohol. Finally, he does not have the same visible ties or resources within the community as does his white counterpart.⁵³

McCaskill concludes:

... [W]ith a few notable exceptions, the Canadian Committee of Correction's negative profile of the typical Native offender in the federal correctional system is as valid a description in 1984 as it was in 1969. The only major difference is that Native offenders tend to be older today and are less likely to come from a rural area.⁵⁴

The Manitoba Inmate Survey findings suggest that the 1969 description continues to be true in 1989.⁵⁵

53 Roger Ouimet, Chairperson, *Report of the Canadian Committee on Corrections*, (Ottawa: Canadian Committee on Corrections, 1969), quoted in Don McCaskill, "Patterns of Native Criminality: A Longitudinal Analysis," (Trent University. Peterborough: n.p., 1990), at p. 3.

54 McCaskill, note 7, *supra*, 1990, p. 9.

55 Australian conditions are similar. See A. Duckworth, C. Foley-Jones, P. Lowe and M. Laller, "Imprisonment of Aborigines in North Western Australia," *The Australian and New Zealand Journal of Criminology*, 15, 1, (March 1982): 26 at pp. 28-35, from their survey of 96 Aboriginal inmates: "64% were 25 and under, 78% had been in prison twice or more, 70% had no educational qualifications, and 72% were serving less than six months ... 74% classified themselves as being really drunk at the time of the offence. A further 18% said that they had been drinking but were not drunk. ... [Only] two percent said that they liked being prison. ... [T]he data once again gives the lie to the assumption that Aborigines are unconcerned by the prospects of imprisonment ... During the 1979/80 financial year, 37% of all prison receivals were for default of fine only. On any given day, about 5% of the prison population is serving a sentence purely in default of payment of a fine ... [In response to the question] 'Why do you think there are so many Aborigines in prison?' 39% mentioned police discrimination with a further 9% mentioning limited access to assistance in court and a limited understanding of court procedure. Discrimination was vocalized primarily in two forms. Firstly, there is the alleged failure of police to arrest whites guilty of similar drinking or drunken behaviour i.e., in streets and pubs, and secondly there is the use of imprisonment for an offence which they see as trivial ..."

CHAPTER 3 - ARREST TO SENTENCING

This chapter examines the inmates' responses about their contact with the justice system from arrest to sentencing. The results reveal that the Aboriginal inmates in the survey were disadvantaged at every stage of the criminal justice system process.

Explaining rights

When asked whether the police explained their rights to them the majority responded yes, but there was a disturbingly large number of inmates who responded no. Thirty-five per cent (N=62/178) of Aboriginal inmates and 26% (N=16/58) of non-Aboriginal inmates reported that the police had not explained their rights to them. The results were similar for the women, (33%, N=8/24 Aboriginal and 23% N=3/13, non-Aboriginal).

A number of reasons can be advanced to explain why so many inmates reported their rights were not explained to them. Perhaps the inmates' views of the rights that should be explained to them are different than the rights legally required to be explained. Perhaps lack of education or language barriers resulted in many inmates reporting rights were not explained to them. Many inmates were under the influence of the alcohol at the time of the offense and this may have affected their recollections of the police cautions. Some inmates may have been charged before it was required for the police to explain their rights (especially under the 1982 *Charter of Rights and Freedoms*). Some inmates may want to make the police look bad. Of course, it may well be that in some cases the police simply did not explain legal rights to the offender. This is discussed in greater detail in chapter 8. The

bottom line, however, is that Aboriginal offenders appear to have less opportunity to take advantage of their rights.

Go directly to jail

The inmates were asked where police took them once they were charged. Ninety-four per cent (N=184/195) of the Aboriginal inmates and 87% (N=52/60) of the non-Aboriginal inmates reported being taken directly to jail (the others were given notices to appear or went directly before a judge or justice of the peace - 13%, N=8/60, non-Aboriginal and 6%, N=11/195 Aboriginal).

Bail

When asked whether the inmates applied for bail, 38% (N=73/194) of Aboriginal respondents replied no, compared to 30% (N=18/60) of non-Aboriginal inmates. Thirty-nine per cent (N=46/118) of Aboriginal respondents replied that bail was granted, compared to 36% (N=15/42) of non-Aboriginal inmates.

When asked how long they had to wait for their bail hearing, the Aboriginal and non-Aboriginal inmates reported similar delays, although non-Aboriginal inmates waited somewhat less.

Table 13 - Waiting for bail - all respondents

<u>Days:</u>	<u>2 or less</u>		<u>3 - 7</u>		<u>8 - 14</u>		<u>15+</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	32	29%	35	31%	18	16%	27	24%	112
Non-Aboriginal	14	34%	12	29%	5	12%	10	24%	41
Total	46	30%	47	31%	23	15%	37	24%	153

There are numerous cases missing as 91 persons did not apply for bail and were not asked this question.

The Provincial Court Study data, as analyzed by Dansys Consultants, indicated that there are differences in the pre-trial treatment of Aboriginal and non-Aboriginal inmates.

Detentions involving natives comprised 65 percent of all detentions, even though the PCS sample of 1,802 persons involved similar proportions of native (53 percent) and non-native (47 percent). There were judicial interim release hearings in 72 percent of non-native detentions, versus 35 percent of native detentions. When bail hearings were held, they were followed by release the same or next day in 77 percent of detentions involving non-natives, versus 59 percent of those involving natives. Overall, about 56 percent of detentions involving non-natives resulted in judicial interim releases; for detentions involving natives the figure was about 21 percent.¹

[A]t least one hour of pre-trial detention was recorded for about 41 percent of non-natives in the PCS sample, versus about 55 percent of natives. ... [N]atives were significantly more likely than non-natives to spend time in pre-trial detention. About 48 percent of native females of age 18-34 spent time in detention, versus about 20 percent of non-natives. For males of age 18-34, about 54 percent of natives were detained pending trial, versus about 41 percent of non-natives. ... For females of age 35 and over, 63 percent of natives were detained, as opposed to only 28 percent of non-natives.²

1 Dansys Consultants, "Manitoba Aboriginal Justice Study," (Winnipeg: Aboriginal Justice Inquiry, 1991), p. 54.

2 *Ibid.*, pp. 57-58.

Dansys also found that while Aboriginal persons were generally more likely to spend time in pretrial detention, for many groups that Dansys compared (age/sex cohorts), the time spent in pre-trial detention was the same. This was not true for men between the ages of 18 and 34, where "native detainees spent an average of 6.2 days in detention on all charges combined, versus an average of 4.2 days for non-natives." On the other hand, Aboriginal and non-Aboriginal youth had similar instances of being put into pre-trial detention, but once there, Aboriginal youth spent more time in pre-trial detention. "Native male youth spent an average of 29.3 days in pretrial detention, compared to only 10.8 days for non-natives."³

Dansys also examined those cases where accuseds were initially put into pre-trial detention and later released before trial, suggesting that they did not need to be in pre-trial detention in the first place. This occurred to approximately 21% of the persons in the Provincial Court Study sample. Among inmates who were released, "78 percent of non-native males spent less than three days in detention, [but] only 68 percent of native males were released this quickly. About 16 percent of non-native males spent between three and seven days in detention, whereas 23 percent of native males fell into this category."⁴

A 1988 study of bail at the Winnipeg Remand Centre by the Winnipeg Social Planning Council produced data that show similar problems with bail for Aboriginal persons.⁵ The data showed that 49.6% of the Aboriginal inmates were

3 *Ibid.*, p. 59.

4 *Ibid.*, p. 63.

5 P. Sawatzky, "Winnipeg Remand Study: A Re-Analysis, Comparing Aboriginal and Non-Aboriginal inmates," (Winnipeg: Aboriginal Justice Inquiry, 1991).

charged with a single offense compared to 42.8% of the non-Aboriginal inmates. These figures suggest Aboriginal offenders may not have more charges per person than non-Aboriginal offenders and they show that the number of charges cannot explain why so many Aboriginal persons are in pretrial detention. The study also found 33.5% of the remand inmates were Aboriginal, while the Provincial Court study found that only 18% of the Provincial Court offenders in Winnipeg were Aboriginal.⁶

The above figures suggest that Aboriginal inmates are considerably over-represented in pre-trial detention which can have very serious consequences for the accused.

A lengthy period of pretrial detention may well prove to be disastrous to accused persons, who may lose their jobs, thus rendering it impossible for them to fulfill their obligations to either their family or their community. Furthermore, pre-trial incarceration may render it more difficult for accused persons to engage the services of a lawyer and to assist in the assembling of evidence for their case. Particularly disturbing is the conclusion of a number of Canadian studies that the denial of bail to a suspect has a significant effect upon both the likelihood of a *conviction* and the *severity* of any sentence that is ultimately meted out. ... It is not clear exactly how the suspect's bail status exerts such an impact upon the trial and sentencing processes; however, there is a strong possibility that an aura of suspicion may surround a defendant who appears in custody before the court and that this negative impression may well affect the outcome of the case.⁷ (emphasis in original)

6 Dansys Consultants, note 1, *supra*, p. 43. A C. Birkenmayer and S. Jolly, "The Native Inmate in Ontario," (Toronto: Ontario Native Council on Justice, 1981), p. 8, found 60% of their sample of Aboriginal inmates spent some time in pre-trial detention.

7 C. Griffiths and S. Verdun-Jones, *Canadian Criminal Justice*, (Vancouver: Butterworths, 1989), p. 191, citations omitted.

Time served in pre-trial custody is often called "dead time," and does not count towards the eventual sentence. Time served in pre-trial custody is usually spent in conditions that are far more harsh than jails for sentenced offenders. All of the above exerts considerable extra pressure on accuseds to plead guilty if they spend time in pre-trial custody. The above figures, from various sources, show that Aboriginal persons are receiving adverse pretrial treatment that is not clearly related to so-called "legal" variables.⁸

8 A. C. Hamilton and C. M. Sinclair, Commissioners, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 1 - *The Justice System and Aboriginal People*, (Winnipeg: Queen's Printer, 1991), p. 222. Pages 223-224 explain a variety of reasons why the decision to impose pretrial detention rather than to release a person is often discriminatory - primarily because it often relates to socio-economic considerations. The discriminatory aspects include Aboriginal persons being shuttled about the province because they are more likely to come from remote communities and Aboriginal persons, being more likely to need Legal Aid, are more likely to have their bail applications delayed while the Legal Aid application is processed. Factors such as mobility, family ties, whether the accused is employed, has a fixed address or has strong links to the community are all used by judges in deciding whether or not to release on bail or what conditions to impose. All of these factors have adverse impacts on Aboriginal persons who tend to move residences more frequently, in part because of ties to their home communities while they attempt to make a life in an urban centre and in part because Aboriginal persons generally are less likely to own their homes. Conditions involving sureties or cash guarantees also have adverse consequences for Aboriginal persons who tend to have less income.

Explaining court proceedings

Aboriginal inmates were less likely to understand the proceedings than non-Aboriginal inmates. At least part of this seems to be due to less service from their lawyers. Sixty-one per cent (N=118/195) of Aboriginal and 83 % (N=50/60) of non-Aboriginal inmates reported their defence lawyer explained the proceedings. This result may well be due to the finding discussed below that lawyers spent less time with Aboriginal clients than with non-Aboriginal clients.

Of those who had proceedings explained to them by persons other than lawyers, 14 Aboriginal and two non-Aboriginal inmates reported the police explained proceedings to them, five Aboriginal and one non-Aboriginal inmate reported it was the judge who provided the explanation, two Aboriginal inmates reported the Court Communicator explained the proceedings, and five inmates (four non-Aboriginal) reported someone else provided the explanation.

The inmates were asked about the service provided by Court Communicators. Thirty-one per cent (N=47/153) of Aboriginal and 17% (N=8/47) of non-Aboriginal inmates reported a Court Communicator was present in court when they were there. Of those who responded that a Court Communicator was present, 34% (N=16/47) of Aboriginal and 25% (N=2/8) of non-Aboriginal inmates reported that the Court Communicator had helped them. Thus, only 10% (N=16/153) of the total sample of Aboriginal respondents reported that a Court Communicator helped them. It is likely a large number of the non-responses to this question are because the inmates did not know whether or not a court communicator was present. If this is true, then these respondents were not helped either and the 10% figure should be even lower.

Asked what kind of assistance was provided, half of the 18 inmates (16 Aboriginal and two non-Aboriginal) who were helped reported that the Court Communicator explained the charges, seven reported the Court Communicator explained the proceedings, one reported the Court Communicator asked a question for the inmate, four reported the Court Communicator translated for the inmate, and three reported some other help was provided. Five inmates reported the Court Communicator spent time with them after court.

The survey asked whether the inmates understood everything they felt they needed to know during their court hearing. Sixty-one per cent (N=118/193) of Aboriginal inmates said yes compared to 68% (N=41/60) of non-Aboriginal inmates. When asked whether they felt they understood everything they needed to know from arrest to the time of the interview for this survey, 73% (N=143/195) of Aboriginal and 88% (N=51/58) of non-Aboriginal inmates replied yes. The figures show that Aboriginal persons are at a disadvantage in understanding the proceedings affecting them and that the Court Communicator program is an inadequate way to address this problem.⁹

9 A. C. Birkenmayer and S. Jolly, "The Native Inmate in Ontario," (Toronto: Ontario Native Council on Justice, 1991), p. 10, found that only 26% of their sample of Aboriginal inmates reported receiving help from a court worker.

Lawyers

We have seen above that the majority of inmates had court proceedings explained to them by their defence lawyer and this was more likely to occur for non-Aboriginal than Aboriginal respondents. The survey asked specific questions about lawyers. The vast majority of the inmates were represented by a lawyer when they appeared in court, and only two Aboriginal and one non-Aboriginal respondent reported not being represented by a lawyer (of 255 respondents).¹⁰

The majority of inmates were represented by a Legal Aid lawyer as opposed to private counsel. Eighty-nine per cent (N=171/193) of Aboriginal inmates, compared to only 56% (N=33/59) of non-Aboriginal inmates reported being represented by a Legal Aid lawyer.

When asked to what extent the lawyer helped, the responses were mixed.

Table 14 - Help from lawyers - all respondents

	<u>Helped a lot</u>		<u>Helped a little</u>		<u>Neither</u>		<u>Did not listen</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	59	32%	41	23%	55	30%	27	15%	182
Non-Aboriginal	23	39%	12	20%	10	17%	14	24%	59
<u>Total</u>	82	34%	53	22%	65	27%	41	17%	241

Forty-five per cent (N=82/182) of Aboriginal inmates reported their lawyer neither helped them a lot nor a little, or the lawyer did not listen. Forty-one per

¹⁰ These three were male, federal inmates.

cent (N=24/59) of non-Aboriginal inmates found the same result. Morse and Lock found that 48% of the respondents in their Aboriginal sample were not satisfied with their counsel. This is quite consistent with the present result, even though the questions were somewhat different.¹¹

Answering that the lawyer neither helped a lot nor a little does not necessarily express dissatisfaction because the inmate may be reflecting a perception that the case was such that the lawyer could not have contributed to his defence or sentence in any event. It might also be expected that there would be dissatisfaction from a sample where all the persons responding were convicted and incarcerated. Nonetheless, the above table still indicates a rather high degree of dissatisfaction with lawyers, especially from those that reported the lawyers did not listen to them.

There are other ways of trying to assess quality of service from lawyers. The inmates were asked how many times they saw their lawyers before being sentenced.

Table 15 - Number of times saw lawyer before sentencing

<u>Times:</u>	<u>Never</u>		<u>Once</u>		<u>2 - 3</u>		<u>4 - 5</u>		<u>>6</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N	%	
Aboriginal	2	1%	47	25%	57	35%	39	21%	34	18%	189
Non-Aboriginal	0	0%	4	7%	17	30%	14	25%	21	38%	56
<u>Total</u>	2	1%	51	21%	84	34%	53	22%	55	22%	245

11 B. Morse and L. Lock, "Native Offenders' Perceptions of the Criminal Justice System," research paper prepared for the Canadian Sentencing Commission, (Ottawa: Policy, Programs and Research Branch, Department of Justice, 1988), p. 36.

Non-Aboriginal inmates were likely to see their lawyers more often than Aboriginal inmates. Only 38% (N=21/56) of non-Aboriginal inmates reported seeing their lawyer between zero and three times. By contrast, 61% (N=116/189) of the Aboriginal inmates reported seeing their lawyer less than four times. The inmates were also asked about the number of hours the lawyers spent with them.

Table 16 - Number of hours spent with the lawyer

<u>Hours:</u>	<u>Less than 1</u>		<u>2 - 3</u>		<u>3 or more</u>		<u>Total</u>
	N	%	N	%	N	%	N
Aboriginal	90	48%	59	32%	37	20%	186
Non-Aboriginal	12	22%	17	31%	25	46%	54
<u>Total</u>	102	43%	76	32%	62	26%	240

Forty-eight per cent (N=90/186) of Aboriginal compared to only 22% (N=12/54) of non-Aboriginal inmates reported spending less than an hour with their lawyers. Thus, while Aboriginal inmates in the sample were 1.6 times more likely to have had less than four visits with their lawyer, they were 2.2 times as likely to spend less than an hour with their lawyers. This suggests that even where non-Aboriginal inmates saw their lawyer infrequently, they still received more time with their lawyers. Combining the number of hours spent with their lawyers, the number of times inmates saw their lawyers, the degree to which their lawyers assisted them and whether their lawyers explained court proceedings to them, it appears that many inmates could have received better service from their lawyers and Aboriginal inmates in particular seem to have received less service.¹² This

12 Birkenmayer and Jolly, note 9, *supra*, p. 7, found that more than half of the Aboriginal inmates they surveyed were not represented by a lawyer at their first court appearance, the majority chose Legal Aid and many did not apply for Legal Aid because of the summary nature of the offenses or because there was a guilty plea entered at the first

trend continues when we look at whether the lawyer applied pressure to plead guilty. Forty-five per cent (N=73/160) of Aboriginal and 37 % (N=17/46) of non-Aboriginal inmates replied that they had felt pressure to plead guilty.

Approximately half of the respondents pleaded guilty at their first appearances (95/186 Aboriginal and 30/60 non-Aboriginal inmates). Of those who pleaded not guilty at first appearance, more than half later changed their plea to guilty, 74 % (N=69/93) of the Aboriginal and 53 % (N= 16/30) of the non-Aboriginal inmates. This left approximately 13 % (N=24/186) of the Aboriginal and 23 % (N=14/60) of the non-Aboriginal inmates who pleaded not guilty, or 15 % (N=38/246) of the total sample.¹³ In total, 87 % (N=162/186) of Aboriginal and 77 % (N=46/60) of non-Aboriginal inmates pleaded guilty.

The Provincial Court Study data also shows that Aboriginal accuseds pleaded guilty more often than non-Aboriginal accuseds.

appearance. Only 57% said they received help preparing for the trial and only 47% said the court process was explained to them.

¹³ Birkenmayer and Jolly, note 9, *supra*, found at p. 7 that only 11% of their sample pleaded not guilty.

There were significant differences between natives and non-natives in the entering of pleas. Natives were more likely to plead guilty to their charges, but they were also more likely to plead not guilty. This apparent contradiction arises from the fact that natives were much less likely than non-natives to enter no plea at all. No plea was entered for 36 percent of charges laid against non-natives, versus only 22 percent of charges laid against natives. On the other hand, guilty pleas were entered for 60 percent of charges against natives, versus 50 percent for charges against non-natives. For not guilty pleas, the figures were 17 percent for natives and 13 percent for non-natives.¹⁴

The above findings confirm the often reported observation that Aboriginal persons are more likely to plead guilty than non-Aboriginal persons. One of the possible reasons for this could be a combination of language difficulties, lack of Court Communicator assistance, a plea bargain process that excludes the accused, long delays and pressure resulting from pre-trial custody, resulting in a dangerous mix of almost total and blind reliance on duty counsel who are themselves under pressure to process as many cases as possible and are administratively prohibited from dealing with not guilty pleas. Chapter 8 discusses guilty pleas and especially the various pressures to plead guilty in detail.

Sentencing

When asked if the inmates thought the sentence they received was fair, 61% (N=109/179) of Aboriginal and 58% (N=34/59) of non-Aboriginal inmates said their sentences were *not* fair. Thirty-nine per cent (N=70/179) of Aboriginal and 42% (N=25/59) of non-Aboriginal inmates believed their sentences were fair. Morse and Lock found 49% of the Aboriginal inmates they interviewed believed

¹⁴ Dansys Consultants, note 1, *supra*, p. 48.

their sentences were unfair, a more generous assessment than that given by the inmates in the present sample.¹⁵

Of those inmates who thought their sentences were not fair, the main reason given for this perception was that the sentence was too long - 55% (N=56/101) of Aboriginal and 53% (N=17/32) of non-Aboriginal inmates gave this response. Morse and Lock reported 56% believed their sentences were too long.¹⁶

Other reasons given included 23% (N=23/101) of Aboriginal and 19% (N=6/32) of non-Aboriginal inmates who said they believed themselves to be innocent, and 17% (N=17/101) of Aboriginal and 16% (N=5/32) of non-Aboriginal inmates who thought their trial was unfair. Overall, 21% (N=51/238) of all respondents either believe they are innocent or their trial was unfair. This is more than the number that pleaded not guilty (15% of the total sample). Thirty-eight per cent (N=69/180) of Aboriginal and 30% (N=18/59) of non-Aboriginal inmates said their offense did not warrant a jail sentence.

When the inmates were asked "in general, do you think that non-natives get different sentences than natives for the same offence", most inmates believed there were differences.

15 Morse and Lock, note 11, *supra*, p. 44. See J. Ekstedt and M. Jackson, "Justice in Sentencing: Offender Perceptions," (Ottawa: Canadian Sentencing Commission, 1988), whose survey of B.C. inmates showed at p. 37 that 48% disagreed with the statement "the sentence I received was pretty fair."

16 Morse and Lock, note 11, *supra*, p. 47.

Table 17 - Aboriginal and non-Aboriginal differences in sentencing

	<u>Very Different</u>		<u>Some Difference</u>		<u>A Little Difference</u>		<u>No Difference</u>		<u>Total N</u>
	N	%	N	%	N	%	N	%	
Aboriginal	100	56%	40	22%	15	8%	23	13%	178
Non-Aboriginal	17	31%	19	35%	4	7%	14	26%	54
<u>Total</u>	117	50%	59	25%	19	8%	37	16%	232

More than half of all inmates interviewed believed that Aboriginal and non-Aboriginal persons receive very different sentences for the same offenses. Three-quarters of all inmates believed sentencing was very different or had some difference (including two-thirds of non-Aboriginal inmates). Only 24% (N=56/232) of the inmates thought there is little or no difference. The perceptions of difference were held more strongly by Aboriginal inmates than by non-Aboriginal inmates, but still only 33% (N=18/54) of the non-Aboriginal inmates thought there was little or no difference. Morse and Lock found 54% of their Aboriginal sample believed Aboriginal inmates get harsher sentences than non-Aboriginal inmates.¹⁷

The survey asked the inmates who thought there was a difference why they thought these differences existed. Eighty per cent (N=115/144) of Aboriginal and 77% (N=30/39) of non-Aboriginal inmates thought the reason was discrimination.

17 *Ibid.*, p. 48. In a key actor study in Saskatchewan, Hemingway found the non-Indians factor analysis "included the opinions that courts are generally unfair to Indian defendants, Indians are generally easy targets by police, and that many Indians undergo arrest and conviction because of Indian apathy towards alleged illegal police acts." P. Hemingway et al., "An Opinion Study Concerning Causes and Solutions of Problems Related to Canadian Indians and Crime using a Quasi-Clinical Approach," (Ottawa: Solicitor General, 1983), p. 84.

Of the other responses, nine Aboriginal inmates and four non-Aboriginal inmates thought it was because Aboriginal offenders did not understand the system and six Aboriginal inmates thought it was because of lack of access to a lawyer.

The large majority of inmates indicated they felt Aboriginal people were treated more harshly by the justice system than non-Aboriginal people. The comments offered by the inmates mentioned discrimination specifically in very many cases. Other inmates used words such as "stereotyped views," "unequal access to resources," or "longer sentences for same offenses" and these were categorized by the interviewers as a response of "discrimination."

The inmates frequently referred to inconsistency and disparity in sentencing as well as personal biases and stereotypes on the part of judges. This could include stereotypes about alcohol abuse, poverty and a lack of resources to support non-incarceration options. Many comments centred on differences in financial resources, ability to retain private lawyers, community standing in the eyes of the court, ability to pay a fine (resulting in sentences of incarceration) and ability to understand the proceedings. Some inmates suggested that the efforts defence counsel put into the case depended on the amount of money the offender could pay.

Even where judges were more lenient towards Aboriginal offenders, many inmates mentioned that it would be because they believed whites should know better, while this attitude was not applied to Aboriginal offenders, or that Aboriginal lives were not as highly valued and therefore offenses involving Aboriginal victims drew less severe sentences.

Here are selected quotes from Aboriginal inmates about whether and why Aboriginal offenders are treated differently than non-Aboriginal offenders in sentencing:

- "I guess they just don't like the colour of our skin. The system is prejudiced."
- "It starts with biased police discretion."
- "The colour of one's skin. Native people get picked out regardless if they are guilty or not."
- "The justice system is set up in a discriminatory system, all factors considered in sentencing are set up to work against native people, pre-sentence report to aspects considered by judge, courts hold a stereotypical view of natives as alcoholics."
- "Money, judges assume natives have no money and would rather send them to jail than fine them."
- "The court system doesn't understand natives."
- "Lawyers don't try hard for natives."
- "Whites get better lawyers because they have money."
- "Native people don't have assets, property, credibility as opposed to white people."
- "Native lives aren't valued."
- "Depending on who you know, if you're native and don't know anybody, you're pretty much in trouble to begin with."
- "Yes, some difference, because I look white the courts go easier on me."
- "Because of lot of them just want to get the court over with and plead guilty to speed things up."
- "Natives trials are hurried."
- "A lot of native people don't understand the system and are impatient."
- "Yes, some difference, natives get more time because the courts see whites as being more stable, coming from good background, family, job, money and some natives have nothing and are on welfare."
- "Because of how native people are perceived on the street. They don't respect the fact that we have treaties. Therefore we are locked away so we don't have to be a burden to society."
- "Natives are looked at as being lower than whites."
- "The courts would sooner jail a native than a non-native, that's the way it's always been."

- "Police and courts look down on native people."

Here are selected quotes from non-Aboriginal inmates:

- "Yes, very different, natives and blacks get a raw deal."
- "Yes, a little difference, any visible minority get heavier sentences."
- "Yes, some difference, courts and prison systems are very prejudiced. If a native kills another native he gets a light sentence because native lives aren't valued, if a native kills a white he gets crucified."
- "Yes, some difference, there are no Indian judges, people are generally discriminatory."
- "Yes, very different, lack of understanding of system, coerced into pleading guilty. lack of resources (financially), being misled by all aspects of the legal system."
- "Yes, some difference, white men would get a stiffer sentence than a native because of the myth that whites should know better, native lives are not valued as much as white lives."
- "Yes, very different, natives don't often understand the system and if their communication skills do not meet the white standard they get treated as a low priority."
- "Yes, some difference, they get different sentences for their crimes because police centre out any minority for special attention, as they, the police dictate, including phony charges, if the police think the situation warrants this. I have had an officer say to me 'when you see me you know God has arrived'."

While it may be possible for some persons to discount the comments and perceptions of inmates as being malcontents, having "sour grapes" about their treatment by the system and being dishonest people with no morals, it seems inconceivable that the inmates' comments were pure fabrications. Approximately 40% of inmates thought their sentences were fair and 21% thought either they were innocent or their trials were unfair. More importantly, if non-Aboriginal inmates were simply feeling sorry for themselves, they would not suggest that they are better treated than Aboriginal inmates in sentencing. Further, the inmates also

suggested that Aboriginal inmates are treated worse than non-Aboriginal inmates by jail staff (discussed below). Thus, I conclude that the views of the inmates cannot be dismissed out of hand. Assessing the accuracy of their perceptions is a difficult task, but at least some weight must be given to their views.

The Provincial Court Study data was reported as follows by the Aboriginal Justice Inquiry, which supports a finding of differential sentencing:

[A]pproximately 25% of Aboriginal persons received sentences that involved some degree of incarceration, compared to approximately 10% of non-Aboriginal persons ...

In the sentencing of males between 18 and 34 years of age, Manitoba courts handed sentences involving some degree of incarceration to 29.5% of the Aboriginal offenders and 10.9% of the non-Aboriginal offenders. In the sentencing of females between 18 and 34 years of age, Manitoba courts handed sentences involving some degree of incarceration to 19.2% of the Aboriginal offenders and 3.7% of the non-Aboriginal offenders.

... 79% of Aboriginal offenders received a "full sentence" (one in which the most serious charge is not reduced or where the sentence is not a discharge or suspended sentence), compared to 65% of non-Aboriginal offenders. Forty-two per cent of Aboriginal accused received "minimum sentences" (absolute and conditional discharges, suspended sentences and reprimands), while 58% of non-Aboriginal accused received such sentences.¹⁸

... It is often said that pleading guilty is a mitigating factor in sentencing, being an indication that the offender accepts responsibility for the crime and is remorseful. If that is true, Aboriginal persons do not appear to benefit as much as they should, because they are pleading guilty more often than non-Aboriginal persons, but are being sentenced more harshly.

18 Hamilton and Sinclair, note 8, *supra*, p. 103.

... Our analysis of Provincial Court data shows that, while Aboriginal offenders are incarcerated 2.5 times as much as non-Aboriginal offenders, on average Aboriginal and non-Aboriginal accused had the same number of previous convictions, Aboriginal accused faced 1.24 times as many charges, and 1.35 times as many Aboriginal accused faced more than one charge.

... The Provincial Court data indicated that for "common offenses" (mischief, wilful damage, theft of less than \$1,000 and common assault), Aboriginal men aged 18-34 were more likely to receive sentences of incarceration and the sentences they received tended to be longer than those given to non-Aboriginal men in the same age category. ...

... In addition, Aboriginal persons consistently have represented approximately 60% of total fine defaulters admitted to jails, even though Aboriginal offenders had fewer outstanding fines. For these reasons we conclude that the number of charges and the seriousness of charges do not adequately account for Aboriginal rates of incarceration.¹⁹

The author of the Provincial Court Study, Barbara Hendrickson, concluded that those offenders with longer prior records and more serious offenses do receive more serious sentences. Once seriousness of offense, number of current charges and prior record are controlled for, then ethnic background is a moderate but consistent predictor of disposition.²⁰ The analysis of the same data by Dansys Consultants, commissioned by the Aboriginal Justice Inquiry, found "natives and non-natives were treated somewhat differently by the Manitoba provincial courts,

19 *Ibid.*, p. 109. Further, Birkenmayer and Jolly, note 9, *supra*, found (p. vi) that over half of the recidivists in their sample had been sent to jail the very first time they were found guilty of an offense. Only 19% of their sample were in jail for offenses against the person.

20 B. Hendrickson, "A Study of the Operation of the Manitoba Provincial Court in Winnipeg and Selected Northern Communities with Reference to the Treatment of Aboriginal Offenders," (Winnipeg: Manitoba Department of Justice, 1989), p. 103.

and the justice system generally. ... [There was] evidence of differential sentencing practices."²¹

The fine default study commissioned by the Aboriginal Justice Inquiry²² provides another example of Aboriginal/non-Aboriginal differences and shows that seriousness of offense is not a complete explanation of imprisonment. Persons who served time for fine defaults accounted for eight per cent of all admissions in Manitoba in 1988. Many more were admitted and then given a Temporary Absence to participate in the fine option program, bringing the number to 13% of total admissions. Further, many more were taken to jail but were immediately released to the fine option program. If these persons had been admitted, 31% of all admissions would have been fine defaulters. The study finds that 1988 had the lowest number of admissions in the history of the fine option program to that year.

The study included a file review of fine defaulters in 1988, and considered similar file reviews for 1980, and 1982 to 1986 inclusive. The study also included a survey of fine defaulters conducted between June and August 1989 to determine more specific information. The survey found 65% (N=136/208) of all defaulters were admitted for non-payment of just one fine, with 88% (N=182/208) admitted for non-payment of one or two fines.²³ The 1988 file review showed that Aboriginal persons were twice as likely to be incarcerated for default of one fine and one and a half times more likely than non-Aboriginal persons to be

21 Dansys Consultants, note 1, *supra*, pp. 88-89.

22 L. Messer, "Manitoba Fine Option Program: A Survey of Fine Defaulters," (Winnipeg: Aboriginal Justice Inquiry, 1990).

23 *Ibid.*, p. 49.

incarcerated for default of two fines.²⁴ Aboriginal persons imprisoned for fine default also have smaller amounts in default.²⁵

The fine default figures show that at least some Aboriginal persons are going to jail more than non-Aboriginal persons for reasons that have nothing to do with seriousness of offense.²⁶ The file review found that 43% of both groups of fine defaulters had *Criminal Code* fines. A greater proportion of Aboriginal defaulters were fined under the *Liquor Control Act* while more non-Aboriginal offenders were fined under the *Highway Traffic Act*. My argument here is that incarceration for non-*Criminal Code* offenses indicates that offense seriousness is not the issue in the decision to incarcerate for failure to pay a fine. This proposition could also be advanced with respect to less serious *Criminal Code* offenses or indeed to all fine default cases, because by imposing a fine the judge has ruled that jail is not appropriate for the offense.²⁷

Further support for the view that seriousness of offense is not a satisfactory explanation for incarceration is provided by other statistics cited by the Aboriginal Justice Inquiry.

²⁴ *Ibid.*, p. 27.

²⁵ *Ibid.*, p. 28.

²⁶ In 1988, 509 persons served time for fine default and a further 245 registered with fine option only after being admitted to jail. Hamilton and Sinclair, note 8, *supra*, p. 422.

²⁷ Messer, note 22, *supra*, p. 28.

... [A]ccording to the 1988-89 *Annual Report* of the Manitoba Attorney General's department, only 20% of the 4,192 convicts held in Manitoba's provincial correctional institutions in 1988 were sentenced for major offenses - homicide, sexual offenses, assaults, dangerous substance/weapons offenses and robbery. ... Fully 79%, or 2,100 of the 2,568 young offenders in custody in 1988, had not committed a crime against the person.²⁸

Nationally, Aboriginal persons are more over-represented in fine default and provincial offenses than they are with *Criminal Code* offenses.²⁹

The findings of the Aboriginal Justice Inquiry, its fine option study and inmate survey, the Provincial Court Study, the Manitoba Attorney General's figures and

28 Hamilton and Sinclair, note 8, *supra*, pp. 392-393.

29 See S. Moyer, F. Kopelman, C. LaPrairie, B. Billingsley, "Native and non-Native Admissions to Federal, Provincial, and Territorial Correctional Institutions," (Ottawa: Solicitor General, 1985), p. 2.4, Table 2.2, where for all provinces examined (B.C., Alberta, Saskatchewan, Manitoba and Ontario) Aboriginal persons represented a greater proportion of fine default admissions than they did of sentenced admissions, and p. 2.17, Table 2.5, where for Alberta, Saskatchewan, Manitoba and Ontario, Aboriginal persons represented a greater proportion of provincial statute admissions than *Criminal Code* offenses. Pp. 3.2, 3.8: "... 48% of Native, versus 22% of non-Native sentence admissions, had a provincial infraction as the admitting offence. ... [I]n Ontario, where in 1982-3, almost 60% of all fine default admissions were the consequences of non-payment of a fine on a provincial statute conviction." Figure 3.2 shows that in Alberta, Saskatchewan, Manitoba and Ontario there were more Aboriginal non-*Criminal Code* admissions than for non-Aboriginal persons. The study found that Hagan and Schmeiser both made similar findings in studies in Alberta and Saskatchewan, respectively.

D. Schmeiser, H. Hermann, and J. Manning, "The Native Offender and The Law," (Ottawa: Law Reform Commission of Canada, 1975), note at p. 71: "Natives were involved in 26.1% of offenses for which probation was granted. This is much lower than the proportion of Native inmates in provincial jails." See also J. Hylton, "Admissions to Saskatchewan Provincial Correctional Centres: Projections to 1993," (Regina: University of Regina, 1980), at p. 44: "Table XII ... offenses committed by persons to correctional centres in 1976-1977, clearly shows that a substantial proportion of all those incarcerated had committed minor offenses. ... [O]ffenses against the person represented less than 10% of all offenses."

other studies all serve to confirm that differences in sentencing occur and they appear to be related to race.³⁰

To make matters worse, Canada incarcerates too frequently and more than most other western countries and was recently reported as having the third highest

³⁰ Gilbert Monture, Project Committee Chairperson, Canadian Corrections Association, *Indians and the Law, a survey prepared for the Hon. Arthur Laing*, (Ottawa: Department of Indian Affairs, 1967), pp. 45 and 66, found that Aboriginal inmates represented 32% (N=424/1,314) of all Manitoba inmates in August 1966, but cited other figures that showed in 1961, only 13% (N=275/2,130) of Manitobans convicted of indictable offenses in 1961 were Aboriginal. The discrepancy between proportion of inmates and proportion of indictable offenses, despite the five year gap, suggests seriousness of offense does not give an adequate explanation of over-representation even twenty-five years ago.

Other empirical studies from Manitoba include Rita Bienvenue and A. H. Latif, "Arrests, Dispositions and Recidivism: A Comparison of Indians and Whites," *Canadian Journal of Criminology*, 16, (1974): 105. This study draws on 1969 data from the City of Winnipeg. It does not estimate whether Aboriginal offenders receive harsher sentences but does show that Aboriginal persons are substantially over-represented in the criminal court system. On the other hand, at p. 114: "Incarceration figures show however, that warrants of committal greatly increase numbers actually incarcerated, and that while this applies to all males, the situation is more accentuated for Indians."

See also Ian Dubienski and Stephen Skelly, "An Analysis of Arrests for the Year 1969 in the City of Winnipeg with particular reference to arrests of persons of Indian descent," (Winnipeg, n.p., 1970). This study also shows Aboriginal over-representation and finds that more than half of Headingley inmates were there for non-payment of a fine. H. Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities", *Queens Law Journal*, 15, 2, (Fall 1990): 327, at p. 339 shows that in 1983, Manitoba had the highest rate of federal charges against 14 year olds of any province in Canada. All of the above studies help give Manitoba perhaps Canada's best sentencing data comparing Aboriginal and non-Aboriginal persons.

incarceration rate in the world.³¹ Further, Manitoba judges sentence persons to imprisonment at rates well above the national average.

According to the Canadian Centre for Justice Statistics, in 1988-89 Manitoba sentenced more people to jail (15,341) than Saskatchewan (12,045), and more than British Columbia (14,635). Not only are the number of jail admissions high in Manitoba, the sentences are also harsh. Manitoba had a lower proportion of intermittent sentences compared to total number of admissions than any other province in Canada (4%, compared to the national average of 12%). Manitoba's median sentence length was the longest in Canada, two and a half times more than the national average, with half of all sentences being 75 days or more, compared to the national average of 30 days.³²

According to a Canadian Centre for Justice Statistics study in 1986, Manitoba's in custody rate was 11.14 per 10,000 population, compared to the national average of 8.34 per 10,000 (3rd highest rate among Canadian provinces, Saskatchewan and Alberta having higher rates). Manitoba ranked second highest rate for persons in jail on remand only with a rate of 1.76 per 10,000 compared to the national rate of 1.42.³³

31 "Canada in top 3 when it comes to jailing people," *Globe and Mail*, February 20, 1992, p. A3. See also Hamilton and Sinclair, note 8, *supra*, p. 392, and the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (Ottawa: Supply and Services Canada, 1987), p. 52. See P. Havemann et al., *Law and Order for Canada's Indigenous People*, (Regina: School of Human Justice, 1985), p. xxiv: "The research literature does tend to confirm the over-use of imprisonment for all offenders."

32 Hamilton and Sinclair, note 8, *supra*, p. 392.

33 Canadian Centre for Justice Statistics, "A One-Day Snapshot Profile of All Persons in Provincial Adult Correctional Institutions," 1986, p. 16. The study was a one-day snapshot of all persons in provincial adult jails on June 30, 1985. The study found at p. 3 that inmates who are detained for short periods of time have a relatively small chance of being included in the survey. See also Moyer, Kopelman, LaPrairie, Billingsley, note 30, *supra*, pp. 2.21-2.23 showing Manitoba to have the second-highest rate of Aboriginal vs. non-Aboriginal admissions, among B.C., Alberta, Saskatchewan, Manitoba and Ontario.

We have seen above that Aboriginal inmates pleaded guilty more often, felt more pressure to plead guilty, were more likely to be in pretrial detention, spent more time in pre-trial detention, had less time with their lawyers and had more difficulties understanding rights and procedures. It would be naive to conclude that these factors do not produce negative impacts unrelated to seriousness of offense. As well, most inmates believed their sentences were not fair, primarily because the sentences were too long. A significant proportion believed their sentences did not deserve jail terms. Two-thirds of non-Aboriginal respondents and three-quarters of Aboriginal respondents believed there was some difference or very different sentencing of Aboriginal offenders and that the nature of the difference is discrimination. Manitoba has perhaps the best data of any jurisdiction in Canada by which to evaluate this claim and by examining a variety of data sources, there is a strong case to be made that the inmates are correct in their perceptions. More will be said about this in chapter 8 when other literature is considered.

CHAPTER 4 - JAIL AND PAROLE

This chapter examines inmate participation in programs in jail, satisfaction with the programs, desires for different programs, treatment of Aboriginal inmates and respect for Aboriginal spirituality in jail, parole success, and suggestions for changing the jail and justice system.

Jail programs

The inmates were asked whether they had a job in jail. Seventy per cent of Aboriginal (N=137/198) and 73% (N=44/60) of non-Aboriginal respondents replied that they did. Other than one job reported as skilled and one reported as volunteer, all jobs were unskilled or semi-skilled jobs (79 persons did not answer this question).

When asked about the programs they participated in, the responses showed little participation in education programs overall and very little differences between Aboriginal and non-Aboriginal involvement.

Table 18 - Education Programs

	<u>Basic</u> <u>Literacy</u>		<u>High</u> <u>School</u>		<u>Technical or</u> <u>University</u>		<u>Trades</u>	
	N	%	N	%	N	%	N	%
Aboriginal	11	6%	15	8%	9	5%	13	7%
Non-Aboriginal	1	2%	7	12%	3	5%	6	10%
<u>Total</u>	12	5%	22	9%	12	5%	19	7%

Note: The percentages are based on 197 Aboriginal and 60 non-Aboriginal respondents.

Somewhat surprisingly, more non-Aboriginal than Aboriginal inmates reported they did not participate in any programs (34%, N=20/59 vs. 27%, N=53/ 198). This result could show different understandings of what constitutes a "program," particularly if Aboriginal inmates include the Native Brotherhood Association. The result does not address the frequency of participation (for example, as discussed below, Aboriginal spirituality ceremonies do occur, but generally not on a regular basis).

Each institution varies in the programs they offer. Many respondents noted that no or few programs were offered (especially at Portage la Prairie jail for women), so it can be assumed participation would have been greater if more programs were available. The fewest programs are available in the provincial institutions, particularly Portage, which are the jails that have the highest proportion of Aboriginal inmates.

Programs that were identified by the inmates included Alcoholics Anonymous, Emotions Anonymous/Anger Management, Narcotics Anonymous/Substance Abuse, and Breaking Barriers (a course for life skills and self-esteem).

Table 19 - Other programs used by inmates

	<u>None</u>		<u>A. A.</u>		<u>Subst. Abuse</u>		<u>Breaking Barriers</u>		<u>Studies</u>		<u>Bible Other</u>	
	N	%	N	%	N	%	N	%	N	%	N	%
Aboriginal	53	27%	102	52%	9	5%	9	5%	13	7%	117	59%
Non												
Aboriginal	20	34%	16	27%	16	27%	4	7%	3	5%	34	58%
<u>Total</u>	73	28%	118	46%	25	10%	13	5%	16	6%	151	59%

Note: There were 257 respondents, 46% (118) of whom reported participating in more than one program (this proportion holds for both Aboriginal and non-Aboriginal inmates). The above table includes reports of users of all programs. Twenty-eight per cent of respondents reported they did not participate in any program, including 27% (N=53/198) of Aboriginal and 34% (N=20/59) of non-Aboriginal inmates. Of those who participate in programs, 64% participate in more than one program (Aboriginal N=92/145 and non-Aboriginal N=26/39).

Inmates have a variety of understandings of "program," such that where some inmates might report participation in a program, other inmates who participate in that program might not consider it to be a program and did not report their participation. "Other programs" identified by the inmates included sweat lodges, Sacred Circle, Native Brotherhood meetings, anger management, chaplain services, life skills development, correspondence school, meetings with a psychologist, the Omega lifers group, John Howard Society, Elizabeth Fry Society, Salvation Army and women's shelter counselling. A few inmates named sports, gym and recreation, and some replied "cultural awareness" or "native traditional awareness."

Eighty-four inmates reported participating in a program with a specific Aboriginal aspect to it, whether it be Aboriginal spirituality or the Native Brotherhood Organization. This is 42% (N=84/198) of the total Aboriginal respondents and 58% (N=84/145) of those Aboriginal inmates who reported participating in at least one program. Many reported participating in Aboriginal specific events but noted these were not ongoing programs (these are included in the 84 responses for the purposes here).¹

1 It is possible that others also participate in Aboriginal programs such as the Native Brotherhood Organization but did not report participation because they did not consider it a "program."

The inmates were asked about their satisfaction with the programs and the responses indicate a general feeling of satisfaction, although a greater proportion of non-Aboriginal inmates were both not satisfied and very satisfied.

Table 20 - Satisfaction with Courses

	<u>Very Satisfied</u>		<u>Satisfied</u>		<u>Somewhat Satisfied</u>		<u>Not Satisfied</u>		<u>Total</u> N
	N	%	N	%	N	%	N	%	
Aboriginal	11	19%	27	46%	13	22%	8	14%	59
Non-Aboriginal	6	30%	6	30%	2	10%	6	30%	20
<u>Total</u>	17	22%	33	42%	15	19%	19	24%	79

The inmates were asked what programs they would like to have offered. Most wanted educational or vocational training. This response was given by 43% (N=61/143) of Aboriginal and 56% (N=24/43) of non-Aboriginal inmates. The next most desired program was native culture or spirituality, named by 29% (N=41/143) of Aboriginal respondents. The next most desired program was life skills training, identified by 14% of the inmates (N=20/143 Aboriginal, N=6/43 non-Aboriginal). Other programs suggested by the inmates included more programs to help with alcohol and drug dependency, stress management, crafts, parenting programs, marital counselling, native language course and conjugal visits. Some of the respondents specifically said they would like Alcoholics Anonymous delivered in an Aboriginal way.²

2 A. C. Birkenmayer and S. Jolly, "The Native Inmate in Ontario," (Toronto: Ontario Native Council on Justice. 1981). In their survey of inmates, they found at p. v "... almost 2/3 of the inmates had never taken part in an alcohol treatment programme of any kind, and over 3/4 of them were not participating in any such programme while in jail. ... None of the alcohol treatment programmes in the community or in an institution are perceived to be effective by a large number of Natives - male or female."

Here are some selected quotes from the inmates:

- "I would like programs offered in protective custody - you get the butt end of things in PC - such as native spiritual/cultural program."
- "Steps to a standard lifestyle on the street even for the people who screwed up a few times at an early age."
- "More native programs, meaning of traditional ceremonies, songs, powwows and what they mean."
- "The program should be more in depth. With life skills you only watch videos and it doesn't help."
- "Should be left up to the individual to seek and take courses they want and not be forced to take courses and programs."
- "There are no other programs offered here, there should be some programs here, we are constantly locked up with nothing to do." (this was a common comment for the Portage jail for women)
- "On release the institution should provide the quickest transportation to your home town."
- "Anybody that comes in for a short period of time does not get programs during the summer months, all the programming starts in late September."
- "Any kind of program that brings in the community and the inmates can socialize with people from the street."

By far the most common theme of the responses was that preparation for release is required and is not being offered. Inmates want to use programs, want to learn how to find employment and stay out of jail, want to deal with alcohol and chemical dependency, and for Aboriginal inmates, they want the programs they receive to be relevant to the conditions they will be encountering on release, especially if they are returning to rural Aboriginal communities. Aboriginal inmates want to learn about Aboriginal traditional ways and the interviewers found that this was frequently expressed by inmates who feel they have lost their Aboriginal identity.

Aboriginal inmates views on spirituality programming

The survey asked the Aboriginal inmates some questions about Aboriginal spirituality programming in the jails. One of them was which of the following Aboriginal ceremonies they would like to participate in on a regular basis. Named specifically were the sweat lodge, Sacred Circle, fasting, healing, feasts and sweetgrass while allowing for other responses. The survey then asked which of those ceremonies were available on a regular basis (at least once a week). A number of inmates responded they did not know or chose to give no response.

Table 21 - Aboriginal Spirituality

	Would like to <u>participate?</u>				Programs regularly <u>available?</u>			
	Yes		No		Yes		No	
	N	%	N	%	N	%	N	%
Sweat Lodge	129	84%	25	16%	6	3%	178	97%
Sacred Circle	129	84%	25	16%	82	45%	102	55%
Fasting	94	61%	60	39%	2	1%	182	99%
Healing	110	71%	44	29%	2	1%	182	99%
Feasts	115	75%	39	25%	2	1%	182	99%
Sweetgrass	139	90%	15	10%	113	61%	71	39%
Other	53	34%	101	66%	11	6%	173	94%

Inmates were allowed to make more than one choice. The percentages for "would like to participate" are based on 154 respondents, 24 inmates responded "do not know" and 20 "no response." The percentages for "programs available" are based on 184 respondents, with eight "do not know" and six "no response."

The Aboriginal inmates were asked how they would rate the availability of elders in their institution. With 177 respondents, six or three per cent replied very good, 29 or 16% replied good, 34 or 19% replied fair, 33 or 19% very poor, and 75 or 42% replied that no elder was available.

Finally, the survey asked the Aboriginal inmates whether Aboriginal religions and ceremonies were respected in the institution. Eighty-one per cent (N=115/142) replied no, compared to 19% (N=27/142) who replied yes (there were 11 "do not know" and 45 "no response"). What these responses show is that prison programming does not even approach meeting the spiritual needs and desires of the Aboriginal inmates.

The 1988 Task Force on Aboriginal Peoples in Federal Corrections provides its own evidence to show that non-Aboriginal decision-making cannot properly serve Aboriginal inmates:

There was no consensus among corrections staff as to whether Aboriginal-specific programs are needed or warranted. For those who believe that Aboriginal-specific programs are appropriate, there was no consensus as to which programs should be given priority.³

The Task Force confirms that programming is not equally available for Aboriginal inmates. There is great variation in the cultures and proportions of Aboriginal inmates in institutions across the country. Access to programs varies as well according to security level.

It appears that the variation in the levels at which Aboriginal and non-Aboriginal offenders are placed is influenced by limitations with respect to the types of institutions available close to the home community of the offender. For example ... Stony Mountain Penitentiary, the major institution in Manitoba, accounts for 150 of the 235 S5 [the second highest security classification] placements of Aboriginal offenders [across Canada].⁴

3 Task Force on Aboriginal Peoples in Federal Corrections, *Final Report*, (Ottawa: Correctional Services of Canada, 1988), p. 49.

4 *Ibid.*, pp. 23-25.

As Table 1 in chapter 1 shows, the type of institution is not a full explanation for why Aboriginal inmates are over-represented in Stony Mountain Penitentiary, when a less secure federal facility is immediately adjacent to it, Rockwood Institution. Table 1 shows 46% of Stony Mountain's population is Aboriginal, compared to only 24% of Rockwood's.

The Task Force found that Aboriginal inmates have difficulty cascading to lower levels of security. The Aboriginal Justice Inquiry stated strongly that security is far too high for inmates, "security is not an issue for 80% or more of the Aboriginal offenders who are incarcerated."⁵ The Inquiry based this conclusion on statements made to it by the Stony Mountain warden and the superintendent at The Pas Correctional Institution, on positive experiences reported to the Commissioners at the minimum security Dauphin Correctional Institution, on their visit to Egg Lake work camp in Manitoba, on their observation that jails operate almost exclusively with a "worst case" mindset and on the conviction that alternative allocation of resources could better accomplish correctional objectives.⁶ The Task Force on Federally Sentenced Women supports this finding.

5 A. C. Hamilton and C. M. Sinclair, Commissioners, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 1 - *The Justice System and Aboriginal People*, (Winnipeg: Queen's Printer, 1991), p. 456.

6 *Ibid.*, pp. 437-440, and pp. 396-397.

Women ... are consistently over-classified in terms of security, and there is some indication that this tendency is even more pronounced for Aboriginal women. ... The punitive model is particularly irrelevant and harsh in its effect on Aboriginal women. Task Force members learned that the current criteria [for security classification] are not culturally relevant and, therefore, Aboriginal women, in particular, are affected negatively by the current classification system.⁷

The Aboriginal Justice inquiry confirms that programming is simply not adequate or culturally appropriate for Aboriginal inmates.⁸

Complaints in jail

The survey asked the inmates if they had a complaint, who could they talk to about it. A couple of inmates identified the correctional investigator as a person to whom they could complain, but noted the investigator only came once every two months. A number of inmates mentioned the routine methods for voicing a complaint and then rejected these because they failed to produce results and in the opinion of at least some inmates "nobody listens anyway."

7 Task Force On Federally Sentenced Women, *Creating Choices*, (Ottawa: Solicitor General, 1990), pp. 95, 110, 112.

8 Hamilton and Sinclair, note 5, *supra*, see their ch. 11 generally about jail conditions.

Table 22 - Who to talk to about a complaint in jail

	<u>Nobody</u>		<u>Staff*</u>		<u>Inmates**</u>		<u>Lawyer</u>		<u>Other</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N	%	N
Aboriginal	49	30%	56	34%	38	23%	1	1%	21	13%	165
Non-Aboriginal	11	19%	31	53%	8	14%	1	1%	8	14%	59
<u>Total</u>	60	27%	87	39%	46	21%	2	1%	29	13%	224

* Staff includes counsellors, prison guards and classification officers. Sixteen per cent (N=27/165) of Aboriginal inmates identified counsellors, 18% (N=29/165) identified prison guards and classification officers. Twenty-two per cent (N=13/59) of non-Aboriginal inmates identified counsellors, and 31% (N=18/59) identified prison guards and classification officers.

** Inmates includes other prisoners (six Aboriginal inmates gave this response), the Native Brotherhood Organization (five Aboriginal inmates gave this response), the inmate Welfare Committee or grievance clerk (16% (N=27/165) of Aboriginal inmates and 14% (N=8/59) of non-Aboriginal inmates gave these responses).

When asked if they had ever complained about anything in prison, 64% (N=124/195) of Aboriginal inmates and 40% (N=24/60) of non-Aboriginal inmates reported they had not (this is a combined total of 58%). Not only does this show that a large proportion of inmates do not complain about prison conditions, it also shows that Aboriginal inmates are far more reluctant to complain than non-Aboriginal inmates or that they have no complaints.

When asked what the result of their complaints were, 16% (N=11/68) of the Aboriginal and 15% (N=5/33) of the non-Aboriginal inmates reported the problem was resolved. Sixty-nine per cent (N=47/68) of Aboriginal and 61% (N=20/33) of non-Aboriginal inmates reported the problem was ignored. Of the 47 Aboriginal and 20 non-Aboriginal inmates who said the problem was ignored, 42 and 19 respectively reported that the problem continues, while the others said the

problem went away. Thirteen per cent (N=9/68) of Aboriginal and 21% (N=7/33) of non-Aboriginal inmates reported the staff were working on a solution. (Two inmates, one Aboriginal and one non-Aboriginal gave a response combining the above possibilities.)

These results show that many inmates feel unable to express their concerns or protest conditions in the jails. Aboriginal inmates feel this more strongly than non-Aboriginal inmates (30% of Aboriginal inmates felt they had no one to talk to about a complaint compared to 19% of non-Aboriginal inmates). The people who are identified are primarily jail staff and one can assume this does not offer much encouragement or hope for the inmates as a satisfactory forum. Lawyers do not play much of a role in jails. As a result of all these factors, it is not surprising that complaints are rather infrequent (58% of the sample had never made a complaint).

These findings are consistent with the report of the Special Committee of the Canadian Bar Association on Imprisonment and Release, which found that the grievance procedure is afflicted with "routine ratification" and a "lack of credibility from the prisoner's perspective."⁹

9 Canadian Bar Association, Committee on Imprisonment and Release, *Justice Behind the Walls*, (Ottawa: 1988), p. 251. This study also found the prison discipline system operated in an extremely unfair and arbitrary way in numerous respects. This report gives chilling proof that while "justice" may end at sentencing, the effects of the justice system are only beginning for many offenders. *Justice Behind the Walls* is discussed in greater detail in ch. 8, *infra*. Similarly critical comments of the discipline process can be found in Hamilton and Sinclair, note 5, *supra*, chapter 11.

Different treatment from jail staff

When asked if jail staff treat Aboriginal inmates differently than non-Aboriginal inmates, 61 % (N=101/165) of Aboriginal and 49 % (N=27/55) of non-Aboriginal inmates reported the staff did treat Aboriginal inmates differently.

Table 23 - Does jail staff treat Aboriginal inmates differently?

	<u>Yes</u>		<u>No</u>		<u>Total</u>
	N	%	N	%	N
Aboriginal	101	61 %	64	39 %	165
Non-Aboriginal	27	49 %	28	51 %	55
<u>Total</u>	128	58 %	92	42 %	220

Morse and Lock found 56% of their Aboriginal respondents believed there is different treatment. They also found this perception increased with the number of times in jail, although 45% of first timers perceived difference in treatment.¹⁰ This analysis was not done for the present survey. Of those inmates who did express an opinion, 64% of the Morse and Lock sample replied there is different treatment and an additional 12% replied there is different treatment sometimes.¹¹

The examples of different treatment mentioned by respondents include preferential treatment to non-Aboriginal inmates for phone calls and temporary absences, more staff accusations of Aboriginal inmate misconduct, greater

10 The study by B. Morse and L. Lock, "Native Offenders' Perceptions of the Criminal Justice System," research paper prepared for the Canadian Sentencing Commission, (Ottawa: Policy, Programs and Research Branch, Department of Justice, 1988) included "don't know" responses.

11 *Ibid.*, p. 55.

tolerance of non-Aboriginal misbehaviour, more intimidation and assaults on Aboriginal inmates by the staff, guards not being respectful and not taking seriously concerns of Aboriginal inmates, non-Aboriginal inmates getting better jobs in the jails and, at Headingley, non-Aboriginal inmates being kept in the lower security annexes while Aboriginal inmates are primarily kept in the higher security main population. Here are selected comments from Aboriginal inmates:

- "Advantages taken over illiteracy, release plans forced with no consideration given to individual interests."
- "They put on an act like they treat everybody the same but you feel the different treatment."
- "Prison staff search cells of inmates and natives' belongings like sweetgrass is not respected."
- "Prison staff go out of their way to harass natives."
- "Yes, some of them, because natives were involved in the killing of two guards (in '84) the present native inmates are still paying the price." (Stony Mountain)
- "Yes, but I can't explain it, it appears in subtle ways."
- "No, they treat everybody with disrespect."
- "Yes, I'm not saying it is out of racism, but definitely natives are treated differently."
- "Some guards automatically assume that natives are troublemakers."
- "Some guards have actually stated they don't like natives."
- "Yes, the least little things Indians do gets segregation immediately, while whites just get warnings."
- "Yes, guards use their authority, play head games with the native inmates such as writing bad reports for parole."

Here are some quotes from non-Aboriginal inmates:

- "No, I think we get treated badly no matter who we are, but natives get their sweetgrass trashed."
- Guards "would go out of their way to search natives."
- "No, the staff has a bad attitude all round."
- "Yes, treated as if they are dumb."
- "Derogatory remarks toward natives."
- "Prison staff take natives less seriously, lack of value."

- "General disrespect for natives."
- "Some guards treat natives like they are of less value than whites."

Temporary absences

The inmates were asked if they knew how to apply for temporary absences. While the large majority did, a significant number did not (28%, N=55/196 of Aboriginal and 21%, N=13/60 of non-Aboriginal inmates). Seventy-five per cent (N=105/140) of Aboriginal inmates and 79% (N=37/60) of non-Aboriginal inmates reported they had applied for a temporary absence in the past. In total, 63% (N=62/99) of Aboriginal inmates were granted the last temporary absence they had applied for compared to 71% (N=24/34) of non-Aboriginal inmates.

Table 24 - Temporary absences

	<u>Ever apply?</u>					<u>Succeed on last one?</u>				
	<u>Yes</u>		<u>No</u>		<u>Total</u>	<u>Yes</u>		<u>No</u>		<u>Total</u>
	N	%	N	%	N	N	%	N	%	N
Aboriginal	105	75%	35	25%	140	62	63%	37	37%	99
Non										
Aboriginal	37	79%	10	21%	47	24	71%	10	29%	34
<u>Total</u>	142	76%	45	24%	187	86	65%	47	35%	133

Of those who were refused temporary releases, a number of Aboriginal inmates reported it was because the prison staff did not respect the inmate's relationship to members of their extended family (for example, temporary absences to attend funerals of members of the extended family were denied).

For those inmates whose last application was rejected, they were asked why. Three Aboriginal inmates reported it was because they were judged not motivated,

one because he was judged unrepentant, one because the classification officer refused to process the application, 25 because the inmates did not meet the necessary conditions and seven reported other reasons. For non-Aboriginal inmates, no one reported being judged not motivated or unrepentant, six reported it was because they were told they did not meet the conditions and two reported it was because the classification officer refused to process the application.

Parole

When asked if they knew how to apply for parole, again Aboriginal inmates were less likely to know, although the majority of inmates did know how. Thirty per cent (N=59/196) of Aboriginal and 15 % (N=9/60) of non-Aboriginal inmates reported they did not know how to apply for parole.

Seventy-nine per cent (N=107/136) of Aboriginal and 80 % (N=41/51) of non-Aboriginal inmates reported they had applied for parole before. Morse and Lock's sample reported 56% had not applied for parole before.¹² They found that those inmates who were employed prior to their incarceration were somewhat more likely to apply for parole and were more likely to be hopeful of their chances of success. Morse and Lock also found parole applications decreased with the more prior incarcerations an inmate had.¹³

When asked if they had been granted parole, 48 % (N=43/89) of Aboriginal and 55 % (N=17/31) of non-Aboriginal inmates reported their parole application

¹² *Ibid.*, p. 61.

¹³ *Ibid.*, p. 63. These analyses were not done for our survey.

was rejected.¹⁴ These results are surprising and are an indication that at least as far as this question is concerned, the responses do not reflect what is actually happening with parole applications.

The Final Report of the Task Force on Aboriginal Peoples in Federal Corrections, 1988, stated

a greater proportion of non-Aboriginal offenders are serving their sentence in the community. On May 11, 1988, 32.5 per cent of Aboriginal offenders were in the community, compared with 43.2 per cent of non-Aboriginal offenders. In particular it should be noted that only 10.2 per cent of Aboriginal offenders were serving their sentence on full parole, compared with 23.9 per cent of non-Aboriginal offenders. The proportions in the community on day parole were quite similar, at 6.8 per cent and 7.9 per cent respectively.

It also appears that Aboriginal offenders who are paroled may serve a greater proportion of their sentence prior to being paroled. ... [N]ationwide, Aboriginal offenders granted full parole had served 51.3 per cent of their sentence prior to being paroled, as compared to an average of 45.7 per cent of sentence for all offenders. ... For 1986-87, 20.5 per cent of decisions in respect of Aboriginal offenders resulted in the granting of parole, in comparison to 38 per cent of the decisions made regarding non-Aboriginal offenders. The proportion of decisions resulting in the granting of full parole to Aboriginal offenders has shown a consistent decline, from 25.6 per cent in 1984-85 to 20.5 per cent in 1986-87.

14 Notice that the number of inmates who responded to this question was 120, compared to 148 who had said they had previously applied for parole. The low cell numbers put the reliability of this question into doubt. Part of the problem with the question is that parole appears to be much less formal or frequent in provincial institutions. Manitoba does not have a provincial parole board and some inmates in provincial institutions are in for such short periods of time that parole does not become an issue. Of 146 provincial inmates in the sample, only 63 reported they had ever applied for parole. On the other hand, of 112 inmates in the federal sample, 72 replied they had applied for parole before. Of the 112 federal inmates, only 87 responded to these questions about parole.

... [A]nother study of all offenders released in 1979, 1980 and 1981 found that Aboriginal offenders were more likely to have their release revoked than were other groups of offenders, again regardless of the general category of offence under consideration.

The higher failure rate for Aboriginal offenders should not be taken as an indication that they necessarily pose a greater danger to the community. ... [I]t was frequently argued that inappropriate conditions are imposed on the release of Aboriginal offenders, that enforcement of their conditions of release might be more stringent, that support and resources upon release are inadequate, and so forth.¹⁵

Given the comprehensive figures of the Task Force, how can the result in the Manitoba Inmate Survey that more Aboriginal inmates reported successful parole applications than non-Aboriginal inmates be explained? First, the question was quite simplistic and did not specify full or day parole, did not ask how many unsuccessful applications there were before an inmate succeeded, did not ask about the conditions imposed with the parole grant and did not ask how many inmates had parole revoked.

Second, the sample of non-Aboriginal inmates was small to begin with (60 inmates, 33 in federal institutions). This was compounded by a reduced number of respondents as the parole questions became more specific. Sixty-eight of 256 respondents reported they did not know how to apply for parole. Thirty-nine of 187 reported they had never applied for parole. Only 120 inmates answered the question whether they had ever applied for parole, 31 non-Aboriginal. Therefore

15 Task Force on Aboriginal Peoples in Federal Corrections, note 3, *supra*, pp. 27-31. See also Birkenmayer and Jolly, note 2, *supra*, p. 27, where of 103 Aboriginal inmates who had appeared before Ontario's Board of Parole only 11% were granted parole and 44% rejected (the rest were deferred, 31%, or refused to take parole, 15%).

the representativeness of the sample, particularly for this question, is very much in question.

Bearing in mind the weaknesses of sample size in mind, the inmates who had their parole applications rejected cited the following reasons: for non-Aboriginal inmates, 12 reported it was because they did not meet the necessary conditions, in one case the hearing was deferred and two cited other reasons. For Aboriginal inmates, 30 reported it was because they did not meet conditions, three because they were judged not motivated, one because he was judged unrepentant, one because the classification officer refused to process the application, two because there was a negative assessment provided by the classification or parole officer and two cited other reasons.

Different Treatment by the Parole Board

When asked whether the parole board treated Aboriginal inmates differently than non-Aboriginal inmates, there were 132 responses from the total sample of 258 (82 of 112 from federal institutions). Seventy-two per cent ($N=95/132$) of the respondents replied there was some or very different treatment. While more Aboriginal than non-Aboriginal inmates gave these responses, the majority of both groups gave these answers.

Table 25 - Does the parole board treat Aboriginal inmates differently?

	<u>Very</u> <u>Different</u>		<u>Some</u> <u>Difference</u>		<u>A Little</u> <u>Difference</u>		<u>No</u> <u>Different</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	55	54%	23	23%	6	6%	17	17%	101
Non-Aboriginal	10	32%	7	23%	6	19%	8	26%	31
<u>Total</u>	65	49%	30	23%	12	9%	25	19%	132

Here, as with sentencing and prison staff treatment, the majority of the sample believe Aboriginal inmates are treated differently, including more than half of the non-Aboriginal inmates who responded to this question. Morse and Lock found 50% of their Aboriginal sample responded that the parole system is either pretty unfair or very unfair, with 21% responding "don't know." Counting only those inmates who expressed an opinion, Morse and Lock found 63% viewed the system as being pretty unfair or very unfair.¹⁶

When asked in what ways the parole board treated Aboriginal inmates differently, more than half of the inmates responded that it was discrimination (N=41/80 Aboriginal and N=15/23 non-Aboriginal, three of the non-Aboriginal inmates believed the discrimination worked in favour of the Aboriginal inmates). Thirty-two Aboriginal and three non-Aboriginal inmates said it was because the parole board put more restrictions on Aboriginal inmates, while two Aboriginal and one non-Aboriginal inmate said it was because the parole board prohibited the Aboriginal inmate from returning to his community. Five Aboriginal and four non-Aboriginal inmates said it was because Aboriginal inmates did not understand the system.

¹⁶ Morse and Lock, note 10, *supra*, p. 69.

Here are some selected quotes:

- "The board is mostly white and they don't understand the native way and native problems on the street."
- "Yes, very different, because there are natives from up north who have no experience with city life, the parole board turns them down because they can't send them back to the reserve because there are no parole officers."
- "Yes, some difference, from board requirements, natives are discriminated against from criteria the board bases these decisions on which are structured for the typical non-native person, and doesn't consider the reality of natives."
- "Natives need a better structural plan than whites to get parole."
- "Yes, some difference, most whites have families in cities, while native people's families are on reserves and they are expected to go to halfway houses, etc."
- "Yes, very different, whites are supposed to know better, natives are treated as if they aren't responsible."
- "Yes, some difference, just like anywhere else, they treat whites fairer, but use excuses to cover prejudice."
- "White board members expect native inmates to act like whites, often natives are shy and don't sell themselves and therefore are denied."
- "Yes, some difference, native people have a harder time articulating and language problem is sometimes a serious problem."
- "Yes, very different, the first thing parole board members ask Indians is are you an alcoholic, do you have a drinking problem. They consider Indians drunks, dumb and dirty."
- "Yes, some difference, the board has a stereotypical view of natives as being drunks and they get more stipulations on parole."
- "Yes, very different, the board puts more restrictions on natives and are more likely to enforce them."
- "Yes, very different, the board always expects natives to be drinkers and puts abstinence clauses."
- "Yes, very different, white people have a lot more community supports whereas native people's families are scattered."
- "Yes, very different, the parole board expects natives to have nowhere to go when they get out."
- "Yes, very different, a lot of natives have no place to go so the board denies natives."

- "Yes, very different, (they) fail to realize that natives in general tend to live under extreme pressure in and about cities, reserves, life is really harder for a native in all circumstances than for non-natives."
- "Yes, very different, with native people the first thing that the parole board requires is to take care of your drinking problem even if you don't have one and must have a job to go to."

When asked what changes they would like to see made to the parole board, 60% (N=68/113) of Aboriginal inmates suggested more Aboriginal representation on the board. This was also suggested by four of five non-Aboriginal respondents. Other suggestions for greater Aboriginal resources included elders on the board, a separate board for Aboriginal inmates, more Aboriginal parole officers, a community committee (on reserve) to make the decision and more parole officers and halfway houses on reserves.

Other suggestions included less delay, a better appeal mechanism, less reliance placed on prison staff reports, giving inmates the chance to bring in representatives, family and friends to show support for the inmate, fewer conditions, an ex-convict on the board, greater leniency for first-time offenders, no former correctional officers should be on the board and greater consistency in decision making.

Inmate suggestions for changing the system

Inmates were asked what changes they would like to see to prisons. Thirty-five per cent (N=54/154) of Aboriginal and 46% (N=23/50) of non-Aboriginal inmates want more training, education and programming.¹⁷ Twenty-six per cent (N=40/154) of Aboriginal and two non-Aboriginal inmates suggested more Aboriginal staff. Eighteen per cent (N=28/154) of Aboriginal and two non-Aboriginal inmates suggested more staff training (particularly cross-cultural training). Many inmates suggested there should be more respect given to Aboriginal culture and spirituality with more programming in this area. Also, a number of inmates suggested there should be some staff who can speak an Aboriginal language.

Other suggestions included more visitors, more temporary absences (including absences for pow-wows and traditional ceremonies), attitude changes among the staff better food, more pay, fresh air, no uniforms on guards, greater access to John Howard Society services, more recreational and physical activities, stronger grievance procedures, transportation to be provided for visitors, fewer restrictions of movement (one inmate notes that conditions in Stony Mountain now continue to be worse than before a 1984 incident when two guards were killed), more privacy and more access to phones.

As the last question in the interview, the inmates were asked their opinions about what changes they would like to see implemented in the criminal justice

17 Recall that in response to the more specific question of what programs inmates would like to have, 29% (N=41/143) of Aboriginal inmates identified native culture or spirituality.

system (rather than just in the jails, discussed above). The question was open-ended and there were 149 Aboriginal and 46 non-Aboriginal respondents. Nine Aboriginal inmates suggested a separate system, 55 Aboriginal inmates suggested more Aboriginal personnel in the system, seven Aboriginal and three non-Aboriginal inmates suggested more alternatives to incarceration.

There was a wide variety of other suggestions offered by a few or by individual inmates for changes to various parts of the system beyond the jails. These suggestions included: less delay; greater consistency between cases; sentencing guidelines; greater focus on circumstances of the case (rather than on a person's background); a permanent Aboriginal Justice Inquiry with a counsellor, lawyer, and liaison officer; more cases allowed to go to the Supreme Court; more emphasis on rehabilitation; greater use and acceptance of Aboriginal languages in the system; better public legal education in Aboriginal communities; more Court Communicators; more parole officers on reserves; more temporary absences to treatment centres; Aboriginal judges for Aboriginal offenders; screening for racist attitudes; fewer youths sentenced to federal time; a permanent inquiry doing random checks on the system; more psychological and psychiatric assistance for inmates, more inquiries into the justice system (particularly focusing on lawyers and judges); less police harassment and brutality; a better complaint mechanism in the jails; more facilities in the north; and a suggestion that Aboriginal children should not be placed in non-Aboriginal homes.

Many inmates believe Legal Aid does not provide high quality service and that persons able to pay for a lawyer receive better representation. One inmate suggested closing the Public Safety Building and noted that its horrendous conditions, coupled with delays in the system, influence some accused to plead

guilty simply to get out of the building. A number of inmates said the change that is needed is for the system to start treating Aboriginal people equally.

Here are some quotes from the inmates:

- "If I commit a crime, I would like to answer to my own people, because I have never known justice as per my traditional Indian way of justice. My experience has been with a foreign system."
- "Indian people have to be treated with respect. When white people are intoxicated they are taken home by the police while Indians are locked up in the drunk tank."
- "The system should have more control over the police's actions. Police have too much discretion and it affects society. It's beginning to be a war for native people to stay out of jail once the police have tagged them as being troubled."
- "The longer the remand ... it gives the Crown a better chance of locking up native people."
- "The whole justice system seems to be trying to break up the native family unit by transferring inmates from up north to southern Manitoba. It's also harder for these inmates to get temporary absences and parole."
- "The community should look after their own justice system."
- "A program that deals with Aboriginal offenders that uses the true native way. It would be more flexible and would be determined by an inmate's true feelings, motivations, ambitions than by a set of non-Aboriginal qualifications."
- "I would like to see native people in their communities work out their problems amongst themselves."
- "The law should be applied equally to all natives and non-natives. The system is just not working."
- "In my opinion, they should have advocates for people arrested to assist them in understanding what is happening to them."
- "More native police, native judges and lawyers."
- "Be more sensitive to native people and their culture."
- "The courts in Manitoba seem to be based on the judges' biases and feelings. The court system is one big industry that uses the poor, people are treated like cattle in order to create jobs for people such as prison staff and parole officers."
- "Being dealt with by our own peers."

- "Sometimes it's so crooked it's unreal. Cops can do anything they want because of their badge."
- "The justice system should be fair and equal to all in every aspect. Too many native people get the short end of the stick."
- "It is not consistent, not fair to Indian people. Police often use excessive force, harass natives. Police brutality is extreme against natives."
- "Discretion should be totally eliminated with judges, lawyers, police. There should be structured guidelines."
- "The courts should be more lenient and use alternative sentencing methods on first offenders."
- "The crime rate is high in small reserves. An alternative justice system would be beneficial."
- "The police treat natives harshly and with no respect. They don't explain charges and the law to natives who don't understand it."
- "I wish the justice system would help people instead of trying to put them away."

Finally, the inmates were asked if they would like to see an alternative Aboriginal justice system. Almost all of the inmates responded affirmatively, with 96% (N=184/191) of Aboriginal and 88% (N=49/56) of non-Aboriginal inmates favouring such an innovation.

CHAPTER 5 - IMPORTANT SUB-GROUPS

RURAL OFFENDERS, WOMEN, FEDERAL/PROVINCIAL JAILS

This chapter discusses three important sub-groups: offenders who either resided in rural areas at the time of their arrest or lived the first parts of their lives in rural areas; women offenders; and offenders in federal and provincial jails. Generally, the responses of the whole group of inmates did not vary too much by these sub-groups. However, because the make-up of the Aboriginal and non-Aboriginal samples are different, with more women and federal inmates in the non-Aboriginal sample and more rural offenders in the Aboriginal sample, it is important to note differences where they exist. This will allow a better assessment of the representativeness of the answers given by the Aboriginal and non-Aboriginal samples as a whole. It also ensures that inmates are not perceived as a uniform group of persons, even within racial groups.

RURAL AND RURAL BORN OFFENDERS

The inmate survey revealed that there were special problems experienced by rural offenders. The problems were of two distinct natures: offenders in rural areas are faced with fewer legal services and poorer socio-economic circumstances generally, while rural born offenders who made a transition to urban areas appear to have great difficulties making a successful transition - difficulties that contribute to their conflict with the law.

The study confirms that Aboriginal inmates are far more likely to be born in rural areas and to experience a rural-urban transition than non-Aboriginal inmates. The survey also confirms that crime problems are more frequent in urban areas.

Seventy-four per cent (N=142/191) of Aboriginal respondents lived their first six years in rural areas, while only 39% (75/193) reported living in rural areas at the time of arrest.¹ By contrast, 83% (N=49/59) of non-Aboriginal respondents reported living in a town (N=15) or city (N=34) in their first six years. This number increased to 90% (N=54/60) at the time of their most recent arrest.

In total, 56% (N=108/193) of the Aboriginal inmates experienced some kind of transition in residency (sometimes urban to rural, sometimes several transitions). Of the different residence/transition groups among Aboriginal respondents, the largest proportion, 36% (N=69/193), moved from a rural area to an urban area, with another six inmates moving from rural to urban, to rural and back to urban again. This gives a total of 39% (N=75/193) of Aboriginal inmates who made a rural-urban transition. The next largest group were those who always lived in rural areas, 25% (N=49/193). By contrast, 78% (N=47/60) of non-Aboriginal inmates were always urban.

1 Our survey defines "Rural" as including a reserve, Metis settlement or farm. The large majority of inmates classified as "rural" came from reserves - 84% (N=119/142) of Aboriginal inmates who lived in "rural" areas in their first six years lived on reserves. Sixty-two per cent of all Aboriginal respondents reported living on reserve in their first six years, including 110 Status Indians, 5 non-Status Indians, and 4 Metis. Fifteen respondents lived in Metis settlements in their first 6 years, including 3 Status Indians and 7 non-Status Indians. Eight Aboriginal respondents lived their first 6 years on a farm. Not included in the definition of "rural" are "towns." It may be that some of these towns are more properly categorized as rural than as urban, although the questions did not ask for more precise information. There were 26 Aboriginal respondents who replied "town" as place lived in their first 6 years. Only 12% (N=23/191) of Aboriginal respondents responded "city" as the place lived in their first 6 years. "Town" is included in the definition of "urban."

Table 26 - Rural-urban transition - Aboriginal respondents only

	<u>0 - 6 yrs.</u>		<u>7 - 12 yrs.</u>		<u>13-18 yrs</u>		<u>19-25 yrs.</u>		<u>26 yrs+</u>	
	N	%	N	%	N	%	N	%	N	%
On Reserve	119	62%	97	50%	67	35%	44	32%	21	28%
Metis settlement	15	8%	13	7%	8	4%	3	2%	3	4%
Farm	8	4%	12	6%	16	8%	6	4%	3	4%
Town	26	14%	33	17%	39	20%	15	11%	10	13%
City	23	12%	38	20%	61	32%	71	51%	39	51%
<u>Total</u>	191		193		191		139		76	

Note: There is a significant drop in the sample of respondents over the age of 18. This is due to fewer inmates having attained those ages and it is likely that a number of inmates who did attain those years but who spent those periods in jail would not have their responses indicated in the choices set by the question.

Other studies have made similar findings. Morse and Lock point out that a significant number of Metis and non-Status Indian offenders were raised on reserves. By looking at the place where the inmates were raised, Morse and Lock found that "far more Native people who grew up on reserves are involved with the law than those were raised elsewhere."²

The Task Force on Aboriginal Peoples in Federal Corrections reports that at the time of their admission to a federal institution, 67.2% of Aboriginal offenders

2 *Ibid.*, p. 22. See also A. Birkenmayer and S. Jolly, "The Native Inmate in Ontario," (Toronto: Ontario Native Council of Justice, 1981), p. iii: of 513 Aboriginal inmates surveyed, 272 ordinarily lived on reserve, but the majority of offenses were committed in a city or town. P. 6: "From the data, one can assume that the lives of the Native people were marked by instability caused by a transition from a reserve to an urban setting."

had been residing in communities of over 10,000 people.³ McCaskill found that there has been a decrease over time of offenders whose crimes were committed in Aboriginal communities.⁴ He also discovered that "53% of all crimes [meaning those committed by offenders in his survey] occurred in urban areas in 1970 compared to 68% in 1984."⁵

The migration from reserves is a phenomenon affecting other Aboriginal persons as well. It has been reported that 68.8% of Status Indians in Manitoba in 1988 lived on reserve.⁶ Dansys Consultants estimated that in 1991, 62% of Status Indians in Manitoba were living on reserve and only 37% of Manitoba's total Aboriginal population were on reserve.⁷ McCaskill also noted this trend. His 1970 study found 89% of his sample was born in a rural area (including towns).⁸ The present survey, including towns, reported 88%. McCaskill's 1984 survey found 29% of the Aboriginal inmates were born in urban areas, while the present survey found only 12% who were born in cities (26% if towns are included). Thus, the

3 Task Force on Aboriginal People in Federal Corrections, *Final Report*, (Ottawa: Correctional Services of Canada, 1988), p. 25. There are no First Nations in Manitoba with populations even approaching 10,000.

4 D. McCaskill, "Native Offenders in Manitoba: A Longitudinal Analysis," (Ottawa: Correctional Service of Canada, 1985), p. 47.

5 *Ibid.*, p. 43. The Manitoba Inmate Survey found 61% (N=118/193) of Aboriginal inmates lived in urban areas at the time of their most recent arrest.

6 Canada, Department of Health and Welfare, *Vital Statics 1988 -Manitoba Indians*, p. 3.

7 Dansys Consultants, "Aboriginal People in Manitoba: Population Estimates for 1986 and 1991," (Winnipeg: Aboriginal Justice Inquiry, 1990). This is because the large majority of Metis and non-Status Indians do not live on reserve.

8 McCaskill, note 4, *supra*, p. 20.

Manitoba Inmate Survey is unable to confirm that there is a trend to more Aboriginal offenders being born in urban areas than in previous years.

McCaskill suggests that Aboriginal offenders tend to live in urban areas more than the Aboriginal population as a whole.⁹ The Manitoba Inmate Survey confirms this is the case, with 69% (N=122/196) of the Aboriginal sample living in cities or towns at the time of their most recent arrest, compared to approximately 66% of Manitoba's total Aboriginal population that lives outside of Winnipeg and Brandon (clearly some of that 66% lives in towns but the exact number is unknown). Importantly, 62% of Status Indians live on reserve¹⁰ while 58% (N=82/141) of the Status inmates in the survey were living in urban areas at the time of their most recent arrest.

Even though Aboriginal offenders are now more likely to be living in urban areas, it is also clear that Aboriginal offenders have strong family ties in rural areas and that of all inmates in the jails, it is Aboriginal inmates who are more likely to live in rural areas at the time of arrest - 90% (N=54/60) of non-Aboriginal inmates live in urban areas compared to 62% (N=122/196) of Aboriginal inmates.

9 *Ibid.*, p. 22.

10 Dansys, note 7, *supra*.

The Manitoba inmate Survey shows that rural born Aboriginal offenders are more likely to speak Aboriginal languages,¹¹ identify Aboriginal spirituality as their religion¹² and they have greater connection to their extended families than urban Aboriginal offenders.¹³

-
- 11 Seventy-six per cent (N=107/140) of Aboriginal inmates who lived their first 6 years in rural areas speak an Aboriginal language at home compared to only 20% (N=10/49) of Aboriginal inmates whose first 6 years were in an urban setting. Eighty-one per cent (N=58/72) of Aboriginal inmates who lived in rural areas at the time of their most recent arrest speak an Aboriginal language at home, compared to 50% (N=61/122) of Aboriginal inmates who lived in a city or town at the time of their most recent arrest.
 - 12 Thirty per cent (N=37/126) of Aboriginal respondents who lived their first 6 years in rural areas reported "Aboriginal Spirituality" compared to 17% (N=7/42) of urban Aboriginal respondents. By contrast, 27% (N=18/72) of Aboriginal respondents who lived in rural areas and 25% (N=27/107) who lived in urban areas at the time of their arrest identified "Aboriginal Spirituality." This suggests that the religious influence comes early in life, and Aboriginal Spirituality is stronger in rural areas.
 - 13 Ninety-six per cent (N=137/146) of Aboriginal respondents who lived in rural areas their first 6 years reported living within their extended family during that time, compared to 80% (N=39/49) of Aboriginal respondents whose first 6 years was in urban areas. Eighty per cent (N=118/148, including 7 in residential school) of Aboriginal inmates who lived their first 6 years in rural areas and 89% (N=65/73, 4 in residential school) of Aboriginal inmates who lived in rural areas at the time of arrest lived within their extended family from 7 to 12 years of age (those who were in residential school during this period are included in the "extended family" category). This compares to 71% (N=35/49, none in residential school) of Aboriginal inmates who lived their first 6 years in urban areas and 76% (N=92/121, 3 in residential school) of Aboriginal inmates who lived in rural areas at the time of their most recent arrest lived within their extended families between the ages of 7 and 12.

Seventy-two per cent (N=100/139, 10 in residential school) of Aboriginal respondents who lived their first 6 years in rural areas, and 79% (N=57/72, 4 in residential school) of Aboriginal inmates who lived in rural areas at the time of their most recent arrest reported living within their extended family between the ages of 13 and 18. For Aboriginal respondents whose first 6 years were in urban areas, 64% (N=30/47, 1 in residential school) lived within their extended families between the ages of 13 and 18. For Aboriginal inmates who lived in urban areas at the time of their most recent arrest, only 54% (N=64/118, 7 in residential school) lived within their extended families between ages 13 and 18. One interpretation of this information is that cities pose

Rural Aboriginal offenders are less likely to succeed in education,¹⁴ less likely to be employed¹⁵ more likely to have family members who have been in jail.¹⁶ They have more previous incarcerations¹⁷ but become involved with the criminal

particular problems for Aboriginal families. Migration from one area to another poses even greater problems. See also R. Kueneman, R. Linden, and R. Kosmick, "Study of Manitoba's Northern and Rural Juvenile Courts," (Winnipeg: Attorney General, 1986), p. 14, whose 1981 survey found almost 75% of rural Aboriginal youth offenders were living with both parents compared to less than half for urban Aboriginal youth offenders.

- 14 Eighty-four per cent (N=119/142) of Aboriginal respondents who lived their first 6 years in rural areas had less than grade 12, while 53% (N=26/49) of urban Aboriginal respondents had grade 12 or better. For Aboriginal inmates who lived their first 12 years in rural areas, 52% (N=46/89) had less than grade 10. For those Aboriginal inmates who lived in cities or towns at the time of their most recent arrest, 18% (N=22/122) had their grade 12 or better, which is similar to the result for Aboriginal inmates who lived in rural areas at the time of their most recent arrest, 20% (N=15/74). These figures suggest that migration to urban areas does not assist education, but starting off in urban areas does.
- 15 Twenty-five per cent (N=36/141) of Aboriginal inmates who lived their first 6 years in rural areas were employed full-time prior to their most recent arrest, while 35% (N=17/48) of urban Aboriginal offenders were employed full-time. Of those Aboriginal respondents who lived in rural areas at the time of their most recent arrest, 22% (N=16/74) were employed full-time compared to 34% (N=41/120) who lived in cities or towns at the time of their most recent arrest. What these figures show is that employment does increase in urban areas.
- 16 Eighty-four per cent (N=116/138) had family members who had been in jail, compared to 73% (N=35/48) for Aboriginal respondents who lived their first 6 years in urban areas. For Aboriginal inmates, at the time of their most recent arrest, 84% (N=62/74) of those living in rural areas at the time of their most recent arrest and 79% (N=93/117) of the urban respondents had family members who had been in jail.
- 17 For 77% (N=108/141) of Aboriginal respondents who lived their first 6 years in rural areas, this was not their first incarceration, while for those who lived their first 6 years in urban areas, 61% (N=30/49) said this was not their first incarceration. This indicates that rural born Aboriginal offenders are experiencing the most difficulty. There was no difference in prior incarcerations when inmates were compared by their *last* place of residence - 73% of both rural (N=53/73) and urban (N=89/122) inmates had previous

justice system at a later age.¹⁸ Rural Aboriginal offenders are less likely to believe a desire to leave the community and poverty are factors in Aboriginal crime and more likely to believe substance abuse is a factor than urban Aboriginal offenders.¹⁹

incarcerations.

- 18 Forty-two per cent (N=44/106) of Aboriginal inmates who lived their first 6 years in rural areas compared to 54% (N=16/30) of Aboriginal inmates who lived their first 6 years in urban areas were first arrested and charged before the age of 16. This was also true for Aboriginal inmates whose last place of residence before their most recent incarceration was rural - 56% (N=29/52) of rural Aboriginal respondents compared to 74% (N=65/88) of urban Aboriginal respondents were arrested and charged before the age of 18.
- 19 Thirty-five per cent (N=57/139) of Aboriginal inmates who lived in rural areas at the time of their most recent arrest identified substance abuse as a factor, compared to 42% (N=51/121) of urban Aboriginal inmates who identified a desire to leave the home community as a factor. This suggests that there is a false impression about desire to leave home community as a factor in Aboriginal crime, an impression shared by urban Aboriginal offenders. Seventy-one per cent (N=51/72) of rural compared to 78% (N=94/121) of urban Aboriginal inmates identified poverty as a factor. Seventy-four per cent (N=53/72) of Aboriginal inmates who lived in rural areas at the time of their most recent arrest identified substance abuse as a factor, compared to 61% (N=74/121) of urban Aboriginal inmates.

Rural Aboriginal offenders wait longer to see a judge,²⁰ understand the proceedings less well,²¹ spend less time with their lawyers and see them less often²² and apply for bail less often.²³

Courts that rely heavily on duty counsel from Legal Aid staff have special difficulties ensuring fair justice. Reliance on duty counsel is particularly prevalent in remote Aboriginal communities. Part of the problem is a lack of choice of counsel. Another problem is that duty counsel are under tremendous time pressures while at the same time are not allowed to act for a person if the accused pleads not guilty. This creates a situation where duty counsel has incentives to resolve cases

-
- 20 Forty-six per cent (N=29/63) of the inmates who lived in rural areas at the time of their most recent arrest waited more than 5 days to see a judge or justice of the peace compared to 34 % (N=39/177) of urban Aboriginal inmates.
- 21 Forty-two per cent (N=58/139) of Aboriginal inmates who lived their first 6 years in rural areas were less likely to understand everything they needed to know at their court hearing compared to 33 % (N=16/48) of urban Aboriginal inmates. Twenty-nine per cent (N=41/140) of rural Aboriginal inmates replied they did not understand everything they needed to know from the time of arrest to the time of the interview compared to 19% (N=9/47) of urban Aboriginal inmates. This result may be explained by the fact that Aboriginal inmates who were raised in rural areas were more likely to speak Aboriginal languages and did not progress as far in school, meaning English language and literary problems could be present. For inmates who resided in rural and urban areas at the time of their most recent arrest, the differences in understanding were insignificant, with approximately 40% of both groups feeling they did not understand everything they needed to in court.
- 22 Sixty-six per cent (N=46/72) of the Aboriginal inmates who lived in the rural areas at the time of their most recent arrest saw their lawyers less than four between times compared to 59% (N=69/115) of the urban Aboriginal inmates. Fifty-four per cent (N=37/69) of the rural Aboriginal inmates reported spending less than an hour with their lawyer, compared to 46% (N=53/115) of the urban Aboriginal inmates.
- 23 Forty-four per cent (N=31/70) of Aboriginal inmates who lived in rural areas at the time of their most recent did not apply for bail, compared to 34 % (N=42/122) of urban Aboriginal inmates.

quickly by encouraging guilty pleas in circuit courts. "[T]he amount of time available either means that cases must proceed prematurely or else the matter is adjourned ... Either way, the interests of the accused may suffer."²⁴

The Executive Director of Legal Aid Manitoba confirmed the time pressures on duty counsel, particularly in remote communities.

There is little chance for lawyers to ensure that their clients understand the court proceedings or their legal rights and options, let alone come to grips with the full range of cultural or linguistic factors ...²⁵

An evaluation of Legal Aid Manitoba commented as follows:

Time and distance raise a different set of issues in the provision of duty counsel on some circuit courts. In some communities, *pressure of the docket* and the real possibility that defendants will not reappear at a later date *force duty counsel to conclude as many matters as possible without the issuance of a certificate*.²⁶ Because of the nature of the circuits, *remanding cases which might otherwise qualify for a certificate would add to future dockets*, and increase the risk that some defendants might commit offenses in the interim or fail to appear on the date set. [emphasis added]²⁷

24 Kueneman, Linden, and Kosmick, note 13, *supra*, p. 9.

25 Alan Fineblit, presentation to the Aboriginal Justice Inquiry, March 14, 1989.

26 Duty counsel cannot act if there is a not guilty plea but must remand the case for the issuance of Legal Aid certificate (to allow time for Legal Aid to ensure that the accused qualifies for Legal Aid). In remote communities there is chronic unemployment, high reliance on social assistance and many accused are known to duty counsel and have been accepted for Legal Aid in the past. In the majority of cases, duty counsel will represent the accused once a certificate issues anyway (because Legal Aid will not pay for travel for private lawyers to communities where duty counsel is present). Thus, the rules are unnecessary and seem designed to have lawyers encourage guilty pleas for the sake of administrative efficiency.

27 Rick Sloan, "Legal Aid in Manitoba: An Evaluation Report," (Winnipeg: Canada Department of Justice, 1987), p. 49.

The inmate survey also suggests that rural offenders complain less often in jail²⁸ and ask for more but receive fewer temporary absences than urban Aboriginal inmates.²⁹

Rural and urban Aboriginal inmates had relatively similar views as to whether Aboriginal offenders were treated differently in sentencing, by jail staff or by the parole board.³⁰

The above findings demonstrate the differences in needs and backgrounds between individual Aboriginal inmates. Some have special language and religious needs and are likely to return to areas of chronic unemployment, others may lack family supports. Others may be caught in the worst of both rural and urban worlds - separated from informal supports in the home community, but with the

28 Seventy-four per cent (N=54/73) of Aboriginal inmates who lived in rural areas at the time of their most recent arrest had never complained, compared to 58% (N=69/120) of urban Aboriginal inmates.

29 Eighty-two per cent (N=42/51) of Aboriginal inmates who lived in rural areas at the time of their most recent arrest had applied before, compared to 71% (N=62/87) of urban Aboriginal inmates. Only 55% (N=22/40) of rural Aboriginal inmates reported being granted their last temporary absence application, compared to 67% (N=39/58) of urban Aboriginal inmates.

30 For differences in sentencing, 84% (N=56/67) of Aboriginal inmates who reported living in rural areas at the time of their most recent offense and 76% (N=83/109) of urban Aboriginal offenders said Aboriginal inmates are treated very differently or with some difference. For different treatment by jail staff, 63% (N=35/56) of rural and 60% (N=64/107) of urban Aboriginal inmates said Aboriginal inmates were treated differently. Seventy-five per cent (N=24/32) of rural and 78% (N=53/68) of urban Aboriginal offenders said the parole board treats Aboriginal inmates very differently or with some difference. Interestingly, in a study of the general population in the United States, J. Hagan and C. Albonetti, "Race, Class, and the Perception of Criminal Injustice in America," *American Journal of Sociology*, 88, 2, (Sept. 1982): 329, at p. 346, found "residing in a central city significantly increases the perception of criminal injustice."

education, language and employment disadvantages of the home environment in an urban area.

Rural justice presents an array of adverse impacts for Aboriginal accuseds. There is adverse impact in the structure of the court system because neither the courts that deal with most serious cases nor the appeal courts go to Aboriginal communities. This makes it more difficult for Aboriginal accuseds to identify defence witnesses and ensure their attendance, requires more transportation of the accused and often requires detention away from the home community. It makes it more difficult for Aboriginal communities to learn from and participate in the process and ensures there are no jury trials in Aboriginal communities. The failure of the superior court to sit in Aboriginal communities ensures that many court services, including family matters and civil matters, are not available in Aboriginal communities.³¹ As well, lawyers, court offices and other important justice services are generally not located in the rural areas, especially in Aboriginal communities. This has an adverse impact on Aboriginal persons who are over-represented in the rural population.

Non-custodial dispositions assume the availability of services and resources, which are generally absent in these kinds of communities. ... [T]hose communities most in need of resources and services are the least able to develop or sustain them.³²

31 See A. C. Hamilton and C. M. Sinclair, Commissioners, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 1, *The Justice System and Aboriginal People*, (Winnipeg: Queen's Printer, 1991), ch. 6.

32 Carol LaPrairie, "The *Young Offenders Act* and Aboriginal Youth," in *Justice and the Young Offenders Act in Canada*, J. Hudson, J. Hornick, B. Burrows, eds., (Toronto: Wall & Thompson, 1988), p. 163.

Lilles notes that the lack of a variety of community resources can lead to the community relying on police in circumstances where a more appropriate and less intrusive helping agency would be preferable.³³ (Havemann et al. echo Lilles but do not restrict the consideration to rural areas.³⁴) Schmeiser et al suggested in 1975 that pre-sentence reports were not as available in rural areas.³⁵

It is important to understand that key actors in the justice system may have differences in approach to justice depending on whether they are rural or urban. Hagan reports that rural probation officers may make harsher sentence recommendations against Indians.³⁶ Hogarth found that urban magistrates attach

33 H. Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities," *Queen's Law Journal*, 15, 2, (Fall 1990): 327, at 336: "[T]he dearth of counselling and other support resources in those small communities often precludes the resolution of family problems without the involvement of the police."

34 P. Havemann et al., *Law and Order for Canada's Indigenous People*, (Regina: School of Human Justice, 1985), p. xxi: "[P]olice appear to be coercive substitutes for the adequate provision of other services (e.g., housing, health care, educational and recreational facilities). A question to be explored is whether less policing and equivalent or more expenditures on these other services would lead to less involvement with the criminal process for both indigenous and non-indigenous people."

35 D. Schmeiser, H. Hermann, and J. Manning, "The Native Offender and The Law," (Ottawa: Law Reform Commission of Canada, 1975), noted the greater difficulty of Aboriginal offenders in obtaining probation and said at pp. 71-72: "The Saskatchewan Corrections Study Committee, 1971, found that part of the disparity between the proportion of Natives in jail and Natives on probation was due to the fact that Native people in Saskatchewan live predominantly in rural areas where probation supervision is not as practical under the present probation structure. ... Rural probationers constituted only 16.7% of all probationers in 1971-72." P. 74: "Of all 'rural presentence reports,' 49.0% concerned Natives, while only 18.2% of urban pre-sentence reports concerned Natives. ... [P]re-sentence reports are not as available in rural areas as in urban areas."

36 See J. Hagan, "Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice," *Social Forces*, 55, 3, (March 1977): 597, at 597: "[P]robation officers in rural jurisdictions, as contrasted with those in urban

less importance to rehabilitation and more on deterrence and retribution than rural magistrates. They attach greater weight to the offender's offense and criminal record than they do the offender's background. They are more likely to impose more and longer jail terms.³⁷ Perhaps most importantly, the ratio of police per capita is likely to be higher in rural areas.³⁸

The lack of community resources can have serious implications for parole release. A former member of Canada's Parole Board comments on the problem as follows:

Sometimes the inmate was ready to go out, and if he was from a city, we would release him. Another inmate, just as ready, would be denied release simply because he was from a community in the far North with no supports available to him - not only no work, but also no self-help group of former alcoholics, no local hospital with a mental health program, no drug counsellors, no sex-offender programs.

communities, sentence Indians severely, without the justification of correlated legal variables. In addition, Indians are more likely to be sent to jail in default of fine payments in rural, than in urban communities." At p. 609: "It will be recalled that in urban settings, probation officers focused on native offenders' prior records in assigning them more severe sentences than whites. Since in many cases these prior records will presumably derive from experiences in rural communities, it is plausible that rural patterns of differential treatment may lead to urban sentencing decisions that perpetuate the initial inequities."

37 J. Hogarth, *Sentencing as a Human Process*, (Toronto: University of Toronto Press, 1971), pp. 220-221.

38 See Havemann et al., note 34, *supra*, p. 22: "The Yukon and the Northwest Territories have a much higher number of police per capita than any other area in Canada ... and Saskatchewan, the province with the largest indigenous population in southern Canada, has the second highest rate."

Perhaps there only seemed to be no supports in the northern native communities because the Parole Board and the Parole Service lacked sufficient knowledge of what was informally available in terms of community mechanisms for controlling, healing, or reconciling.³⁹

The Task Force on Federal Sentenced Women found

Aboriginal women are frequently denied the opportunity (some would assert it is a right) to return home to their reserves on release because there is no supervised housing or parole supervision available.⁴⁰

The Aboriginal Justice Inquiry provides a stinging indictment of the problems of rural justice.

The court system appears to view Aboriginal people and their communities with a mixture of disdain and disregard. The province's senior courts never hold hearings in their communities, while the courts that do travel there appear to want quite literally to "get out of town before the sun goes down." As a result, cases are either rushed through without due preparation and consideration, or are delayed from month to month. ... [T]he court system in Manitoba is not an equal system. As far as Aboriginal people are concerned, the inequality exists both in the services the system provides and impact it has on their communities. It is foolish and naive for anyone to insist that the administration of justice in Manitoba provides a uniform standard of justice to all people in this province. ... [T]here clearly exists a distinguishable, separate justice system for Aboriginal people.⁴¹

39 L. Hobbs Birnie, *A Rock and a Hard Place: Inside Canada's Parole Board*, (Toronto: Macmillan, 1990), pp. 196-197.

40 Task Force on Federally Sentenced Women, *Creating Choices*, (Ottawa: Solicitor General, 1990), p. 20.

41 Hamilton and Sinclair, note 31, *supra*, p. 249. See also ch. 6 - Manitoba Courts (and in particular "Circuit Courts," pp. 227-237). See also R. Kueneman, R. Linden, and R. Kosmick, note 13, *supra*.

There is no clearer example of the unequal and uneven manner in which the current justice system deals with Aboriginal people than in the circuit courts of northern Manitoba.⁴²

The undeniable problems arising in rural justice do not mean that the urban environment promises a fairer delivery of justice and certainly the urban environment poses special risk factors to Aboriginal persons.⁴³ A study by Bridges, Crutchfield and Simpson examined differential sentencing across counties in Washington State. It concludes:

42 See Hamilton and Sinclair, note 31, *supra*, p. 227.

43 See Havemann et al., note 34, *supra*, p. 111. See also J. Hylton, "Admissions to Saskatchewan Provincial Correctional Centres: Projections to 1993," (Regina: University of Regina, 1980), p. 56: "The urban environment is associated with the incidence of crime. Cities always report higher rates of crime than do rural areas. This suggests that, even if the population of Saskatchewan is to remain constant, migration to urban areas would result in more serious crime problems. This in turn could well result in increased rates of incarceration."

Australian conditions are similar. See A. Ducksworth, C. Foley-Jones, P. Lowe and M. Laller, "Imprisonment of Aborigines in North Western Australia," *The Australian and New Zealand Journal of Criminology*, 15, 1, (March 1982): 26, at 28: "Although only 40% reported town areas as the usual place of residence ... 77% said that they were in towns when arrested." Pp. 32-33: "Aborigines are at greater risk of being imprisoned in two circumstances. Firstly this is more likely to occur when an Aborigine moves out of his usual residential area into a white area such as a town. One explanation offered for this was that the police rarely visit Aboriginal settlements other than to make arrests for offenses committed elsewhere or where a major offence has been committed. e.g., murder. Moreover, an offence such as street drinking or drunkenness attracts notice only when committed in a public (i.e. European) place. ... Secondly ... respondents reported that local police soon became aware that a 'stranger' was in town and were perhaps less inclined to overlook minor infringements of the law. ... Yet another point is that 'strangers' who incur a fine may be less able to pay it than a local who can muster family or kinship support."

Courts in different counties with large minority populations and those that are highly urbanized sentence non-whites to prison at relatively higher rates, and whites at relatively lower rates, than other counties. These differential effects occur net of racial differences in arrests for serious and violent crime. Thus, high levels of urbanization and large minority populations significantly increase non-whites rate of imprisonment relative to that of whites.⁴⁴

A key actor opinion study by Hemingway et al. in Saskatchewan found similar results.

As Indians continued to move to cities through the 'sixties and 'seventies, there appeared a corresponding rise in Indian criminal conviction and incarceration levels ... A strong suspicion persists that the unstabilizing effects of urbanization precipitate conditions which enhance urban Indian crime. ... [P]ressures bearing upon urban Indians ... include absence of extended family social support, poverty, cultural clash and racial prejudice ... the non-Indian sample factor also produced an urban conflict factor, albeit of considerably weaker composition than the Indian factor analysis. ... Indian and non-Indian leaders perceive urban conflict as precipitating high levels of urban Indian crime.⁴⁵

The above findings contribute to the concern raised by the Manitoba Inmate Survey that the large urban Aboriginal population in Manitoba is particularly at risk of incarceration from the courts. The rural-urban migration factor adds to an Aboriginal individual's difficulties in the urban environment.

44 S. Clark, "Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders," June 1989, for the Department of Justice, p. 10; G. Bridges, R. Crutchfield, E. Simpson, "Crime, Social Structure and Criminal Punishment: White and Non-white Rates of Imprisonment," *Social Forces*, 34, 4, (1987): 335.

45 P. Hemingway et al., "An Opinion Study Concerning Causes and Solutions of Problems Related to Canadian Indians using a Quasi-Clinical Approach," (Ottawa: Department of the Solicitor General, 1983), p. 79.

Once sentenced, the fact that more Aboriginal inmates come from rural areas than non-Aboriginal inmates means the location of jails in or near large urban centres makes family visits, planning for release into the community, and quality temporary releases much more difficult and costly for Aboriginal inmates generally than for the non-Aboriginal inmate. Inmates or their families must pay for the cost of phone calls, so the inmates whose jail is in or near a centre where they are from (especially Winnipeg) benefit again from lower phone costs. There are also the costs of transportation for visits in person. Paying for these costs is all the more difficult for Aboriginal inmates because they generally come from severely disadvantaged economic conditions.

The location of all of Manitoba's jails are in predominantly non-Aboriginal communities. Virtually all of the economic benefits of jails, from construction contracts to permanent employment, go to the benefit of non-Aboriginal persons. All of the jails are in southern Manitoba except The Pas, which is located on the western border of Manitoba, far away from the majority of northern Aboriginal residents, Headingley, Stony Mountain, Rockwood and Milner Ridge are all very close to Winnipeg. Thirty-six per cent of Aboriginal people in Manitoba live in the north and a further 30% live in southern locations away from Winnipeg and Brandon. By contrast, almost two-thirds (65%) of non-Aboriginal people in Manitoba live in Winnipeg.⁴⁶

⁴⁶ Dansys Consultants, note 7, *supra*.

Another way the location of jails works against Aboriginal inmates is identified in the interviews conducted by Morse and Lock, where Aboriginal inmates complained that parole restricts the distance an inmate may travel (35 mile radius limit). The result is families cannot be visited regularly⁴⁷ and jobs outside the radius cannot be accepted. For inmates from remote areas, limits on travel pose considerably greater problems than they do for urban inmates.⁴⁸

It is very important that programming take into consideration the facts of Aboriginal rural ties, Aboriginal rural-urban transition and the various consequences these can have for Aboriginal inmates.⁴⁹ In sentencing, it is important to understand that Aboriginal inmates will experience a wide variety of hardships in jail that most non-Aboriginal inmates will not face - isolation from family, language and religion coupled with poor support services upon release. In

47 Birkenmayer and Jolly, note 2, *supra*, pp. 24-26, found that 68% of the inmates they interviewed had received no visits at the time of the interview, and of these, the reason in 48% of the cases was distance, and in another 5%, it was cost. The average distance families would have to travel was 285 miles (one way), the average duration of the return trip would be 24 hours, 49% of the inmates' families would need some economic assistance to make such a journey (including time off work), 52% would have to travel by some form of public transit, 7% said their families would need child care assistance, and 10% would need an escort for the trip. The survey revealed that northern inmates received fewer visits than southern inmates.

48 B. Morse and L. Lock, "Native Offenders' Perceptions of the Criminal Justice System," research paper prepared for the Canadian Sentencing Commission, (Ottawa: Policy, Programs and Research Branch, Department of Justice, 1988), p. 73.

49 In fact, the justice system plays a direct role in urbanization. For example, "a disproportionate number of Native releases are required to reside in the cities despite their rural background confirms the intervention role played by the parole system." B. D. Maclean and R. S. Ratner, "An Historical Analysis of Bills C-67 and C-68: implications for the Native Offender," *Native Studies Review*, 3, 1, (1987): 52.

these circumstances, it is unfair to say identical sentences in similar circumstances produce equal justice.

Some courts have tried to account for these hardships felt more by Aboriginal offenders. One example of taking these considerations into account is provided by the Ontario Court of Appeal, in a judgment concerning an appeal of a 10 year sentence for manslaughter, substituted a period of two years, using the following reasoning:

One can only proceed to consider the fitness of the sentence meted out to this man upon a proper appreciation of his cultural background and of his character, as it is only then that the full effect of the sentence upon him will be clear ... the effect of his removal from his environment and his imprisonment would no doubt dull every sense by which he has lived in the north.⁵⁰

The criminal justice system must understand that Aboriginal demographic origins are different than for non-Aboriginal offenders and these require different policies and considerations. The rural justice system provides Aboriginal communities with second-rate service. A failure of governments to assist Aboriginal persons making the transition to urban areas seems to be an aggravating factor to Aboriginal urban crime. The ties to rural communities and Aboriginal spirituality must be recognized and given due attention (and not simply seen as a reason to doubt whether the accused will appear in court later) if the justice system hopes to make a meaningful impact on Aboriginal offenders. To date, the evidence is that the justice system continues to rigidly resist understanding the people who appear in the system.

50 *R. v. Fireman*, [1970] 3 O.R. 380 (C.A.). See also *R. v. Naqitarvik* (1986), 26 C.C.C. (3d) 193 (N.W.T.C.A.) and the discussion of the case in Hamilton and Sinclair, note 31, *supra*, pp. 400-401.

WOMEN

Women are an important group whose differences and needs must be recognized. Table 1 of this study shows that there is only one jail in Manitoba for women - Portage la Prairie. The only federal institution presently in Canada for women is in Kingston, Ontario.

One of the most important differences about Portage jail for women is that it has a considerably greater proportion of Aboriginal inmates than the male institutions in Manitoba, 67% vs. 56% of total admissions. As stated in Chapter 1, only 3.3% of Manitoba's inmates in the summer of 1989 were women and the Manitoba Inmate Survey had 16% (N=40/258) female respondents.

In the past, little attention has been given to the special needs of women in jail, especially Aboriginal women,⁵¹ but recently there have been important additions to the literature on this topic. Four important sources of information can be found in *Creating Choices*, the report of the Task Force on Federally Sentenced Women, 1990,⁵² "Survey of Federally Sentenced Aboriginal Women in the Community,"⁵³ *Too Few to Count: Canadian Women in Conflict with the Law*,

51 See Havemann et al., note 34, *supra*, p. xxvi: "Previous research on the impact of Canada's criminal justice system on indigenous people has grossly overlooked the needs and concerns of indigenous women."

52 Ottawa: Correctional Service of Canada.

53 Fran Sugar and Lana Fox, "Survey of Federally Sentenced Aboriginal Women in the Community," (Ottawa: Native Women's Association of Canada, 1990). See also Margaret Shaw et al., "Survey of Federally Sentenced Women," (Ottawa: Solicitor General, 1990).

1987,⁵⁴ and chapter 13 of volume one of the report of the Aboriginal Justice Inquiry.⁵⁵ It is beyond the scope of this paper to fully canvass the special needs of female offenders, but two passages summarize the problems:

Imprisoned [Aboriginal] women are triply disadvantaged: they suffer pains of incarceration common to all prisoners; in addition, they experience both the pains Native prisoners feel as a result of their cultural dislocation and those which women prisoners experience as a result of being incarcerated far from home and family.⁵⁶

Studies have shown that women's prisons tend to increase women's dependency; stress women's domestic, rather than employment, role; aggravate women's emotional and physical isolation; destroy family and other relationships; and engender a sense of injustice. In other words, they appear to accomplish the opposite of what is intended. What we saw at Portage confirms these conclusions.⁵⁷

In fact, the Commissioners of the Aboriginal Justice Inquiry found conditions at Portage jail for women so deplorable and inappropriate they recommended the jail be closed.⁵⁸ The Kingston Penitentiary for Women (the only federal penitentiary for women) has been called cruel and inhuman punishment in one case,⁵⁹ and there have been repeated calls for its closure, most recently in the 1990 report of

54 edited by E. Adelberg and C. Currie, (Vancouver: Press Gang Publications, 1987).

55 Hamilton and Sinclair, note 31, *supra*.

56 David Daubney, Chairperson, Canada, House of Commons Standing Committee on Justice and Solicitor General, *Taking Responsibility*, Report on its Review of Sentencing, Conditional Release and Related Aspects of Corrections, (Ottawa: Queen's Printer, 1988), p. 237.

57 Hamilton and Sinclair, note 31, *supra*, p. 503.

58 *Ibid.*, p. 504.

59 *R. v. Daniels*, [1990] 4 C.N.L.R. 51 (Sask. Q.B.) overturned on appeal on jurisdictional grounds, June 6, 1991.

the Task Force on Federally Sentenced Women,⁶⁰ and the federal government has recently announced its intention to do so.

The purpose of this section of the chapter is to identify those areas of the Manitoba Inmate Survey where answers from women differed to some appreciable degree from the answers given by the Aboriginal and non-Aboriginal total samples. Some of the differences were discussed in the previous chapters because they were essential to understanding particular questions such as seriousness of offense and length of sentence. These questions found women were serving shorter sentences than men, including male provincial inmates. Eighty-six per cent of women were serving sentences of less than one year, with 26% jailed for 100 or 200 seriousness level offenses (for provincial and federal male inmates, the corresponding figures were 35% and 5% respectively). This indicates that women's offenses are different.⁶¹

In the present survey, 46% (N=12/26 Aboriginal and 6/13 non-Aboriginal) of women reported it was their first time in jail (compared to 27% for the sample as a whole). The Task Force on Federally Sentenced Women found 41% of federally sentenced women were first time offenders, half had never been in prison before, yet half were serving sentences over five years.⁶²

60 Task Force on Federally Sentenced Women, note 40, *supra*, p. 35.

61 Birkenmayer and Jolly, note 48, *supra*, p. 5, found that for the men surveyed, 45% committed property offenses and 14% liquor offenses, compared to 24% property and 31% liquor for women.

62 Task Force on Federally Sentenced Women, note 40, *supra*, p. 49.

Women also tended to have been incarcerated fewer previous times. Of women who had been in jail before, 82% (N=9/11) of Aboriginal and 86% (N=6/7) of non-Aboriginal respondents had been in jail between one and five times before (while for the sample as a whole more than half of the offenders had been in jail more than five times before). This is consistent with Morse and Lock's finding that women tended to have much shorter incarceration histories.⁶³

There were differences for women in the factors associated with crime. Women were significantly less likely to say they were under the influence of alcohol at the time of their offense than men.⁶⁴ When provided with a list of factors to explain Aboriginal crime generally, a much smaller proportion of the women identified alcohol abuse as a factor,⁶⁵ a smaller proportion identified unemployment⁶⁶ and a greater proportion identified lack of understanding that the act was a crime.⁶⁷ No Aboriginal women reported a desire to leave their home

63 Morse and Lock, note 48, *supra*, p. 26. They found that the likelihood of pleading guilty increased with the number of prior incarcerations. This analysis was not done for our study.

64 Seventy-eight per cent (N=21/27) of Aboriginal women and 23% (N=3/13) of non-Aboriginal women reported being under the influence at the time of their offense, compared to 83% of Aboriginal and 50% of non-Aboriginal respondents in the whole sample.

65 Forty-two per cent (N=11/26) of Aboriginal and 77% (N=10/13) of non-Aboriginal women said alcohol abuse was a factor, while for the sample as a whole, the figures were 85% Aboriginal and 93% non-Aboriginal.

66 Eighty-one per cent (N=21/26) of Aboriginal and 77% (N=10/13) of non-Aboriginal women reported unemployment as a factor vs. 83% Aboriginal and 88% for the entire sample.

67 Fifty-four per cent (N=14/26) of Aboriginal and 39% (N=5/13) of non-Aboriginal women reported lack of understanding that the act was a crime as a factor vs. 41% Aboriginal and 37% non-Aboriginal for the whole sample.

community or a desire to be incarcerated as a factor, while two non-Aboriginal women identified the former and one non-Aboriginal woman identified the latter.⁶⁸ These responses demonstrate that women become involved in crimes for somewhat different reasons than men, which is not a surprising result.

The socio-demographic information about the female respondents differed in some respects from the men. The women were generally older⁶⁹ and tended to become involved in crime for the first time at an older age than men. Almost half (six of 13) of Aboriginal, and more than two thirds (five of seven) of non-Aboriginal, women were arrested and charged for the first time after the age of 18.⁷⁰

68 For the sample as a whole, 19% of the Aboriginal and 28% of the non-Aboriginal sample reported wanting to be incarcerated was a factor, while 39% of the Aboriginal and 26% of the non-Aboriginal respondents reported desire to leave the home community was a factor.

69 Only 55% (N=22/40) of the women were less than 30 years of age, compared to 68% (N=72/106) in the male provincial jails.

70 This compares to 68% of Aboriginal and 48% of non-Aboriginal inmates being arrested and charged *before* the age of 18.

Unemployment for the women in the sample was greater than for the men and the levels of education attained were lower for Aboriginal women.⁷¹ Aboriginal women reported speaking an Aboriginal language at home less frequently than Aboriginal men.⁷² The most significant difference in family environment is that for Aboriginal women there is a sharp drop of those living within their extended families between the ages of seven and 12, and between the ages of 13 and 18.⁷³

71 Only two of 26 Aboriginal women and six of 13 non-Aboriginal women worked full-time prior to their incarceration (compared to 30% of the whole Aboriginal sample and 62% of the non-Aboriginal sample). Fifty-two per cent (N=14/27) of Aboriginal women had less than grade 10 (compared to 46% of the whole Aboriginal sample), and only two of 27 had grade 12 or more. For non-Aboriginal women, eight of 13 had grade 12 or more, which is more than the 52% of the whole non-Aboriginal sample.

This is also found by Shaw et al., note 53, *supra*, p. 34. Shaw found at pp. 36-37 that "... little incentive is offered to women in provincial prisons to attend school ... pay scales for attending school are very low (e.g. \$2) compared with the average \$4 or \$5 a day for jobs within the prison ... for women arriving in late spring, no classes may be available throughout the summer months. ... The outstanding exception to this general pattern [of poor education opportunities] ... was the experience of the women housed in a federal men's prison where teachers from the nearby university came in daily to run a variety of courses."

Birkenmayer and Jolly, note 2, *supra*, p. iii, found the unemployment rate for Aboriginal female inmates surveyed to be eight times the national average, compared to three times for Aboriginal male inmates.

72 Fifty-six per cent (N=15/27) of the Aboriginal women compared to 62% of the whole Aboriginal sample reported speaking an Aboriginal language at home. This may be a function of residency (perhaps Aboriginal women offenders are more likely to live off reserve than Aboriginal men, and thus experience greater cultural assimilation pressures, or a function of manying non-Aboriginal men who may dictate the language spoken in the home. It is beyond the scope of this paper to investigate these possibilities).

73 While 82% (N=22/27) lived within their extended families between the ages of seven and 12, only 58% (N=15/26) did so between the ages of 13 and 18. This compares to 77% and 63% for the Aboriginal sample as a whole. These figures suggest that Aboriginal adolescent girls go through the most dramatic family situation changes of any group in the study.

Women had some different experiences and perceptions in the arrest to sentencing process of the system. For bail, the most significant differences were that more than half (N=5/9) of non-Aboriginal women reported their bail application was granted and half of the women reported they waited two days or less for their bail hearing.⁷⁴ Women, especially Aboriginal women, were much less likely to feel they understood the proceedings,⁷⁵ women were more likely to believe their lawyers helped a lot, even though they were more likely to report spending less than an hour with their lawyer. Aboriginal women especially spent little time with their lawyers.⁷⁶ Although Aboriginal and non-Aboriginal women

74 This compares to the 36% of the whole non-Aboriginal sample that reported success in their bail applications. This difference is likely a result of a large proportion of the non-Aboriginal sample coming from federal institutions. For Aboriginal women, the result was similar to the result for the Aboriginal sample as a whole - approximately 39% success. For waiting for their bail hearing, only 30% of the whole sample reported waiting two days or less.

W. Jamieson and C. LaPrairie, "Native Criminal Justice Research Issues and Data Sources," (Ottawa: Solicitor General, 1987) found at p. 21: "Of those Native women who become involved in criminal processing, the majority are less likely to be released on bail and less able to pay fines than their non-Native female counterparts. They are twice as likely to be arrested for alcohol-related offences against the person than non-Native women".

75 Only 36% (N=9/25) of the Aboriginal women felt they understood everything they needed to know about the court hearing, compared to 61% of the entire Aboriginal sample. Only 54% of the non-Aboriginal women felt they understood the hearing compared to 68% of the entire non-Aboriginal sample. When asked whether they understood everything they needed to from time of arrest to time of interview, only 56% (N=14/25) of the Aboriginal women said yes, compared to 73% of the Aboriginal sample as a whole. For non-Aboriginal women, 92% (N=11/12) replied yes compared to 88% for the sample as a whole. Reasons for these differences may be the lack of previous experience with the process (fewer previous incarcerations), and the less serious nature of their crimes may result in less time spent with their lawyers.

76 Forty-four per cent (N=14/32) of women said they felt their lawyer helped a lot, compared to 34% for the sample as a whole. Sixty-nine per cent (N=18/26) of Aboriginal women compared to 33% (N=4/12) of non-Aboriginal women and 43% of

pleaded guilty in approximately the same proportions as for the whole Aboriginal and non-Aboriginal samples, they were more likely to report feeling pressure to plead guilty.⁷⁷ Women were more likely to believe their sentences did not deserve a jail sentence.⁷⁸ Aboriginal women were more likely than Aboriginal men to say Aboriginal persons are treated differently at sentencing.⁷⁹

There were also some differences in their jail and parole experiences. Forty per cent (N=10/25) of Aboriginal women said they wanted Aboriginal spirituality programs, compared to 29% of Aboriginal respondents as a whole. The lower identification among Aboriginal men might reflect the fact that they already enjoy greater access to Aboriginal spirituality programming than the women, particularly in federal institutions where there is a sweat lodge and better programming of almost every kind.

Women appear to be closer to the staff at Portage. Women identified staff as someone to talk to about a complaint in jail more often⁸⁰ and complained less

the entire sample of inmates reported seeing their lawyers for less than an hour.

77 Approximately 60% of both Aboriginal (N=11/18) and non-Aboriginal (N=6/10) women reported feeling pressure, compared to 45% and 37% of the Aboriginal and non-Aboriginal samples as a whole.

78 Fifty per cent (N=8/16) of Aboriginal women and 58% (N=7/12) of non-Aboriginal women felt their offense did not deserve a jail sentence, compared to 38% and 30% of the whole Aboriginal and non-Aboriginal samples.

79 Seventy-one per cent (N=15/21) said there was very different sentencing, compared to 56% of the Aboriginal sample as a whole.

80 Sixty-six per cent (N=25/38) of the women said they could talk to a staff member (especially a counsellor) if they had a complaint, compared to just 39% of the entire sample who identified a staff person.

often about conditions (although their responses indicated that they had access to the fewest programs).⁸¹ Women were much less likely to say Aboriginal inmates were treated differently by the staff.⁸² Morse and Lock also found women were much less likely to perceive differences in treatment.⁸³ Parole did not seem to be a familiar exercise for the inmates, especially the non-Aboriginal women and there were no significant differences to report.⁸⁴

To supplement the findings of the Manitoba Inmate Survey, it is important to consider surveys of federally sentenced women. Among the important and special programming needs of female prisoners is to recognize their relationships with and

81 Sixty-three per cent (N=25/40) of the women and 58% of the entire sample had never complained about jail conditions.

82 Sixty-eight per cent (N=15/22) of Aboriginal and 90% (N=9/10) of non-Aboriginal women reported the inmates were not treated differently, compared to 66% (N=95/143) of Aboriginal men and 58% (N=26/45) of non-Aboriginal men who thought jail staff did treat Aboriginal inmates differently. These results should not be surprising considering that the large majority of women in the Portage jail are Aboriginal and there are comparatively small numbers of inmates, which suggests there would be fewer opportunities for treating inmates differently and much greater awareness of those differences by the inmates.

83 Morse and Lock, note 48, *supra*, p. 55. On the other hand, the Task Force on Federally Sentenced Women, note 40, *supra*, p. 56, found "a number" of Aboriginal women "felt they were the target of racism and discrimination."

84 Sixty-two per cent (N=16/21) of Aboriginal and 31% (N=4/13) of non-Aboriginal women reported they did not know how to apply for parole (compared to 30% and 15% for the whole Aboriginal and non-Aboriginal samples). Only three Aboriginal women replied to the question of whether the parole board treated Aboriginal inmates differently, and all said there was a difference. Five non-Aboriginal women replied and three said there was no difference and one said little difference. A few Aboriginal women suggested the parole board should have Aboriginal women on it.

responsibilities to their children, which are much more pronounced than for men.⁸⁵ This means there must be help for women in maintaining contact with their children, including financial and other assistance for visits, better visiting conditions and courses on child care. Johnson highlights the problem with visits. She found that "three-quarters of Native women who receive federal sentences are from the Pacific and Prairie regions, yet seventy per cent are incarcerated in the Prison for Women in Ontario."⁸⁶

85 Shaw et al., note 53, *supra*, a survey of 170 interviews with federally sentenced women, some of whom were spending time in provincial institutions, with 23% of the sample being Aboriginal women. Sixty-four per cent of the women had at least one child (p. 10), of those, 74% had at least one child under the age of 17 (p. 11), and 62% had children living with them at the time of offense (p. 13). Women experienced difficulties with child care agencies, being denied information about their children and refused contacts and visits. P. 12: "Mothers are also dependent on their children ... regardless of how young or old those children may be ... contact [is] essential to their survival and their hopes for the future." P. 15: "... [F]acilities for visiting in provincial prisons were certainly not [good], often cramped, noisy and public. One prison regards contact visits [allowing touching] as a privilege ... Access to overnight facilities was only available in two prisons ... some women preferred not to have visits than submit to the indignities of constant searches." P. 17: Some prisons do not permit visits with relatives or friends with prior incarcerations.

Fifty-five per cent of women expressed health concerns and control over one's own body was a significant issue for the women. (p. 18) Special programs for women who slash themselves, are needed, as are programs about health and nutrition. (p. 22) In fact, more than half the women believed their health had deteriorated since arriving at jail. (p. 23) At p. 27: "... [A]ttendance at group programmes such as AA was not taken seriously by others, particularly if it was part of an attempt to improve chances for parole ... Nor was the Christian basis of such programmes acceptable to a number of women whether native or non-native."

See also Birkenmayer and Jolly, note 2, *supra*, p. v, "[t]he men were more concerned with problems dealing with release while the women considered family problems to be more important."

86 H. Johnson, "Getting the Facts Straight: A Statistical Overview," in *Too Few to Count: Canadian Women in Conflict with the Law*, E. Adelberg and C. Currie, eds., (Vancouver: Press Gang Publications, 1987), p. 42.

Jails must also recognize women's histories as victims of abuse and their need for programs to deal with that (conversely, men might benefit from programs dealing with their abuse of women). In both these areas, Aboriginal women are more likely to have dependent children, to have more children and to have been victims of abuse than non-Aboriginal women.⁸⁷ At the same time, there was a strong demand by women for work programs.⁸⁸ While response to programmes is generally favourable, women believe the rules and discipline procedures at the federal jail are petty, vague and inconsistent and the inmate grievance procedure was useless.⁸⁹

Shaw's survey of federally sentenced women found

87 *Ibid.*, p. 29. Seventy-eight per cent were abuse victims, with 90% of Aboriginal women victims of physical abuse compared to 61% non-Aboriginal women, and 61% victims of sexual abuse compared to 50% of non-Aboriginal women. Seventy-eight per cent want abuse programs. (pp. 31-33) There is "an obvious need for programmes specifically geared to native women, and with Native Elders. ... The importance of staff training on the nature and effects of abuse cannot be underestimated." (p. 33) Seventy-seven per cent of Aboriginal women inmates had children compared to 61% of non-Aboriginal women in the sample. (p. 55)

88 On these topics, see especially Sugar and Fox, note 53, *supra*, and Shaw et al., note 53, *supra*. Shaw found at p. 39 "almost all women are concerned to acquire workable training skills ... there was an obvious demand for non-traditional female skills as well as traditional ones."

89 Shaw et al., note 53, *supra*. As for the programs that are offered, p. 42, "... response to courses taken was generally favourable ... coverage of budgeting and money issues was often felt to be inadequate in life skills." P. 43: "[W]omen also emphasize that programmes, and especially prerelease ones, should be run by people from the community outside the prison, rather than by prison staff." See p. 45 re: rules and discipline procedure, p. 47 re: inmate grievance procedures. The great majority (44%) felt very strongly that it was useless." In total, 56% said it was very slow or not working well, and further 38% did not know about it.

... it is clear that many of the [Aboriginal] women have experienced discrimination and prejudice generally in their lives as well as from the criminal justice system ... [have] experienced discriminatory behaviour from the police, and have not been listened to by criminal justice personnel when they have been sexually abused.

... In prison ... a number felt they were the target of racism and discrimination ... While not all staff were felt to treat them in this way, almost all said that very few staff had any real understanding or acceptance of their cultural backgrounds and practices, or of the kinds of lives they had led in terms of addiction and abuse experiences. ... [T]he collective view was that they were discriminated against and sentenced to segregation unnecessarily.⁹⁰

[Aboriginal women gave] a strong and uniform plea that their cultural and spiritual backgrounds be recognised and accepted. ... [T]he great majority of aboriginal women expressed clearly that assistance from aboriginal people, access to traditional sacred objects and the right to traditions such as Sweat Lodges and PowWows, are of utmost importance in their personal growth and preparation for return to the community. ... In general, both inside and outside prison, native women have experienced much greater disruption in their lives than non-native women ... [and] are much more likely to have experienced physical abuse and sexual abuse, both as children and adults.⁹¹

... [A]ddiction problems among the native women are even more common than for the non-native population, often over a longer period, with a corresponding higher incidence of serious problems faced in life. A high proportion dropped out of school early, due to a combination of early responsibilities at home, cultural disruption of their parent's generation, or to an inappropriate school curriculum taught by non-native teachers insensitive to cultural differences.⁹²

90 *Ibid.*, pp. 56-57.

91 *Ibid.*, p. 54.

92 *Ibid.*, p. 55.

[A]boriginal women are more likely to have injured themselves, or attempted suicide than non-natives, often in prison, as a response to a system which is found to be totally foreign culturally, and punitive rather than supportive.⁹³

Perhaps the most moving of all the studies on Aboriginal justice issues is the survey of federally sentenced Aboriginal women by Fran Sugar and Lana Fox.⁹⁴ This survey speaks strongly on a number of issues. It decries official studies conducted by bureaucrats whose theoretical discussions have no connection to their reality. It argues that women in maximum security are prejudged as violent, that medical and psychiatric assessments are not culturally appropriate, and notes that the only treatment programs as victims of abuse require the women to go to the men's institutions. Aboriginal women who refuse treatment (either programs or medical/psychiatric treatment) do not have their parole applications supported because they are judged not to have addressed their needs. When passes to control movement within the jail were introduced in the Kingston Penitentiary for Women in the early 1980s, this recalled for Aboriginal inmates the pass system imposed in their communities during Canada's earlier history.

The survey describes the nature of the violence to which Aboriginal women have been subjected.

93 *Ibid.*, p. 57. Birkenmayer and Jolly, note 2, *supra*, in a survey of provincial inmates in Ontario, found at p. 13:

"... a Native woman in jail is more likely to have dependent children who are in turn more likely to be in the care of a Children's Aid Society. She is more likely to be unemployed or relegated to unstable, periodic employment. She has a greater likelihood of being dependent on some type of welfare or on the generosity of parents, husbands, friends or relations and finally, of returning to the same economic dilemma following her release as she faced before her arrest."

94 Sugar and Fox, note 53, *supra*.

Many of us are not the victims of violence in the way in which victims of a mugging experience violence. Instead, and all too often, we are the victims of long term and systematic violence. ... Twenty-seven of the 39 women interviewed described experiences of witnessing a murder, watching our mothers repeatedly beaten, beatings in juvenile detention centers at the hands of staff and other children. Twenty-one had been raped or sexually assaulted either as children or as adults. Twenty-seven of the 39 women had experienced violence during adolescence ... In adulthood, 34 of 39 had been the victims of violence. ... The violence of which we are the victims, and of which our stories tell is not occasional or temporary. Most of us have experienced sustained abuse extending through much of our lives ... The violence we have experienced has typically been at the hands of men ... There is no accidental relationship between our convictions for violent offenses and our histories as victims ... For us, violence has begot violence ... Suicide attempts are common. Thirty-one of 39 had abused alcohol ... Twenty-seven considered themselves severely addicted to narcotics ... Twenty-three tell of addiction in institutions to prescription drugs ... Ten of 39 describe slashing themselves: self-mutilations that are not suicide attempts, but the relief of tension and anger, physical pain self-inflicted as escape from what lies inside us.⁹⁵

The experiences of the Aboriginal women are as much marked by racism as they are by violence.

Our understandings of law, of courts, of police, of the judicial system, and of prisons are all set by lifetimes defined by racism. ... As children we were taught to fear white authority ... Faced with institutional neglect and overt racism, our feelings about white authority even before we encountered the criminal justice system mixed passive distrust and active hatred. ... Twenty of the 39 described negative relationships with the police. ... Relationships with prison guards are described in extremely negative terms: physical beatings, rape, sexual harassment, and verbal intimidation. ...⁹⁶

95 *Ibid.*, pp. 5-9.

96 *Ibid.*, pp. 10-11.

We cannot trust these so-called care givers, and all too often in the view of those interviewed, we again experience direct hostility from the very people who are supposedly there to help. This is why Aboriginal women express anger at these care givers. This is why we refuse to become involved, and then are further punished because we fail to seek treatment.⁹⁷ ... Twenty six of the women are mothers ... prison officials ... are widely seen as insensitive to mother-child relationships. ... The money spent on studies would be much better spent on family visits, on culturally appropriate help, on reducing our powerlessness to heal ourselves.⁹⁸

The critical difference is racism. We are born to it and spend our lives facing it. Racism lies at the root of our life experiences. The effect is violence, violence against us, and in turn our own violence. ... Existing programs cannot reach us, cannot surmount the barriers of mistrust that racism has built. It is only Aboriginal people who can design and deliver programs that will address our needs and that we can trust. It is only Aboriginal people who can truly know and understand our experience. It is only Aboriginal people who can instill pride and self-esteem lost through the destructive experiences of racism.⁹⁹

The differences identified between women and men in the sample, including differences between Aboriginal women and non-Aboriginal women, are important for showing that the experiences and needs of women are different and must be addressed with specific reference to them.¹⁰⁰ The results suggest areas for further

97 *Ibid.*, p. 13.

98 *Ibid.*, p. 16-17.

99 *Ibid.*, p. 18.

100 S. Cooper, "The Evolution of the Federal Women's Prison," in *Too Few to Count*, note 86, *supra*, p. 140: "The historical record of federal corrections tells us that the small female population has always been housed where and in whatever manner best suited the interests of the larger male population. For almost a century (from 1835 to 1934), the majority of women offenders were housed within the walls of the Kingston Penitentiary for men. During this period, they occupied at least three separate locations within the walls, each of these, until 1913, considered 'temporary' and in each case the moves were made because the location was required for the male inmates."

study, including family experiences of adolescent girls, time spent with lawyers, availability of programming, and necessity for incarceration.

FEDERAL/PROVINCIAL JAILS

Another difference that was found was between inmates with sentences of more than two years (sentenced to federal jails) and those with sentences of less than two years (sentenced to provincial jails). The institutions have differences depending on inmate security requirements and how long the inmates will be in the jail. These differences must be kept in mind when comparing the Aboriginal and non-Aboriginal results of the Manitoba Inmate Survey. The Aboriginal sample had 40% from federal institutions while the non-Aboriginal sample had 55% from Manitoba's two federal jails.

Of the total jail admissions in 1989 (see Table 1), six per cent of non-Aboriginal admissions were sentenced to federal jails, compared to 3.5% of Aboriginal admissions. According to the figures in Table 2, 54% of the non-Aboriginal inmates in jail in the summer of 1989 were in federal jails compared to 38% of Aboriginal inmates. Within the federal jails, 57% of 1989 admissions were non-Aboriginal offenders and 63% of the inmates in federal jails in the summer of 1989 were non-Aboriginal.

Provincial and federal inmates differ in terms of seriousness of offenses and lengths of sentences. As well, federal inmates tend to be older. These differences are discussed in chapter 2. There were other differences that arose during the course of the survey. In the discussion that follows, only male inmates are

included in the comparisons between provincial and federal inmates because there were no female federal respondents.

Perhaps surprisingly, federal inmates had fewer prior incarcerations than provincial inmates.¹⁰¹ This may reflect the difference between persons who have a lifestyle that exposes them to minor criminal charges on a regular basis and others whose crimes are of a less frequent but more explosive nature (described by Lisa Hobbs Birnie, a former member of the National Parole Board, quoted in chapter 2).

Federal Aboriginal inmates were more likely to identify a desire to leave the home community as a factor that motivates Aboriginal crime generally.¹⁰² Federal inmates had higher education attainment than those in provincial institutions.¹⁰³ This may be due at least in part to the fact that inmates in provincial jails are younger and have fewer educational programs available to them at the institutions (in part due to short periods in jail). Federal non-Aboriginal

101 Of those who had been in jail before, 44% (N=12/27) of federal non-Aboriginal inmates and 41% (N=23/56) of federal Aboriginal inmates had been in jail between one and five times before. Of those provincial inmates who had been in jail before, only 10% (N=1/10) of the non-Aboriginal and 31% (N=22/70) of the Aboriginal inmates had been in jail between one and five times before. The remainder had been in jail six or more times. This suggests provincial inmates have longer records than federal inmates.

102 Fifty-nine per cent (N=46/78) of federal Aboriginal inmates identified desire to leave the community as a factor in Aboriginal crime compared to 33% (N=30/91) of provincial Aboriginal inmates.

103 In federal institutions, 27% (N=21/79) of Aboriginal inmates had grade 12 or better, compared to 16% (N=15/92) in provincial institutions.

inmates had more employment at the time of their most recent arrest, although Aboriginal inmates in both levels of jails had high unemployment.¹⁰⁴

A significantly greater proportion of Aboriginal provincial inmates went directly to jail following apprehension than non-Aboriginal provincial inmates.¹⁰⁵ Federal inmates were much less likely to have their bail requests granted and waited longer for their bail hearings.¹⁰⁶ These results are consistent with federal inmates having more serious offenses. Federal inmates saw their lawyers more often than provincial inmates¹⁰⁷ and were somewhat more likely to say their

104 Seventy-three per cent (N=24/33) of non-Aboriginal federal inmates were employed full-time prior to their most recent arrest, compared to 50% (N=7/14) for non-Aboriginal provincial inmates. For Aboriginal inmates, unemployment rates were approximately 33% in both groups (N=56/170 combined).

105 Ninety-one per cent (N=84/92) of Aboriginal provincial inmates went directly to jail compared to 71% (N=10/14) of non-Aboriginal provincial inmates. In federal institutions, 75 of 76 Aboriginal inmates and 31 of 33 non-Aboriginal inmates went directly to jail. In total, 94% of Aboriginal and 87% of non-Aboriginal inmates went directly to jail.

106 In federal institutions, 28% (N=11/40) of Aboriginal and 31% (N=8/26) of non-Aboriginal inmates had their bail requests granted. This compares to 39% and 36% respectively for the whole Aboriginal and non-Aboriginal samples. Five per cent (N=2/36) of federal Aboriginal inmates and 27% (N=7/26) of the federal non-Aboriginal inmates waited two days or less for their bail hearing. By contrast, 37% (N=22/60) of provincial Aboriginal inmates and 43% (N=3/7) of provincial non-Aboriginal inmates waited two days or less.

107 Twenty per cent (N=15/76) of Aboriginal and 44% (N=14/32) of non-Aboriginal federal inmates saw their lawyers six or more times. For provincial inmates, 17% (N=15/89) of Aboriginal and 7% (N=1/14) of non-Aboriginal inmates saw their lawyers six or more times. Despite this, only 15% (N=13/86) of Aboriginal compared to 21% (N=3/14) of non-Aboriginal provincial inmates spent three or more hours with their lawyers. Twenty-seven per cent (N=20/74) of federal Aboriginal inmates and 61% (N=17/28) of federal non-Aboriginal inmates spent three or more hours with their lawyers.

lawyers helped a lot.¹⁰⁸ Federal inmates were less likely to plead guilty than provincial inmates.¹⁰⁹ This might be because inmates charged with very serious crimes have little to gain by pleading guilty. Less serious crimes might allow greater latitude for negotiating the actual charge put before the court and the kind of sentence recommendation to be made by the Crown Attorney. On the other hand, more federal inmates reported receiving offers to change their pleas.¹¹⁰ A possible explanation for this result is that provincial inmates may be more inclined to plead guilty in the first place, thereby making the issue of offers after a plea of not guilty is entered irrelevant. Perhaps surprisingly, federal inmates were more likely to think their sentences were fair¹¹¹ and less likely to think their offenses did not deserve jail terms.¹¹²

108 Thirty-five per cent (N=26/74) of Aboriginal federal inmates reported their lawyer helped a lot compared to 44% (N=14/32) of non-Aboriginal federal inmates (compared to 32% and 39% respectively of the whole Aboriginal and non-Aboriginal samples).

109 Seventy-seven per cent (N=59/77) of federal Aboriginal, 67% (N=22/33) of federal non-Aboriginal, 87% (N=78/90) of provincial Aboriginal, and 93% (N=13/14) of provincial non-Aboriginal inmates pleaded guilty.

110 Sixty-nine per cent (N=42/61) of Aboriginal federal inmates and 70% (N=16/23) of non-Aboriginal inmates received an offer to change their plea. This compares to 59% (N=47/80) of Aboriginal and 46% (N=6/13) of non-Aboriginal provincial inmates who received offers.

111 Forty-seven per cent (N=35/75) of federal Aboriginal inmates, 55% (N=18/33) of federal non-Aboriginal inmates, 32% (N=27/84) of provincial Aboriginal inmates and 21% (N=3/14) of provincial non-Aboriginal inmates thought their sentences were fair.

112 Thirty-four per cent (N=26/76) of federal Aboriginal inmates, 15% (N=5/33) of federal non-Aboriginal inmates, 40% (N=35/88) of provincial Aboriginal inmates and 43% (N=6/14) of provincial non-Aboriginal inmates thought their offenses did not deserve a jail sentence.

According to the inmates, Aboriginal program availability was better in federal than provincial jails.

Table 27 - Aboriginal spirituality - programs regularly available
(Aboriginal provincial and federal respondents)

	<u>Federal</u>		<u>No</u>	<u>%</u>	<u>Provincial</u>		<u>No</u>	<u>%</u>
	<u>Yes</u>				<u>Yes</u>			
	N	%	N	%	N	%	N	%
Sweat Lodge	3	4%	74	96%	3	3%	104	97%
Sacred Circle	77	100%	0	0%	5	5%	102	95%
Fasting	1	1%	76	99%	1	1%	106	99%
Healing	0	0%	77	100%	2	2%	105	98%
Feasts	0	0%	77	100%	2	2%	105	98%
Sweetgrass	77	100%	0	0%	36	34%	71	66%
Other	0	0%	77	100%	11	10%	96	90%

The percentages for "programs available" are based on 184 respondents, with 77 in federal institutions in 107 in provincial institutions.

Significantly more provincial than federal inmates reported not participating in any programs.¹¹³ Approximately the same number of federal Aboriginal and non-Aboriginal inmates reported there was no one to talk to about complaints in jail, while there was a great difference between provincial inmates. By far the largest group who felt they had no one to talk to were provincial Aboriginal inmates (41%).¹¹⁴

113 In federal institutions, only 13% (N=10/79) of Aboriginal and 24% (N=8/33) of non-Aboriginal inmates reported they did not participate in any programs. In provincial jails, 41% (N=38/92) of Aboriginal and 71% (N=10/14) of non-Aboriginal inmates reported not participating in any programs. The total survey reported 27% Aboriginal and 34% non-Aboriginal inmates who did not participate in any programs.

114 Twenty-five per cent (N=18/72) of Aboriginal and 22% (N=7/32) of non-Aboriginal federal inmates reported there was no one to talk to. For provincial inmates, 41% (N=28/68) of the Aboriginal and 7% (N=1/14) of the non-Aboriginal inmates reported

Federal Aboriginal inmates were slightly more likely to say they felt jail staff treated them differently than were provincial Aboriginal inmates (70% vs. 62%). This is an interesting finding because federal institutions have more Aboriginal programming than provincial institutions. When asked in a follow up question how the difference could be described, 64 of the 65 federal inmates who responded gave answers that can be categorized as "negative discrimination." Thus, the "different" treatment being expressed was not a reflection of different programming.

Table 28 - Do prison staff treat Aboriginal inmates differently?

	<u>Federal</u>			<u>Provincial</u>					
	<u>Yes</u>	<u>No</u>	<u>Total</u>	<u>Yes</u>	<u>No</u>	<u>Total</u>			
	N	%	N	%	N	N	%	N	%
Aboriginal	48	70%	21	30%	69	46	62%	28	38%
Non-Aboriginal	18	58%	13	42%	31	8	57%	6	43%
<u>Total</u>	66	66%	34	34%	100	54	61%	34	39%

Federal inmates had more difficulty obtaining temporary absences.¹¹⁵ For Aboriginal inmates, half in both levels of institutions reported their last parole application was granted (N=22/45 federal and N=20/40 provincial). On the other hand, almost two thirds of non-Aboriginal federal inmates had their last application rejected, 64% (N=14/22), while only 43% (N=3/7) of non-Aboriginal provincial inmates reported their last parole application was rejected. The result that

there was no one to talk to.

115 Fifty-seven per cent (N=26/46) of Aboriginal and 72% (N=13/18) of non-Aboriginal federal inmates reported their last application had been granted. Seventy per cent (N=32/46) of Aboriginal and 78% (N=7/9) of non-Aboriginal provincial inmates reported their last application had been granted.

Aboriginal inmates had fewer rejections than non-Aboriginal inmates is discussed in chapter 4.

In terms of treatment by the parole board, federal inmates were especially emphatic that the parole board treats Aboriginal inmates differently. Sixty-four per cent (N=14/22) of the non-Aboriginal and 92% (N=55/60) of Aboriginal federal inmates noted some difference or treatment that is very different. Eighty-four per cent (N=69/82) of federal inmates made this observation, compared to 72% (N=95/132) of total respondents.

Table 29 - Does the parole board treat Aboriginal inmates differently?
(comparing male federal inmates)

	<u>Very</u> <u>Different</u>		<u>Some</u> <u>Difference</u>		<u>A Little</u> <u>Difference</u>		<u>No</u> <u>Different</u>		<u>Total</u>
	N	%	N	%	N	%	N	%	N
Aboriginal	42	70%	13	21%	0	0%	5	8%	60
Non-Aboriginal	8	36%	6	27%	4	18%	4	18%	22
<u>Total</u>	50	61%	19	23%	4	5%	9	11%	82

The above figures show that federal and provincial inmates do have different experiences in the justice system, and surveys of inmates must take those differences into account. It is beyond the scope of this paper to undertake a thorough analysis of the differences between federal and provincial institutions.

SUMMARY TO PART ONE OF THE THESIS

Part One of this thesis is a presentation of the findings of the Manitoba Inmate Survey. I believe the most significant findings are that both Aboriginal and non-Aboriginal inmates believe Aboriginal inmates are treated differently at sentencing, in jail, and at the parole board. Other Manitoba data show that Aboriginal inmates do receive different and more negative treatment at bail and sentencing and that seriousness of offense and prior record do not adequately explain these differences.

Another important finding is that the large majority of Aboriginal inmates believe their culture is not respected in jail. Aboriginal inmates want to participate in ceremonies and programs that involve their traditional religions. Inmates feel they have no place to take complaints about their treatment in jail, particularly in provincial jails. Other significant findings are:

- Aboriginal inmates become involved with the criminal justice system at an earlier age, have more family separation and more family members who have been in jail;
- crime problems are most acute in urban areas and young Aboriginal males migrating to the city are a special "at risk" group;
- Aboriginal languages are spoken by the majority of Aboriginal inmates, especially rural. Aboriginal inmates understood the processes they are involved in less well, the police were less likely to explain their rights to them and lawyers were less likely to explain the court process to them;

- Aboriginal inmates were more likely to be taken directly to jail, waited longer to see a judge and waited longer for their bail hearing;
- Aboriginal inmates spent less time with their lawyers and were more likely to be represented by Legal Aid;
- the same proportion of Aboriginal and non-Aboriginal inmates had previous incarcerations, although among this group Aboriginal inmates had more previous incarcerations;
- Aboriginal inmates were more likely to plead guilty, to feel pressure to plead guilty and most were offered lighter sentences to plead guilty;
- almost half of the inmates thought the sentences they received were fair but more than a third of those who did not think the sentences were fair thought their offenses did not deserve a jail term;
- most inmates wanted educational and vocational programs, programs relevant to the life they will be facing on the outside and most wanted to deal with their alcohol and drug problems; and
- the large majority of Aboriginal and non-Aboriginal inmates supported the idea of a separate Aboriginal justice system.

This survey raises a limitless number of questions that could be explored. Part Two of the thesis looks at other studies to see if they support the inmates' view that there is discriminatory treatment of Aboriginal persons by the justice system.

PART TWO

WHAT TO DO WITH THIS NEW INFORMATION?

CHAPTER 6 - 25 YEARS OF OFFICIAL STUDY

Part One of the thesis is a presentation of the findings of the Manitoba Inmate Survey, 1989. While the survey covers a very broad range of issues, for the purposes of this thesis, I am focusing on the inmates' assertions of discriminatory treatment in the justice system. Two-thirds of non-Aboriginal inmates and 78% of the Aboriginal inmates in the Manitoba Inmate Survey said Aboriginal inmates are treated very differently or with some difference at sentencing. Fifty-eight per cent of non-Aboriginal male inmates and 61% of Aboriginal inmates reported that jail staff treat Aboriginal inmates differently. Fifty-five per cent of non-Aboriginal inmates and 77% of Aboriginal inmates said the parole board treated Aboriginal inmates very differently or with some difference. Other findings based on the experiences of the inmates revealed differences at other stages in the criminal justice process as well.

My preoccupation is to see what evidence exists to support or refute the perception of discrimination. The existing data from Manitoba has been reviewed in previous chapters and offers strong support for the inmates' perceptions. What is the view of the government?

The federal Department of Justice issued a discussion paper in the fall of 1991 that asserted:

Research has persistently shown that aboriginal people, particularly aboriginal offenders, believe that aboriginal offenders are sentenced more harshly in Canadian courts than are non-Aboriginal offenders.¹

The discussion paper continued:

-
- 1 The Manitoba Inmate Survey shows non-Aboriginal inmates agree. The perception of the inmates is probably shared by a wide portion of the public. The report of the House of Commons Standing Committee on Aboriginal Affairs' 2nd report, "Unfinished Business: An Agenda For All Canadians in the 1990s," (Ottawa: Queen's Printer, 1990) cites a recent Angus Reid poll that found 57% of the general Canadian population feel that Aboriginal people are treated unfairly by the courts and 63% believe that Aboriginal people should have their own police and justice systems.

See W. Head and D. Clairmont, "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System," (Halifax, Royal Commission on the Donald Marshall Jr. Prosecution, 1989), p. 102: "The majority in both populations perceive some discrimination existing. Blacks, however, are about twice as likely as non-Blacks to perceive a great deal existing." P. 105: "... Blacks are more likely to report discrimination and prejudice in the criminal justice system - police and courts - than non-Blacks."

See also J. Hagan and K. Bummer, "Making Sense of Sentencing: A Review and Critique of Sentencing Research," *Research on Sentencing: The Search for Reform* vol. 2, A. Blumstein, J. Cohen, S. Martin and M. Tonry. eds., (Washington. D.C., National Academy Press, 1983), who describe a national survey of American adults in 1977. The data showed that black Americans were particularly likely to perceive minority offenders as receiving tougher sentences than whites. As well, over 80% of the respondents felt that being well-to-do should have no influence on sentencing, but fewer than 30% thought this was actually the case.

See J. Hagan and C. Albonetti, "Race, Class, and the Perception of Criminal Injustice in America," *American Journal of Sociology*, 88, 2, (Sept. 1982): 329, at p. 343: there is "persistent and often striking influence of race on the perception of criminal injustice ... These perceptions of injustice are largest for those items involving law enforcement officials/police ... and for the item involving courts not treating blacks and other minorities the same as whites."

On the surface these perceptions are at odds with recent research on sentencing patterns which has found no substantial differences in the sentencing and parole rate or in sentence length of aboriginals and non-aboriginals. There were no significant differences at the court level in making recommendations for community placements. The amount of time served in jail was the same for aboriginal as for non-aboriginal offenders. Both groups experienced the same parole rates.²

The re-incarceration rates were the same for both aboriginals and non-aboriginals. Canadian data on sentence and fine default admissions to provincial, territorial and federal correctional institutions show equal or marginally shorter sentence lengths for Aboriginal offenders. What these data may mask is that apparently equal sanctions may be experienced unequally because of cultural differences and differences in circumstances.³

The discussion paper fails to identify its sources and conveys an impression that there is an absence of discrimination in the justice system - the problem is with cultural differences and different circumstances. For many persons, this might be perceived as blaming the victim.⁴ The question posed by Part Two of this thesis

-
- 2 These two sentences about equal time served and especially about equal parole rates are baffling to me. It is difficult to see how these sentences can be considered the truth of the situation, given contrary findings from a number of sources - see pp. 75-82 above, 286-294 and 304-312 below. The only explanation I can think of is that the sentences are referring selectively to studies, possibly studies from provincial jails re: parole, which possibly compare only jail sentences for the same charges, excluding comparisons of rates of receiving non-jail sentences for similar charges, and excluding comparisons of persons not charged or who received different charges for similar facts.
 - 3 "Aboriginal People and Justice Administration - A Discussion Paper," (Ottawa: Department of Justice, 1991), p. 53. Despite this spirited defence, the Discussion Paper, in the Message from the Minister of Justice, says at p. i: "It is undeniable that our system of justice is not working for aboriginal people."
 - 4 See P. Havemann et al., *Law and Order for Canada's Indigenous People*, (Regina: School of Human Justice, 1985), p. xii: "description of the relationship between Indigenous peoples and the police center around 'blaming the victim.' ... Indigenous peoples, rather than police actions, are the object of analysis."

is whether there is a foundation for the impression created. Are the inmates correct⁵ or is the federal government correct?

This chapter reviews the findings of numerous public inquiries into how the justice system treats Aboriginal people. Chapter 7 reviews the empirical difficulties in finding discrimination and chapter 8 discusses where discrimination exists in the process.

I have chosen to separate the existing research of the justice system's treatment of Aboriginal people into two broad categories: "official" studies (generally, government commissioned task forces and public inquiries) and other research. While these categories may be somewhat arbitrary, they do help to make the huge body of literature more manageable and help distinguish between those studies that ostensibly carry extra weight because they are specifically commissioned, with acknowledged experts chosen to head them, from those studies that originate from individuals without any involvement from the government or professional associations. In conducting this review, I have come to the conclusion that officials tend to be tentative, making incremental ("band-aid") recommendations, and that other statistical studies have very substantial limitations that often are not acknowledged.

Most important, both the official and statistical studies represent a very long period of research by non-Aboriginal persons that are only now coming to the conclusion that the solutions can be found in what Aboriginal people have been

5 See J. Ekstedt and M. Jackson, "Justice in Sentencing: Offender Perceptions," (Ottawa: Canadian Sentencing Commission, 1988), whose survey of B.C. inmates reported many similar perceptions to those found in the Manitoba Inmate Survey.

calling for the entire time - Aboriginal control of their own communities. The large body of non-Aboriginal research may be seen as producing delay and confusion and as having been unnecessary. In my view, this judgment also applies to the Manitoba Inmate Survey, except that its saving feature is that it provides a forum for Aboriginal persons to reiterate their concerns about the justice system.

Introduction to the reports

The term "official reports" is meant as a way to identify government sponsored or directed research. This review will focus primarily on "independent" studies, such as public inquiries, royal commissions, task forces of non-departmental persons, parliamentary committees and so on. Canadian Bar Association committee reports are included here because they are "official" statements from one of the most important groups in the justice system - lawyers.

It should be noted that the vast majority of the persons writing these reports are white males with deep connections to the existing justice system,⁶ with

6 There has been noteworthy Aboriginal involvement in some of the studies. Gilbert Monture was Project Committee Chairperson of the landmark Canadian Corrections Association report *Indians and the Law, a survey prepared for the Hon. Arthur Laing*, (Ottawa: Department of Indian Affairs, 1967). Aboriginal people were very well represented at both the 1973 Conference on Northern Justice - *Report of the Conference on Northern Justice*, Sept. 30-Oct. 5, 1973, M.S. Lord Selkirk II, Manitoba and the 1975 National Conference on Native Peoples and the Criminal Justice System - *Native Peoples and Justice*, Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, both held in Edmonton, Feb. 3-5, 1975. (Ottawa: Solicitor General of Canada, 1975). Aboriginal people fully controlled the Metis and Non-Status Indian Crime and Justice Commission, *Report*, (Ottawa: Native Council of Canada, 1977). The Osnaburgh-Windigo Tribal Council Justice Review Committee of three persons had one Aboriginal representative: see A. Grant, Chairperson, Osnaburgh-Windigo Tribal Council Review Committee, *Report*,

available data being provided almost exclusively by the existing justice system. Despite this, the reports are independent in the sense that the authors are usually not employed directly by government, and in the case of judges, academics and lay persons, will suffer few consequences by being critical of the justice system.

The various inquiries and reports had a variety of reasons for being commissioned by government. Often there were shocking and tragic events. In Nova Scotia, Donald Marshall Jr. was found to have been wrongfully convicted and imprisoned for 11 years for a murder he did not commit.⁷ In Manitoba, Helen Betty Osborne was brutally murdered and of her four assailants, two were charged and only one convicted - 16 years after her death. John Joseph Harper was killed in an incident with a police officer after he exercised his right not to identify himself. The police department gave an immediate exoneration of the officer involved.⁸ During the Aboriginal Justice Inquiry's review of the Osborne and Harper cases, two other Aboriginal persons, Jason Daniels and Patrick Dan De La

(Toronto: Department of the Attorney General, 1990). The Alberta Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta had seven members, with two Aboriginal persons: see Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, R. A. Cawsey, Chairperson, *Justice on Trial* vol. I, (Edmonton: 1991). Manitoba's Aboriginal Justice Inquiry had an Aboriginal person as Co-Commissioner: see A. C. Hamilton and C. M. Sinclair, Commissioners, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, *The Justice System and Aboriginal People*, volume 1, *The Deaths of Helen Betty Osborne and J. J. Harper*, volume 2, (Winnipeg: Queen's Printer, 1991).

7 T. A. Hickman, Chairperson, Nova Scotia Royal Commission on the Donald Marshall Jr. Prosecution, *Report*, (Halifax: 1989).

8 A. C. Hamilton and C. M. Sinclair, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 2, *The Deaths of Helen Betty Osborne and John Joseph Harper*, (Winnipeg: Queen's Printer, 1991).

Ronde were shot by police in Manitoba (to the neck and head respectively), though they recovered from their injuries.

In Northwest Ontario, Stanley Shingebis was arrested for being drunk in public. Between arrest and release he suffered injuries that resulted in him becoming a quadriplegic.⁹ In southern Alberta, the Blood Tribe wanted answers to more than 100 sudden deaths they felt had not been adequately explained, most of these occurring during the 1980s.¹⁰

In addition to the above incidents, there have been a number of confrontations surrounding non-violent Aboriginal blockades and police attempts to dismantle the blockades, resulting in considerable community bitterness.¹¹ There have also been studies examining cases of police abuse and police shootings of members of other visible minorities.¹² There have been suicides, self-mutilations and other deaths in custody. The incidents have occurred across the country, from Nova Scotia to British Columbia to Baffin Island to Toronto. Indeed, these kinds of incidents are not confined to Canada. Australia has just completed a review of approximately 100 Aboriginal deaths in custody.¹³

9 A. Grant, Chairperson, Ontario, Osnaburgh-Windigo Tribal Council Review Committee *Report*, (Toronto: Department of the Attorney General, 1990).

10 C. H. Rolf, Commissioner, Alberta, Commission of Inquiry on Policing in Relation to the Blood Tribe, *Report*, (Edmonton: 1991).

11 For one example, see *Ibid.*

12 For one example, see Clare Lewis, Chairperson, Ontario Race Relations and Policing Task Force, *The Report of Race Relations and Policing Task Force*, (Toronto: 1989).

13 Elliott Johnston, Commissioner, Australia Royal Commission into Aboriginal Deaths in Custody, *National Report*, (Canberra: Australian Government Publishing Service, 1991).

It would be naive to think that these incidents did not happen in the past. The difference is that governments now feel required to be seen to be doing something about such incidents, even if "doing something" only means commissioning a study.

Underlying all of these incidents is the relentless and shocking poverty afflicting Aboriginal communities. All manner of socio-economic conditions have been referred to - from crowded, substandard housing, to shorter life expectancy, lower formal educational attainment, more sudden deaths, lower income and higher unemployment. In justice system issues, Aboriginal communities experience more crime, have more victims of crime, especially victims of family violence, and have more of their members in jail than non-Aboriginal communities.

Recent developments have added to the impetus for studying these issues. The *Charter of Rights and Freedoms* has created a new awareness of the notion of rights and equality. Section 35 of the *Constitution Act, 1982* recognizes "existing aboriginal and treaty rights" and entrenches them in the Constitution. The subsequent first ministers' conferences focused public attention on the nature of those rights. The Supreme Court of Canada has found that federal and provincial governments have a fiduciary duty to Aboriginal peoples.¹⁴ Aboriginal causes have achieved national attention through Elijah Harper's role in defeating the Meech Lake constitutional proposals, through the summer of armed confrontation at Oka, Quebec and through the ability of the Assembly of First Nations to gain recognition in the national media.

¹⁴ See *Guerin v. R.*, [1984] 2 S.C.R. 335 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

The study that is often referred to as the one that brought the issue of Aboriginal people and criminal justice to national attention is the 1967 report of the Canadian Corrections Association to the Minister of Indian Affairs (sometimes known as the *Laing Report*).¹⁵ Since then there have been many reports on a regular basis over the past 25 years, but the last five years have seen a virtual explosion of studies. This is testimony to the increasing ability of Aboriginal peoples to bring their concerns to the attention of the general population.

In 1973, a conference on Northern Justice was held in Manitoba.¹⁶ At the Manitoba conference were Ovide Mercredi, Elijah Harper and Murray Sinclair, all of whom attained national prominence in Aboriginal issues in the late 1980s and early 1990s. These individuals know first-hand the frustration of recommendations gone unimplemented. The 1973 conference produced a variety of recommendations that were repeated from that point forward, and was a significant contributor to the work of the 1975 joint National and Federal-Provincial Conference on Native Peoples and the Criminal Justice System.

The 1975 conference was held in Edmonton and was attended by all the Attorneys General and Solicitors General of the provinces, the federal Solicitor

15 Gilbert Monture, Project Committee Chair, Canadian Corrections Association, *Indians and the Law, a survey prepared for the Hon. Arthur Laing*, (Ottawa: Department of Indian Affairs. 1967). Another Indian Affairs report is sometimes credited with bringing Aboriginal issues generally to national attention: H. B. Hawthorn, ed., *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies*, vols. 1 and 2, (Ottawa: Department of Indian Affairs and Northern Development, 1966).

16 *Report of the Conference on Northern Justice*, Sept. 30-Oct. 5, 1973, M.S. Lord Selkirk II, Manitoba.

General and the Minister of Indian Affairs, among others. If ever a group was assembled that had the power to effect the necessary changes, this was it. Two of the participants, Howard Pawley and Roy Romanow, later became premiers, but even these lofty positions did not produce significant change.¹⁷ Another participant in the 1975 conference, T. A. Hickman, went on to become the Chief Justice of Newfoundland and the Chairperson of the Royal Commission on the Prosecution of Donald Marshall Jr.

The 1991 Alberta *Justice on Trial* report described the 1975 conference as "the most influential report with its recommendations being repeated in almost all reports up to the present."¹⁸ It is submitted here that the 1975 report did not expand significantly on the recommendations made eight years earlier in the *Laing Report* and that if influence is measured in terms of actual change, especially in the level of Aboriginal incarceration, the conference was not at all influential.¹⁹ Indeed, the 1975 report itself quotes a workshop report that raises this very problem.

17 At the time of writing Roy Romanow is still early in his first mandate.

18 R. A. Cawsey, Chairperson, Alberta, Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, vol. I, (Edmonton: 1991), p. 4-2.

19 For a partial list of developments that did occur following the conference, see B. W. Morse, "Native People and Legal Services in Canada," 1976, *McGill L. J.*, 504, at pp. 532-533. Developments included advisory councils, court worker programs, the Native Law Centre at the University of Saskatchewan, special constable programs and more Aboriginal justices of the peace appointed. These programs were implemented in different places and to varying extents. There was no coordinated approach and little demonstrable result.

For too long now natives have been called together in various places in Canada to discuss proposals for improving their respective situations. Invariably the results have been to call in [sic] new conferences to re-discuss the many issues that cropped up from the last. ... Also no commitments are ever extracted from the myriad of government officials, or those extracted are so general as to amount to a virtual mandate for inaction.²⁰

One of the results of the 1975 conference was a statement of general philosophy, with six guidelines, adopted by the Ministers of Justice. The guidelines might now be seen as a measure of failure:

1. Native persons should be closely involved in the planning and delivery of services associated with criminal justice and native peoples.
2. Native communities should have greater responsibility for the delivery of criminal justice services to their people.
3. All non-native staff in the criminal justice system engaged in providing services to native people should be required to participate in some form of orientation training designed to familiarize them with the special needs and aspirations of native persons.
4. More native persons must be recruited and trained for service functions throughout the criminal justice system.
5. The use of native para-professionals must be encouraged through-out the criminal justice system.

20 *Native Peoples and Justice*, Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, both held in Edmonton, Feb. 3-5, 1975, (Ottawa: Solicitor General of Canada, 1975), p. 17. See also a similar comment in the Metis and Non-Status Indian Crime and Justice Commission, *Report*, (Ottawa: Native Council of Canada, 1977), p. 4.

6. In policy planning and program development, emphasis should be placed upon prevention, diversion from the criminal justice system to community resources, the search for further alternatives to imprisonment and the protection of young persons.²¹

Justice on Trial summarized the "top ten recommendations" which appear in the twenty-two reports it reviewed. These essentially agree with the above six points and add four other items.

- More special assistance to Aboriginal offenders.
- More Aboriginal advisory groups at all levels.
- More recognition of Aboriginal culture and law in criminal justice system service delivery.
- Self-determination must be considered in planning and operation of the criminal justice system.²²

These recommendations have been continually repeated for 25 years, with very little response from governments. This is not to suggest that all of the reports are essentially the same. The more recent reports have been much more likely to find discrimination rather than simply saying it is an Aboriginal perception, to explain concepts of discrimination and equality, to explain differences between Aboriginal and non-Aboriginal cultures and approaches to justice, to discuss Aboriginal and treaty rights and to endorse some level of Aboriginal control of the justice system.

Despite these developments, there continues to be a reluctance to explain the connection between the history of discrimination imposed on Aboriginal persons

21 *Ibid.*, p. 38.

22 Cawsey, note 18, *supra*, p. 4-7.

by government with the conditions faced by Aboriginal persons today, to explain the connection between judicial and government treatment of Aboriginal and treaty rights with Aboriginal experiences in the criminal justice system or to endorse or explore in detail Aboriginal justice systems.

The need to understand discrimination

The majority of all inmates in the Manitoba Inmate Survey said Aboriginal inmates are treated differently at sentencing, in jail and at parole. The interviewers reported that the different treatment was almost invariably described as discrimination by the inmates. The Aboriginal inmates' access to lawyers was clearly more restricted than for non-Aboriginal inmates and they reported that Aboriginal spirituality was not respected.

The various studies make numerous findings of discrimination but only recently have the reports started describing the meaning of discrimination. An example of why it is important to understand what is meant by discrimination is provided by the 1991 Policing in Relation to the Blood Tribe Report.²³ The Blood Tribe submitted 105 cases of poorly explained sudden deaths to the inquiry for its review. The inquiry examined 13 in detail.

Some of the problems found in the cases examined were the following: officers making light of certain situations; delayed responses due to confusion over jurisdiction; files lying dormant; not assigning persons to take responsibility for some of the cases; failing to explain to those close to the deceased police

23 Rolf, note 10, *supra*.

procedures about searching for missing persons; failing to keep interested persons advised of the progress of investigations; failing to use interpreters when dealing with persons who have difficulty with English; failing to identify next of kin; inadequate notification of deaths to close relatives; making assumptions of alcohol abuse; devising theories and scenarios and not pursuing other possibilities; not making use of Aboriginal special constables; failing to check out leads; drawing hasty conclusions; failing to secure the area of the investigation; insensitivity; and generally giving many of the cases a low priority. Medical examiners made assumptions in filling out death certificates or relied too much on police theories.

Here are findings from one of the sudden deaths examined:

... because the missing person was a reserve resident, he was automatically perceived to be the responsibility of the Royal Canadian Mounted Police. The fact that he spent most of his time in the City of Lethbridge, going to school, going to the boxing gym, socializing, etc., was not even considered. The fact that the place he went missing from was Lethbridge was ignored in this case.²⁴

In another case, a 30 year old man died. He had been adopted into a non-Aboriginal family at one month of age. The police refused to give information to the man's adopted mother and sister because they were not blood relatives. In a different case, the police failed

to give any significance to the fact that Mike Eagle Bear was unconscious. Even noticing the head abrasion on lodging him in the cells did not trigger the alarm.²⁵

24 *Ibid.*, p. 29.

25 *Ibid.*, p. 65.

In yet another case:

The file notes indicated that Mrs. Many Bears had requested that police visit her because she was too upset to talk on the phone. It was [Constable] Paulter's evidence that he immediately phoned her for information instead.²⁶

In another case:

... Dr. Low refused to keep this man in hospital and directed the police to take him to cells and to observe him there. He was not a prisoner in any sense of the word. He was a medical problem and a patient at the hospital requiring medical treatment and observation. There is no doubt whatsoever that he should have been kept in the hospital. ... [T]he Interim Death Certificate is dated October 12, 1987 and ... is inaccurate with its circumstances. The deceased did not come to the hospital from cells for treatment. Dr. Low was aware of this ... [T]he final Death Certificate was not signed until March 25, 1988.²⁷

The Commissioner found that when dealing with Aboriginal persons, "police officers do not perceive the Native's true concern. Consequently, they do not give the Natives the full attention they deserve."²⁸ Further,

[s]ince the arrival of the police, and particularly after the signing of the Treaty at Blackfoot Crossing, a paternalistic attitude has developed towards the Indian by the Royal Canadian Mounted Police.²⁹

Given all of the above, what is remarkable about this report is that the Commissioner did not find any discrimination. The Commissioner frequently uses

²⁶ *Ibid.*, p. 73.

²⁷ *Ibid.*, pp. 83-84.

²⁸ *Ibid.*, p. 106.

²⁹ *Ibid.*, p. 177.

words such as "unfortunately" and "regrettably" when describing police errors. There is no discussion of systemic discrimination.

The Commissioner of this inquiry believes from the evidence before this inquiry that there is no *conscious* bias or racial discrimination evidenced in the treatment of the Blood Indians by the Royal Canadian Mounted Police.³⁰

A certain insensitivity was perceived in some investigations, however, the Commissioner does not conclude this behaviour to be a deliberate act to offend or show disrespect. *It is a perceptual matter for the Blood Indians* rooted in their culture which is foreign or certainly unknown to the police officer.

Some concerns about the completeness of investigations were valid, but this was not due to bias or racism, but rather a criticism of the thoroughness of the individual officers involved. ... That police investigations are in some way flawed or incomplete when Native people are involved *is a Native perception* that both Indian and police must tackle ... in this way the "rumours" of bias or racism will be laid to rest ...

Investigations were not always complete or thorough though this was because of assumptions made regarding alcohol. ... The Commissioner believes the bias was related to alcohol abuse and was not motivated by racial concerns. ... The evidence disclosed time and time again, that even those police officers in the field had gained only a superficial knowledge of the Blood culture.³¹ [emphasis added]

In the Manitoba Inmate Survey the inmates found "assumptions made regarding alcohol abuse" to be unacceptable stereotyping of Aboriginal persons by the parole board, as did the Aboriginal Justice Inquiry.³²

30 *Ibid.*, p. 178.

31 *Ibid.*, pp. 187-190.

32 A. C. Hamilton and C. M. Sinclair, Manitoba Public Inquiry into the Administration of Justice Aboriginal People, vol. 1, *The Justice System and Aboriginal People*, p. 472.

While Judge Rolf, Commissioner of the Inquiry into Policing in Relation to the Blood Tribe, understood cultural insensitivity to produce perceptual problems and rumours, the report of the Osnaburgh-Windigo Tribal Council Justice Review Committee finds the result of cultural misunderstanding is racism.

... [I]t is recognized that some Euro-Canadian police officers possess racist attitudes towards native persons. In some jurisdictions, studies have found that

a high percentage of police officers viewed natives as lazy and as drunkards, a perception which is significantly influenced by their pattern of contact with natives.³³

These racist attitudes stem from a lack of understanding and knowledge of cultural differences between natives and non-native people.³⁴

In his report, Judge Rolf discusses the *Indian Act* briefly, noting the injustices of the residential school system, pass system and attempts to destroy Indian spirituality. The Commissioner also notes that there is no private ownership of reserve land, which means it cannot be used for collateral to raise loans. The Commissioner concludes that there is "discrimination within the guidelines of the Act, based on wealth."³⁵ Such a finding is similar to saying the residential school policy discriminated based on education. The fact is, any discrimination in the *Indian Act* discriminates against Indians.

33 C. T. Griffiths and J. C. Yerbury, "Natives and Criminal Justice Policy: The Case of Native Policing," *Canadian Journal of Criminology*, 26, (1984), 148.

34 Grant, note 9, *supra*, p. 103.

35 Rolf, note 10, *supra*, p. 199.

Justice on Trial said this about Judge Rolf's analysis of discrimination:

The report of the Public Inquiry and [this] Task Force clearly differ on the issue of discrimination and racism. ... The Task Force acknowledges that Aboriginal people are victims of racism, discrimination and systemic discrimination, both from within the criminal justice system and from society at large, and its recommendations attempt to address this problem.³⁶

The differences between how Judge Rolf interprets cultural misunderstanding and its adverse consequences, compared to the Osnaburgh-Windigo Tribal Council Committee and the *Justice on Trial* Task Force, show that any analysis of how the justice system treats Aboriginal persons should begin with a discussion of what discrimination means. Another reason this is important is to determine how to test whether and where there is discrimination and what will be required to cure it. This can help the examiner move from describing Aboriginal perceptions to coming to a conclusion about the validity of those perceptions.

If discrimination means adverse impact resulting from the application of a neutral policy, then it is relevant to determine how neutral policies may have adverse impacts. This can mean looking for policies that are fair for most, but unfair in their application to some. Using English in court is fair for all those who speak English, but not for others.

The approach can also mean looking for policies that are unfair for all, but have an especially adverse impact on Aboriginal people. For example, if a disproportionate number of Aboriginal people appear in the criminal courts, then

36 Cawsey, note 18. *supra*, vol. 1, p. 12-3.

any practices which result in excessive use of incarceration will have a disproportionate impact on Aboriginal persons. If the disciplinary process within jails violates basic principles of fundamental justice, there will be a disproportionate impact on Aboriginal people because they are disproportionately exposed to that process.

In its review of twenty-two reports, *Justice on Trial* decided not to review reports that did not contain Aboriginal specific recommendations and specifically chose not to review the Canadian Sentencing Commission or *Justice Behind the Walls*.³⁷ I submit that, for the simple reason that Aboriginal persons are over-represented in the criminal justice system, it is essential to understand how the whole system works in order to determine whether Aboriginal people suffer adverse consequences, whether or not a particular area is studied from an Aboriginal specific perspective.

37 *Ibid.*, p. 4-1. See Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (Ottawa: Supply and Services, 1986), and the Canadian Bar Association Committee on Imprisonment and Release, *Justice Behind the Walls*, (Ottawa: 1988).

Defining discrimination

The three reports that do the best job of defining discrimination are the Aboriginal Justice Inquiry (AJI) report, the Law Reform Commission of Canada report,³⁸ and *Justice on Trial*. The latter does not provide much explanation of discrimination but does make important assertions that systemic discrimination may arise from factors that are "geographical, economic, or cultural. However, it must be acknowledged that the application of uniform policies can have a discriminatory effect."³⁹

The report quotes Chief Judge Heino Lilles of the Yukon Territorial Court:

... [I]t is imperative to recognize the bias beyond bigotry: to recognize the individualized and personal values that intrude on the deliberations of any human being; to understand that there is no judgement of human behaviour that is not subjective; and to appreciate that objective sentencing is a myth that will never be achieved. ... The concept of equality in court proceedings is based on the premise that any law is equally applicable to, understood by and concurred in by all those subject to it. It is, in fact, an assumption of cultural homogeneity; it operates to maintain the existing socio-cultural order. In non-legal terms, the assumption is patently false.

The equal treatment by the justice system of those native people who are culturally and otherwise distinctive is, at best, problematic and, at worst, discriminatory.⁴⁰

38 Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice - Equality, Respect and the Search for Justice*, (Ottawa: 1991).

39 Cawsey, note 18, *supra*, p. 2-46.

40 *Ibid.*, pp. 5-5,6, from Heino Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities," (1990) 15 *Queen's L. J.* 327.

Justice on Trial revealed that the Department of the Attorney General of Alberta wrote to the Task Force:

It has *never* been suggested that in order for the process to be fair, the Prosecutor (or the judge or the defence lawyer for that matter) should receive formal training in any particular ethnic culture. *The Criminal Justice System is not ethnocentric.* [emphasis added]

The Task Force replies in no uncertain terms, "[t]he current Criminal Justice System is an ethnocentric system ..."⁴¹

The AJI provides a more extensive examination of the law concerning discrimination.⁴² It cites the 1948 *Universal Declaration of Human Rights* of the United Nations and other United Nations documents relating to discrimination. It refers to the 1960 Canadian *Bill of Rights*, the 1982 Canadian *Charter of Rights and Freedoms*, the 1987 Manitoba *Human Rights Code*, recent Supreme Court of Canada decisions on the issue⁴³ and the 1984 *Report of the Federal Royal Commission on Equality in Employment*.

The AJI discusses differing concepts of "equality," citing a presentation to the Royal Commission on Bilingualism and Biculturalism which discussed different understanding of rights between English and French Canadians, an article dealing

⁴¹ *Ibid.*, p. 8-40.

⁴² Hamilton and Sinclair, note 32, *supra*, pp. 97-101 and 111-113.

⁴³ Particularly *Andrews v. Law Society of British Columbia*, [1989] 2 W.W.R 289 (S.C.C.) and *R. v. Turpin et al.* (1989), 69 C.R. (3d) 97 (S.C.C.).

with different conceptions of self between men and women⁴⁴ and an expression of the Aboriginal view of equality found in the 1988 *Report of the Task Force on Aboriginal Peoples in Federal Corrections*, which calls for respect to be given to the Creator's plans by respecting the differences and maintaining harmony between peoples (red, white, yellow, and black).

The result of this discussion are the following ideas:

- Findings of discrimination do not require finding an intent to discriminate.
- Evidence of adverse impact suggests the existence of discrimination.
- Neutral laws, policies and practices can and sometimes do discriminate.
- Identical treatment can produce serious injustice and unequal treatment.
- The criminal law does not require a blind application of a policy of "identical treatment for all." In fact, there already exists a wide variety of legal regimes in Canada, including the civil law system in Quebec; unique *Indian Act* courts; provincial differences in the application of the *Criminal Code*; different procedures for summary and indictable offenses; differences in procedures under provincial legislation and the *Young Offenders Act*; and a separate criminal justice system applying to the Canadian military.
- Different persons and peoples have different conceptions of self, rights, relationship to groups and equality, and these differences must be recognized and respected.
- Equal treatment requires making reasonable accommodation for differences based on ancestry, religion and culture.

44 Sarah Salter, "Inherent Bias in Liberal Thought," *Equality and Judicial Neutrality*, S. Martin and K. Mahoney, eds., (Toronto: Carswell, 1987), pp. 50-58.

In the Law Reform Commission's Report, the meaning of equal access to justice, equitable treatment and respect is the first substantive matter discussed in the report. The report reinforces the analysis in the AJI report and in *Justice on Trial*. The Commission states:

Any decision enforces some value. When the value enforced is that of the dominant group in society, however, it is easy for members of that dominant group to look upon the decision not as value-based, but as neutral. ... Identical treatment does not achieve equality in result. ... [O]ur substantive and procedural law must see to it that relevant differences are not ignored or treated as irrelevant. Instead, our law must recognize that these differences are sometimes crucial and, moreover, that true equality is more than mere formal equality identical treatment].⁴⁵

When examining the "official" reports for findings of discrimination, vocabulary is important. Where a report says there is unfairness or injustice in the system (whether or not it applies specifically to Aboriginal people), I argue this is a finding of discrimination, if there is an adverse impact on Aboriginal people. I also contend that an adverse impact will exist where the Aboriginal persons are exposed to the unfairness or injustice in numbers greater than their proportion of the general population.

There will also be unfairness where a practice or law discriminates against particular groups, such as the poor, the illiterate, the non-English speaking, the transient and the geographically remote. Aboriginal people are disproportionately represented in such groups.

45 Law Reform Commission of Canada, note 38, *supra*, pp. 10-11.

When a report finds applicable laws are not followed in practice, it is submitted this is a finding of discrimination. When a report finds facts that reveal adverse impact, but the report's analysis does not recognize it as discrimination, my view is that the report did find discrimination, based on a better understanding of what discrimination is. Using this premise, it can be said that the Policing in Relation to the Blood Tribe report did find discrimination, the Commissioner simply did not recognize it as such.

Four contexts of discrimination

It is important to recognize discrimination in particular contexts. Four important contexts for Aboriginal issues are:

- (a) differences in thought and philosophy between Aboriginal and non-Aboriginal people which the non-Aboriginal system fails to accommodate;
- (b) discrimination affecting Aboriginal and treaty rights that relates to the conditions in the criminal justice system;
- (c) the relationship between past discrimination and today's conditions; and
- (d) discrimination specific to the present operation of the criminal justice system.

The next part of this chapter will discuss public inquiry findings in these four contexts.

It is also important to recognize that there are four different kinds of discrimination which can occur within any given context:

- (a) overt discrimination by individuals;
- (b) unintended discrimination by individuals;
- (c) overt discrimination by the system; and
- (d) unintended discrimination by the system.

Each of these categories has, in turn, important sub-categories:

- (a) discrimination explicitly or directly against Aboriginal persons;
- (b) discrimination against sub-groups in which Aboriginal persons are over-represented; and
- (c) unfairness against the entire group of persons entering the criminal justice system, a group in which Aboriginal persons are over-represented [(c) might be considered just a specific example of (b)].

The result is that anyone looking solely for explicit singling out of Aboriginal people will miss all the other kinds of discrimination.

Cultural differences

One of the contexts of discrimination that must be understood is differences between Aboriginal and non-Aboriginal peoples. These differences include language and concepts, methods of communication, ethics of behaviour and different philosophies of justice. Understanding these differences is essential if Aboriginal people will be able to benefit from their rights and if decision-makers are able to properly understand what Aboriginal people are saying or reasons for their behaviour. Perhaps more importantly, understanding these differences is essential before the system can learn how to make reasonable accommodations for

those differences. Failure to understand the differences will inevitably result in discrimination and adverse impact.

While the various reports have all recommended cross-cultural training, the recent reports are starting to provide some of that cross-cultural training themselves. They are starting to explain Aboriginal and non-Aboriginal differences. Again, the Aboriginal Justice Inquiry leads the way, making the explanation of Aboriginal concepts of justice its second chapter. The Task Force on the Criminal Justice System and its impact on the Indian and Metis People of Alberta also provides a chapter on Aboriginal culture, although it is a very brief discussion that appears near the end of the report.⁴⁶ Cultural differences are also discussed, although briefly, in many of the other reports, including the reports of the Law Reform Commission of Canada, Task Force on Aboriginal People in Federal Corrections, Task Force on Federally Sentenced Women, Osnaburgh-Windigo Tribal Council Justice Review Committee and the House of Commons Special Committee on Indian Self-Government in Canada (Penner Report).

It is beyond the scope of this paper to provide a thorough review of the various cultural differences that exist. This discussion will touch on only a few key elements to reinforce that Aboriginal peoples are different and failure to accommodate those differences is a source of discrimination.

Aboriginal justice is based on oral understandings of the Creator's plan for balance and harmony, and on customary, relatively simple procedures. This is one reason why the connection between Aboriginal and treaty rights and the rest of the

⁴⁶ Cawsey, note 18, *supra*, chapter 9.

justice system must be understood. The importance of the land goes far beyond economic opportunity for Aboriginal people. This is what the Nishga Tribal Council told the Parliamentary Special Committee on Indian Self-Government in Canada:

The land, language and laws of our culture cannot be separated. Everything for the Nishga people - our way of life, our means of earning income, our relationships with each other and with the rest of the world - are all based on our ownership of the land.⁴⁷

Aboriginal law tends not to separate laws into discrete categories such as civil, criminal, regulatory, and so on. The focus is on recognition of the lack of harmony and the restoration of harmony. Atonement and compensation are usually stressed.⁴⁸ Once this is achieved, the offender is considered whole again and the stigma is removed. Traditional Aboriginal justice does not reserve decisions to "professionals," use specialized forces such as police or use jails. It accepts and encourages community participation, so that shame, ridicule and ostracism are effective "penalties." "Hearsay" evidence is not excluded. Aboriginal justice does not accept that anyone can know the "whole truth," but that understanding each person's perception of the truth is a better way to understand particular circumstances.

Modern non-Aboriginal justice is based on written laws, divided into a wide variety of hierarchies and categories, with a myriad of formal, complex procedures. It seeks to punish and control behaviour and generally excludes the

47 Keith Penner, Chairperson, Canada, Special Committee on Indian Self-Government in Canada, *Second Report to the House*, (Ottawa: 1983), p. 105.

48 Hamilton and Sinclair, note 32, *supra*, p. 27.

victim. Rehabilitation is a secondary objective at best. The stigma of criminality continues long after the event and the serving of the sentence. Non-Aboriginal justice distances itself from the community by using professionals, specialized agencies and exclusionary rules of evidence. It is focused on determining the facts about the past and believes that people can know the "whole truth," or at least, all the truth that matters.

Aboriginal languages and concepts of justice do not have literal words for "guilty," "lawyer," "police," "judge," "probation," and many other fundamental terms in the non-Aboriginal justice system. Instead, there are substitutes such as "are you being blamed?,"⁴⁹ "did you do it?"⁵⁰ (for guilt), "the man who begs for someone" (for lawyer),⁵¹ "someone who catches you as you run away" (for police), "the person making the decision"⁵² (for judge), and "dragging a rope behind the offender" (for probation).⁵³ Words for "arrest" and "accused" carry a presumption of guilt when translated into some Aboriginal languages.⁵⁴ Aboriginal persons and languages give less attention to details of measurement, time of day, house numbers and so on. The differences in language and concepts must not be under-emphasized. No understanding of the law or of rights, or of an

49 *Ibid.*, p. 38, citing Bernard Francis, giving evidence to the Royal Commission on the Donald Marshall Jr. Prosecution.

50 *Ibid.*, p. 38, citing Art Wambidee.

51 F. Ahenakew, C. King, C. Littlejohn, "Indigenous Languages in the Delivery of Justice in Manitoba," (Winnipeg: Aboriginal Justice Inquiry, 1990), p. 32.

52 Hamilton and Sinclair, note 32, *supra*, p. 44, citing Barbara Whitford.

53 *Ibid.*, p. 43, citing Art Wambidee.

54 *Ibid.*, p. 44.

individual's evidence, can be adequate without a thorough understanding of the language used.⁵⁵

[S]uch issues raise questions of whether a First Nations accused, functionally illiterate in English, can *ever* receive a truly fair trial in a Canadian court for reasons that go far beyond any question of the *bona fides* of the participants.⁵⁶ [emphasis added]

The AJI report cites the work of Mohawk psychiatrist Clare Brant,⁵⁷ who described cultural imperatives and ethics of behaviour. According to his theory, individuals are governed by these imperatives, they do not choose them. Generally, Aboriginal persons are governed by ethics of non-interference as a way to respect each individual's freedom. Non-Aboriginal persons routinely interfere. Almost the only non-Aboriginal persons seen in Aboriginal communities are "helpers," people who intervene - doctors, nurses, teachers, lawyers, police, child welfare workers and judges.

Other Aboriginal ethics require persons to be non-confrontational, to restrain expression of emotion and conflict, to avoid competition within a group, to share (and to value material and status equality), and to teach by example rather than by lecture (this is an extension of the ethic of non-interference). Another key value is respect.

55 On languages generally, see *Ibid.*, ch. 2, among others.

56 Grant, note 9, *supra*, p. 29.

57 Hamilton and Sinclair, note 32, *supra*, p. 29, and Clare Brant, "Native Ethics and Rules of Behaviour," *Canadian Journal of Psychiatry*, 35, (August 1990): 534.

A further difference is that Aboriginal people tend not to separate their values from their involvement in the legal system. One result is that Aboriginal people are less likely to plead not guilty when they have committed the criminal act. A belief in the relativity of truth, a value for respect, the ethic of non-confrontation and a lack of concern for minute detail, all contribute to Aboriginal people being more willing to agree to suggestive questioning - agreeing with the questioner shows respect for their apparent knowledge and is a way to avoid confronting the person.

Another discussion of cultural differences is found in the AJI's chapter on child welfare. It points out that Aboriginal concepts of "best interests of the child" take into account the best interests of the community, because the two cannot be separated. The community needs its children in order for the community to function properly and in order to provide the support the children will need. If the community breaks down, the child will have to deal with all of the negative stereotypes and lack of supports that situation will create.

Aboriginal child welfare agencies seem to place a higher value on extended families and are better able to take advantage of informal support networks. Aboriginal child welfare approaches do not see apprehension as a final step, but only a temporary measure, with reunification of the family the priority at all times. Too often, it seems that once non-Aboriginal agencies have taken a child away from a family, reunification is not only forgotten, but actively denied. This is at the heart of non-Aboriginal adoption registry policies. Further, Aboriginal agencies, when faced with a choice between family and community relationships or lifestyle and educational opportunities, will emphasize the relationships. Non-Aboriginal agencies will often emphasize the lifestyle and educational

opportunities. These differences do not make either approach wrong, only different, and the differences must be respected.

The Law Reform Commission of Canada notes that Aboriginal peoples may have different concepts or needs concerning police (such as having a greater counselling and conciliation role).⁵⁸ Other differences that may be expected and should not cause alarm include:

Basic distinctions, such as that between criminal and civil law, might not be recognized. Communities may wish to safeguard rights and secure fairness in different ways than our system does.⁵⁹

The Law Reform Commission makes the point that cultural differences have more to do with procedure than concepts of right and wrong.

The conflict between Aboriginal values and the values expressed in the present justice system does not, to any significant extent, relate to deciding what behaviour is objectionable. ... Rather, the conflict arises in determining the appropriate response to objectionable behaviour.⁶⁰

As *Justice on Trial* points out, the issue in the majority of cases is to sort out the facts and this means understanding individual accused and witnesses. The interpretation of the law is rarely the most important consideration. This shows how important accurate cultural understanding is.⁶¹

58 *Ibid.*, p. 47.

59 *Ibid.*, pp. 18-19.

60 Law Reform Commission of Canada, note 38, *supra*, p. 40.

61 Cawsey, note 18, *supra*, p. 5-3.

As discussed earlier, the system is ethnocentric, as all decisions have values attached to them. The prevailing questions in the criminal justice system are:

"Is this a dangerous person?" and "Is this a person who can be trusted?" ... [These] are important, yet inherently subjective, questions. Such questions are necessarily influenced by one's own culture and one's own perception of other cultures.⁶²

We find that a system that seeks to provide justice on the principle that all Canadians share common values and experiences cannot help but discriminate against Aboriginal people ...⁶³

... [T]he legal profession's implicit convictions are so deep and so taken for granted that it is hard for people in this profession to see how it could possibly be different in the minds of another people.⁶⁴

It is the non-Aboriginal inability to understand that Aboriginal people have a highly developed sense of justice and set of cultural imperatives

that is at the heart of systemic discrimination. The justice system assumes much about the people who appear before it. The system assumes all persons will use the same reasoning when protecting their interests, when choosing their pleas, when conducting their defence, when confronting their accusers, when responding to detailed questions, and when showing respect and remorse to the court. It also assumes that punishment will affect all persons in the same manner.⁶⁵

62 Hamilton and Sinclair, note 32, *supra*, p. 100. Similar comments are made in Law Reform Commission of Canada, note 38, *supra*, p. 30.

63 Hamilton and Sinclair, note 32, *supra*, p. 86.

64 Cawsey, note 18, *supra*, p. 9-7.

65 Hamilton and Sinclair, note 32, *supra*, p. 36.

The concepts of adversarialism, accusation, confrontation, guilt, argument, criticism and retribution are alien to the Aboriginal justice system, although perhaps not totally unknown to Aboriginal peoples. In the context of Aboriginal value systems, adversarialism and confrontation are antagonistic to the high value placed on harmony and the peaceful coexistence of all living beings, both human and non-human, with one another and with nature. Criticism of others is at odds with the principles of non-interference and individual autonomy and freedom. The idea that guilt and innocence can be decided on the basis of argument is incompatible with a firmly rooted belief in honesty and integrity that does not permit lying. Retribution as an end in itself, and as an aim of society, becomes a meaningless notion in a value system which requires the reconciliation of an offender with the community and restitution for victims.⁶⁶

Even an ability to understand these differences provides no assurance that non-Aboriginal people will be able to successfully apply their learning. A phrase which captures this challenge is "you can talk the talk, but can you walk the walk?" The point is that understanding on an abstract level will not change the innate ethics of behaviour which govern all of us. A person cannot change their internal make-up and certainly cannot change it back and forth depending on whether one is dealing with an Aboriginal or non-Aboriginal person. It is possible to show non-Aboriginal persons how to be sensitive to cultural differences, but that will not make them behave in Aboriginal ways.

Even if they are sensitive, non-Aboriginal persons, especially white persons, cannot really know what it is like to go through life as an Aboriginal person, to be exposed on a daily basis to racism and negative stereotypes of their heritage.

⁶⁶ *Ibid.*, p. 37.

Given the above understanding of Aboriginal differences, it is clear that the current justice system makes almost no effort to accommodate those differences. The system requires Aboriginal people to behave in culturally foreign ways in order to derive equal benefit from the protection provided by the non-Aboriginal system. The system provides next to no cross-cultural training. The system provides almost no accommodation for Aboriginal languages. The inmates and other studies have said that Aboriginal spirituality is not respected in jails. All of this is discrimination.

Aboriginal rights and the justice system

The second context of discrimination, the relationship between Aboriginal and treaty rights and justice system discrimination, is rarely explored. In most cases, governments ask task forces to study the criminal justice system with no reference to Aboriginal and treaty rights in their requests. Other reports discuss Aboriginal and treaty rights with no reference to the justice system, especially the criminal justice system.

Understanding the relationship between Aboriginal over-representation in the criminal justice system and what has happened to Aboriginal and treaty rights is critical to understanding Aboriginal perspectives about the justice system. The justice system, through laws and court decisions, has routinely failed to recognize Aboriginal rights, failed to enforce treaty promises and failed to force governments to change their behaviour in the face of new constitutional provisions and Supreme Court decisions. The failure of Aboriginal and treaty rights to be recognized has left Aboriginal persons very bitter, and justifiably so. This analysis is at least 25 years old.

[Various studies] indicate that the abrogation of treaties and laws by the non-Indian majority encourages the questioning, in Indian eyes, of much of white man's law. This attitude applies not only to dealings with the government but with white people in general.⁶⁷

The most important provision relating to Aboriginal rights is s. 35 of the *Constitution Act, 1982*. This section recognizes and affirms existing Aboriginal and treaty rights. It states:

- 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, the "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
 - (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
 - (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to subsection (1) are guaranteed equally to male and female persons.

Part of the problem with s. 35 is that Aboriginal rights are poorly defined by our courts, constitution and legislation. This should not be surprising given the prohibitions that prevented Aboriginal persons from pursuing the enforcement of their rights. Some of the most influential cases involving Aboriginal rights have resulted when no Aboriginal representation or viewpoint was present⁶⁸ or have been reduced to absurdities, such as considering whether Aboriginal hunting rights are violated by the *Migratory Birds Convention Act* by debating whether the bird

67 Monture, note 15, *supra*, p. 19.

68 e.g., *St. Catherine's Milling & Lumber Co. v. R.* (1888), 14 A.C. 46 (P.C.).

in question was tame or wild.⁶⁹ Section 37 of the *Constitution Act, 1982* (and the s. 37.1 amendment) resulted in a series of first ministers meetings with Aboriginal representatives to define those rights. These conferences failed to produce a definition of existing Aboriginal and treaty rights.

The "official" reports have defined rights where courts and politicians have failed. The AJI report describes Aboriginal rights this way:

The most fundamental of those rights is the right to their identity as Aboriginal people. Since that identity was derived largely from the land they used and occupied before the arrival of the Europeans, they believe they had - and still have - certain rights in regard to the land, including continuing habitation and use of the land, whether it be for hunting, fishing, trapping, gathering food and medicines, or for any other traditional pursuits.

This right to identity also implies the further right to self-determination, for it is through self-determination that a people preserves their collective identity. The right to self-determination can take several forms. It includes, among other things, the right of a child to be raised in his or her own language and culture, and the right to choose between an Aboriginal and a non-Aboriginal way of life. This latter right is violated if the traditional economy of an Aboriginal group is disrupted severely or damaged by the encroachments of a civilization that exploits or abuses natural resources on a large scale, such as a hydro-electric project, a pipeline or a strip mine. Further, the right to self-determination implies the right to take charge of one's own affairs so as to ensure effectively that Aboriginal identity and culture will be respected in the political sphere. These are the Aboriginal rights of the indigenous people of Canada.⁷⁰

69 *R. v. Sikyea*, [1964] S.C.R. 642.

70 Hamilton and Sinclair, note 32, *supra*, p. 116.

Aboriginal people consider the treaties to be agreements made between sovereign nations. Aboriginal signatories agreed to give up only their rights to certain tracts of land, not their right to govern their own lives and affairs. ... Aboriginal people in Manitoba firmly believe that despite, or perhaps more properly, because of the treaties they entered into with the Crown, they were to have been allowed to retain part of their land, to retain their identities, their cultures, their languages, their religions and their traditional ways of life, including their laws and their systems of government. Those things have been denied to them.⁷¹

The various promises made under treaties were explained to and understood by Indians in broad, conceptual terms, and were to include a commitment to the economic development of reserves and to education of the members of their community, and a respect for the tribe's traditional form of government. The treaties, according to the understanding of Aboriginal peoples, were arrangements between two groups who had agreed to share the land and respect each other's autonomy. Aboriginal people wanted to choose and direct how Western influences would affect them. They never got the chance.⁷²

I argue that of all the forms of discrimination existing in the justice system, the failure to recognize, uphold and enforce Aboriginal and treaty rights is the most fundamental act of discrimination. This failure amounts to a refusal to apply the rule of law to Aboriginal peoples. The most basic principle of our legal system, that laws govern and will be respected, does not apply when it comes to Aboriginal rights.

Our whole society is made up of sub-groups who have special rules that apply to them. This includes farmers, corporations, professional groups, unions, criminally accused persons, civil defendants, married persons, minors,

⁷¹ *Ibid.*, p.117.

⁷² *Ibid.*, p. 118.

francophones, etc. Virtually everyone is a member of some group that is subject to and benefits from special laws, so too Aboriginal persons. However, it is submitted that Aboriginal persons have considerably greater difficulty in having their rights upheld and in having their rights govern.

One example is discussed in the AJI report, where a Provincial Court judge ruled the treaty right to hunt was paramount to the *Migratory Birds Convention Act*. Nonetheless, the government continued to take the opposite view and continued to prosecute others while it appealed the decision. The government lost both in the Court of Queen's Bench and in the Court of Appeal.⁷³

The government was simply flouting the law, as it had no authority whatsoever to ignore this decision. ... [There is a] regrettable and unlawful tendency of the federal and Manitoba governments to refuse to immediately honour decisions from our courts ...⁷⁴

The AJI report also describes the refusal of governments to change their practices following the Supreme Court's explanations of judiciary duty and Aboriginal fishing rights in the cases of *Guerin v. R.* and *R. v. Sparrow*.⁷⁵ There have been a number of other studies detailing the hurdles Aboriginal peoples have to leap in their attempt to obtain their rights.⁷⁶

73 *R. v. Flett*, [1991] 1 C.N.L.R. 140 (C.A.), [1989] 4 C.N.L.R. 128 (Q.B.), [1987] 5 C.N.L.R. 115 (Prov. Ct.).

74 Hamilton and Sinclair, note 32, *supra*, p. 159.

75 *Ibid.*, p. 160. See *Guerin v. R.*, [1984] 2 S.C.R. 335 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

76 On the injustices facing Aboriginal claimants in pursuing their claims, see Canadian Bar Association, Committee on Native Justice, *Aboriginal Rights in Canada: An Agenda for Action*, (Ottawa: 1988); "First Nations Submission on Claims," Ottawa: Assembly of

One of the hallmarks of judicial treatment of Aboriginal rights is that the courts have generally tried to avoid the questions as much as possible. It is a tragic irony that while the theory of sentencing calls for restraint in the use of imprisonment, for Aboriginal people, judicial restraint applies to the definition of their rights, contrasted with the all too frequent use of incarceration.

The theory of "Judicial Restraint" is nowhere more evident than in aboriginal rights cases where the courts have gone out of their way to avoid stating broad principles or going beyond the narrow issue raised by the case before them, presumably throwing these issues back into the political forum.⁷⁷

The simple fact that the treaties, let alone all of the other laws that apply to Aboriginal peoples, have never been translated into Aboriginal languages is an indication of how one-sided the treatment of Aboriginal rights is.⁷⁸ Indeed, the treatment of Aboriginal rights is so perverse that it is sometimes said Aboriginal rights must be ignored in order to ensure equal treatment of Aboriginal persons. This was the Government's stated intention in its 1969 White Paper on Indian policy. The discrimination against Aboriginal rights cannot help but affect Aboriginal perspectives of the entire justice system and provide evidence for how widespread discriminatory treatment of Aboriginal people is.

First Nations, Dec. 14, 1990; "Discussion Paper Regarding First Nation Land Claims," (Toronto: Indian Commission of Ontario, 1990); and Murray Coolican, Chairperson, *Living Treaties: Lasting Agreements*, Report of the Task Force To Review Comprehensive Claims Policy, (Ottawa: Department of Northern Affairs and Northern Development, 1985).

⁷⁷ Canadian Bar Association, *Ibid.*, p. 26. Similar comments are found in the report of Grant, note 9, *supra*.

⁷⁸ For this and Aboriginal language issues generally, see Grant, *Ibid.*

Past discrimination and its present-day effects

This is a context of discrimination that usually receives passing comment but little more. More often than not, the tone is simply one of regretfulness, without exploring how the past has influenced and created the conditions of today. The major exception to this is the AJI report, which devotes an entire chapter to the history of Aboriginal peoples and says this history must be understood before Aboriginal conditions in today's justice system can be properly appreciated.⁷⁹

The AJI described the various discriminatory policies Canada has inflicted upon Aboriginal peoples, primarily over the past century. For most of Canada's history, Aboriginal peoples were subject to Canadian law but were denied the opportunity to participate in the law-making process, being denied the right to vote.

The *Indian Act* defined "persons" as being individuals other than Indians. It alternatively induced and compelled Aboriginal persons to lose their status as Indians, based on their sex, who they married, whether they voted, whether they obtained university education, whether Indian veterans of the armed forces accepted benefits off reserve upon returning home and so on.

The "pass" system prohibited Indians from leaving their reserves without the permission of the Indian agents (even though there was no legal basis for this system). This prevented political organization and prevented parents and children from reuniting. Other laws prohibited Aboriginal persons from meeting in groups or making "riotous" demands on Indian agents, prohibited Indians from raising

⁷⁹ Hamilton and Sinclair, note 18, *supra*, chapter 3.

money to pursue land claims, and prohibited lawyers from accepting money to represent Indians without approval from the Solicitor General.

Aboriginal persons were prohibited from receiving lands that were being given free to European immigrants. Laws prohibited Indians from voting in elections (unless they renounced their status). Laws prohibited Indians from selling the products they produced in their own fields off reserve without permission from the Indian agent. The policy of Indian Affairs was to restrict Indians to peasant farming operations only, reserve lands could not be mortgaged to obtain sophisticated farming implements and the government would not provide them.

Laws destroyed the traditional political and governmental structures of the First Nations, deprived Indian women of a voice or a vote in the newly imposed structures and subjected the reserve governments to the control of the Indian agent, including the power to supervise elections, decide how often and where council meetings would occur, what would be on the agenda, and who was permitted to participate in the meetings. Any decisions made by Indian councils could be vetoed by the Minister of Indian Affairs.

Laws and practices gave each Indian Agent the power to instruct the police to lay charges, then authorized the Agent to sit in judgment of many of the charges in a special court established under the *Indian Act*.

The AJI described how the land bases of Indians were often illegally taken and often not provided in the amounts promised by the treaties in the first place. As well, the Department of Indian Affairs poorly administered the assets of the First Nations. Communities were forcibly relocated to suit the needs of white settlers,

large scale energy projects and sometimes simply for the convenience of Indian Affairs.

Laws were enacted to prohibit Aboriginal observance of their religions, particularly prohibiting many of their ceremonies. Other laws restricted traditional economies, particularly by restricting hunting, fishing, and harvesting.

The residential school system and child welfare practices resulted in Aboriginal children being forcibly removed from their families and communities and being subjected to environments that ignored their cultures, languages, values and family relationships. Policies that harm families continue to the present. A 1985 report, reviewing child welfare conditions in Manitoba in the 1970s and 80s, found "unequivocally that cultural genocide has been taking place in a systemic, routine manner."⁸⁰

The entire report, *No Quiet Place*, is a recounting of recent horror stories of the child welfare system, where Aboriginal parents have little hope of getting needed services or of preventing agencies from taking their children, and Aboriginal children have little hope of having their cultures or treaty rights respected or of maintaining contact with their families and home communities.

This history of unrelenting racism and discrimination is not an historical episode that can be dismissed as no longer relevant. The poverty and dependence of Aboriginal peoples can be tied directly to the dispossession from their lands and

⁸⁰ Edwin Kimmelman, Chairperson, Manitoba, Final Report of the Review Committee on Indian and Metis Adoptions and Placements, *No Quiet Place*, (Winnipeg: 1985), pp. 328-329.

destruction of their community structures. Anti-social behaviour is, in part, a result of not having the guidance of respected community forums, which were displaced by non-Aboriginal structures run by non-Aboriginal persons.⁸¹ As well, family separations resulted in children being deprived of loving environments and role models for parenting when they in turn became parents.

The dire economic circumstances and social breakdown faced by Aboriginal peoples was created by laws and government practices, and enforced in the criminal justice system. Many of these "historical" injustices continue. Land claims have not been settled, lands owed have not been provided, recognition of treaty rights, such as hunting and fishing rights, continue to be ignored. Non-Aboriginal laws continue to define who is and who is not an Aboriginal person. Non-Aboriginal child welfare systems continue to be the primary service agency in many Aboriginal communities and for Aboriginal persons living in non-Aboriginal communities. Aboriginal and treaty rights continue to be defined in the context of individual criminal cases, with judicial pronouncements and laws interpreted narrowly by government officials.

Perhaps most importantly, the social breakdown that has resulted is a significant contributor to Aboriginal crime.⁸² As well, the legacy of past policies has made Aboriginal persons over-represented in sub-groups that are discriminated against in the justice system - the poor, illiterate, non-English speaking, geographically remote, transient and so on.

81 Hamilton and Sinclair, note 32, *supra*, p. 35.

82 Monture, note 15, *supra*, p. 18. Similar comments are made by Kimmelman, note 80, *supra*.

The AJI gives this conclusion about past discrimination:

Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely "laundered" racial discrimination. It is untenable to say that discrimination which builds upon the effects of racial discrimination is not racial discrimination itself. Past injustices cannot be ignored or built upon.⁸³

The policy of cultural oppression is wrong. In 1967 it was recognized that "[t]he Indians and Eskimos of Canada have a great contribution to make, and their identity must be protected so all Canadians can share what they have to offer."⁸⁴ The result of the oppression has been to create conditions where, "for some Indians prison represents their only experience in social equality with non-Indians."⁸⁵

Discrimination in the operation of today's criminal justice system

The fourth context of discrimination for my purposes is the actual operation of today's criminal law. The inmates in the survey said that Aboriginal persons received different and worse treatment at sentencing, in jail and before the parole board. What have the official reports found?

83 Hamilton and Sinclair, note 32, *supra*, p. 109.

84 Monture, note 15, *supra*, p. 56.

85 *Ibid.*, p. 47.

Manitoba's Aboriginal Justice Inquiry provides the most detailed and comprehensive examination of how the justice system treats Aboriginal people and its conclusions are blunt and sweeping.

The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely to be denied bail, spend more time in pretrial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated. ... For more than a century the rights of Aboriginal people have been ignored or eroded.⁸⁶

Aboriginal peoples have experienced the most entrenched racial discrimination of any group in Canada. Discrimination against Aboriginal people has been a central policy of Canadian governments since Confederation. ... The discrimination against Aboriginal people by our governments and permitted by the general Canadian population represents a monumental symbol of intolerance.⁸⁷

In short, the current court system is inefficient, insensitive and, when compared to the service provided to non-Aboriginal people, decidedly unequal.⁸⁸

The Royal Commission into the Donald Marshall Jr. Prosecution made equally strong findings.

86 Hamilton and Sinclair, note 32, *supra*, p. 1.

87 *Ibid.*, pp. 96-97.

88 *Ibid.*, p. 249.

The criminal justice system failed Donald Marshall Jr. at virtually every turn.⁸⁹ ... [T]he evidence is once again persuasive and the conclusion inescapable that Donald Marshall Jr. was convicted and sent to prison, in part at least, because he was a native person.⁹⁰

... We are convinced that if Marshall had been White, the investigation would have taken a different course. We have no direct evidence to support this belief. It is our opinion based on our observation of many of the witnesses who appeared before us.

... If Marshall's treatment in this case occurred because he was a Native, then others Natives will have - and have had - similar experiences.⁹¹

Each component of the system - every check and balance - failed. ... The conclusion we have reached is that the system does not work fairly or equally. Justice is not blind to colour or status.⁹²

... [T]here is a two tier system of justice ... the system does respond differently, depending on the status of the person investigated. ... Officials in the Department of the Attorney General are more concerned about the career of a politician than the reputation of an Indian; they are quick to write superficial and unprofessional opinions that support not investigating or charging a politician yet search for reasons to limit compensation paid to an Indian for years of wrongful imprisonment; and they require substantially more likelihood of conviction before charging a politician than an Indian.⁹³

Other reports shared the conclusions of the Aboriginal Justice Inquiry and the Donald Marshall Jr. Prosecution. The findings of the Alberta Inquiry into Policy

89 Hickman, note 7, *supra*, vol. 1, p. 15.

90 *Ibid.*, p.17.

91 *Ibid.*, p. 162.

92 *Ibid.*, p. 193.

93 *Ibid.*, pp. 220-221.

and the Blood Tribe, the Task Force on the Criminal Justice System and its impact on the Indian and Metis People of Alberta, and the Osnaburgh-Windigo Tribal Council Justice Review Committee, discussed earlier in this chapter, support these findings of discrimination. There are others who agree as well.

The reality ... under current justice regimes is one of gross inequality of treatment for native people in which belies the theoretical model of treating natives equally. ... It would be, in our judgment, perverse to reject [new initiatives such as Aboriginal Justice systems] in the name of an idealised, and for native people, mythical model of equal justice.⁹⁴

Can it be said ... that the Aboriginal peoples of Canada have faced and continue to face, injustice within the legal and justice systems? The answer is clearly "yes."⁹⁵

[T]he present system fails the Aboriginal peoples and contributes to their difficulties.⁹⁶ Canada's current sentencing laws are archaic and inadequate ... in our view, the current regime fails to respect the Charter's guarantees of equality and fundamental justice in a number of important respects.⁹⁷

Cultural bias in the child welfare system is practised at every level from the social worker who works directly with the family, through the lawyers who represent the various parties in a custody case, to the Judges who make the final disposition in the case.⁹⁸ [U]nequivocally ... cultural genocide has been taking place in a systemic, routine manner.⁹⁹

94 Canadian Bar Association, Committee on Imprisonment and Release, *Locking Up Indians in Canada*, (Ottawa: Canadian Bar Association, 1988), pp. 76-77.

95 Canadian Bar Association, note 76, *supra*, p. 14.

96 Law Reform Commission of Canada, note 38, *supra*, p. 16.

97 *Ibid.*, p. 75.

98 Kimmelman, note 80, *supra*, p. 185.

99 *Ibid.*, pp. 328-329.

The above findings of the official reports provides very strong support for what the inmates are saying in the Manitoba Inmate Survey.

It now remains to examine what the official reports have to say about Aboriginal justice systems, an idea that received almost unanimous support from the inmates.

From involvement to control

The final topic that needs to be addressed concerning is the progression the official reports have made from recommending Aboriginal consultation and involvement in the justice system to Aboriginal control of the justice system, with recommendations that Aboriginal communities decide for themselves what the laws will be, including criminal law.

The 1967 report *Indians and the Law* stressed that attempts at assimilation are misguided. A final comment the study makes is: "One experiment that has been tried with success in Canada, but not frequently enough, is the use of Indian and Eskimo people in providing law enforcement, judicial and correctional services to their own people."¹⁰⁰ While this observation is vaguely worded, it becomes a measuring stick for other reports - to what extent do they call for Aboriginal control of justice services?

The 1973 Conference on Northern Justice, 1975 National Conference and Federal-Provincial Conference on Native Peoples and the Criminal Justice System,

100 Monture, note 15, *supra*, p. 57.

the 1975 Royal Commission on Family and Children's Law (B.C.) and the 1977 report of the Metis and Non-Status Indian Crime and Justice Commission all recommended much greater consultation with Aboriginal persons and participation of Aboriginal persons in the delivery of criminal justice system programs, but they did not recommend Aboriginal control of the justice system. The 1975 Edmonton conference recommended a peacemaker court, but this was the only recommendation not adopted by the federal-provincial Ministers meeting that followed the conference; instead, they referred it for further study. The 1975 B.C. Royal Commission did recommend external review boards, with at least two of the three members to be Aboriginal; Community Resource Boards with Aboriginal membership; and "[p]rovincial support for Indian autonomy in the implementation and provision of a program of preventive and statutory social services."¹⁰¹

One of the more remarkable illustrations of the progression that has (and has not) occurred in the reports can be found in the change of Justice Kirby's views. In his 1978 report, he wrote that the practice of having lay judges or a panel of lay persons advising a judge would be "incompatible with the concept of the equality of all before the law."¹⁰² In 1990, addressing the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, Justice Kirby stated he had changed his views and would support such a use of lay

101 T. Berger, Chair, "Native Families and the Law," Tenth Report of the Royal Commission on Family and Children's Law, (Vancouver: 1975).

102 W. Kirby, Alberta Board of Review, Provincial Courts, Report No. 4, *Native People in the Administration of Justice in the Provincial Courts of Alberta*, 1978, p. 31.

persons in the court process.¹⁰³ What is remarkable about this change is both that the change is identified and how modest the proposal is.

One of the strongest statements on Aboriginal control can be found in the 1983 report of the Special Committee on Indian Self-Government in Canada, commonly known as the Penner Report, after its chairperson Keith Penner. This report discusses a variety of issues relating to self-government, talks about inherent rights to self-government, the role of the *Royal Proclamation* of 1763, treaties and the recognition of the Aboriginal and treaty rights in the *Constitution Act, 1982*. It suggests a process by which Aboriginal self-government can be recognized.

[E]ach Indian First Nation government would assume as much jurisdiction as it wished, and the scope of its jurisdiction could be changed over time.¹⁰⁴

A First Nation's decision regarding the extent of its jurisdiction would be based on the First Nation's own assessment, "not on the opinion of bureaucrats that the band was sufficiently 'advanced.'" ¹⁰⁵ The report proposes:

Self-government would mean that virtually the entire range of law-making, policy, program delivery, law enforcement and adjudication powers would be available to an Indian First Nation within its territory.

The Committee agrees that full legislative and policy-making powers on matters affecting Indian people, and full social control over the territory and resources within the boundaries of Indian lands, should be among the powers of Indian First Nation governments.

103 Cawsey, note 18, *supra*, p. 4-5.

104 Penner, note 40, *supra*, p. 58.

105 *Ibid.*, p. 60.

The Committee therefore recommends that Indian First Nation governments exercise powers over a wide range of subject matters. ... A First Nation government should have authority to legislate in such areas as social and cultural development, including education and family relations, land and resource use, revenue-raising, economic and commercial development, and justice and law enforcement, among others. ...

The Committee foresees that for matters within exclusive Indian First Nation jurisdiction, the government concerned would have, under its constitution, full necessary power to make laws and set policy.¹⁰⁶

The Committee anticipates that a period of transition would be necessary for First Nations to exercise their full jurisdiction, but "[e]ventually Indian law codes and courts would be put in place,"¹⁰⁷ and "Aboriginal rights should predominate over any claims of non-members to protection under the *Charter of Rights*."¹⁰⁸

One important aspect of the Penner Report's analysis is that it is based on the rights to self-government of Aboriginal peoples because they are distinct peoples. This analysis by-passes any need to prove something is wrong with the justice system and indeed the Penner Report does not venture into that area of study. The Penner Report represents one of the strongest statements on Aboriginal control of laws and courts that can be enunciated. Reports since then have generally not been as strong, but do continue a progression to Aboriginal control from one of simple consultation.

106 *Ibid.*, pp. 63-65.

107 *Ibid.*, p. 66.

108 *Ibid.*, p. 110.

In 1988 the Canadian Bar Association Committee on Imprisonment and Release delivered its report *Locking Up Natives in Canada*. The report stresses the links between crime, poverty and colonization. It calls for that process to be reversed through the recognition of Aboriginal self-determination and provides a thorough discussion of Aboriginal justice systems. The members of the Committee

endorse the importance of legal pluralism within Canadian confederation ... encourage the development as pilot projects of working models of contemporary native justice systems ... [and] believe there is a sound constitutional basis for the development of parallel native justice systems.¹⁰⁹

Also in 1988, the Canadian Bar Association Special Committee on Native Justice released its report *Aboriginal Rights in Canada: An Agenda for Action*. This report focused on Aboriginal and treaty rights and recommends that the "entitlement of the aboriginal peoples of Canada to a distinct right of self-government should be explicitly guaranteed in the Constitution of Canada" and that "the right of self-government should be enforceable in the court."¹¹⁰ However, unlike the Penner Report, the Bar Association stops short of enunciating what powers are included in the right to self-government and instead says the matter should be left to constitutional negotiations.

In 1989 the Royal Commission on the Donald Marshall Jr. Prosecution released its report. One of its more important recommendations called for an Aboriginal criminal court to allow Aboriginal people some measure of direct control of the administration of justice within their communities. The Commission's recommendation was tentative, calling for a pilot project involving justices of the

109 Canadian Bar Association, note 94, *supra*, p. 107.

110 Canadian Bar Association, note 76, *supra*, pp. 43-44.

peace applying a limited range of Canadian criminal laws, whose jurisdiction would be based on archaic provisions of the *Indian Act*.¹¹¹ This recommendation would do no more than duplicate an existing system already operating on a few reserves in other parts of Canada. Nonetheless, the report recognized the unique justifications for an Aboriginal justice system and allowed for the development of more complete Aboriginal justice systems pursuant to negotiations between First Nations and Canadian governments.

Despite the tentative nature of its recommendation, the Commission acknowledged recent developments concerning Aboriginal and treaty rights and the unique position of Aboriginal peoples in Canada. The Commission did not require or look for statistical evidence concerning how the justice system treats Aboriginal people in coming to its recommendation.

There will be those who will say, "Why should the Natives get their own justice system?" The answer: "Because they are Native." ... The historical and cultural justification for establishing Native justice systems must override the fear of problems which might arise.¹¹²

In 1990, the Task Force on Federally Sentenced Women discussed the concept of Aboriginal justice systems but ultimately decided that the concept went beyond its mandate because it "is an integral aspect of the broader Aboriginal goal of self-determination."¹¹³

111 Hickman, note 7, *supra*, pp. 167-170. See Hamilton and Sinclair, note 32, *supra*, pp. 308-310 for a critique of courts under s. 107 of the *Indian Act*.

112 Hickman, *Ibid.*, pp. 168-169.

113 Task Force on Federally Sentenced Women, *Creating Choices*, (Ottawa: Solicitor General, 1990), p. 84.

Also in 1990, the report of the Osnaburgh-Windigo Tribal Council Review Committee reported. Its basic recommendation was for Canadian governments to recognize and assist in the development of Aboriginal sovereignty, economically viable land bases and Aboriginal justice systems, in the forms chosen by Aboriginal communities. The Committee was of the view that Aboriginal justice systems in the tribal council area should be conducted in the Ojibway language and should not become a pale, mirror image of the existing court system. Thus, the U.S. tribal court experience, while instructive in some respects, should not be seen as a prescriptive model. The report says simply that the Euro-Canadian approach has "failed to achieve justice"¹¹⁴ and there should be a separate, preferably constitutionally entrenched, Aboriginal justice system. This should be justified under the concept of legal pluralism, which speaks of tolerance for differences. For Aboriginal justice systems, they must be created and developed by Aboriginal persons or "they will surely fail."¹¹⁵

The Committee describes four basic misconceptions affecting the discussion of Aboriginal justice systems.

1. Legal pluralism is not acceptable to Canadian society.
2. First Nations have no inherent rights.
3. Any inherent right to self-government that may have existed has been extinguished.

114 Grant, note 9, *supra*, p. 37.

115 *Ibid.*, p. 38.

4. Treaties have extinguished all rights except those expressly preserved therein.¹¹⁶

The Committee states simply that First Nations possess collective rights by virtue of their culture and history. These rights are inherent and do not require recognition or creation by any Canadian government.

In 1991, the report *Justice on Trial* was released.¹¹⁷ This study is a leading report in terms of its identification of discrimination in the justice system and in its discussion of cultural differences between Aboriginal and non-Aboriginal peoples. It states:

Until the implicit convictions of Indian and Metis people are included in the underlying premises of Canadian law, Aboriginal people will continue to have "run-ins" with the law. High incarceration rates will continue to be the norm.¹¹⁸

The remarkable aspect of this statement is the use of the "until." "Until" suggests there is some possibility that Aboriginal values can become part of the underlying premises of Canadian law and even that some progress is being made towards that goal.

Given that the Anglo-Canadian system has had approximately 1,000 years of development and the Aboriginal systems probably longer than that, I seriously doubt that it is even possible for the justice system to incorporate Aboriginal

116 *Ibid.*, p. 38.

117 Cawsey, note 18, *supra*.

118 *Ibid.*, p. 9-7.

values into its underlying premises. Even if it is possible, given the refusal of the justice system to implement almost any of the recommendations made in the preceding 25 years of study, there is no reason to think the justice system will even try to change its underlying values, or could succeed without decades of effort.

Justice on Trial makes all the findings necessary to support an Aboriginal justice system, but goes to the brink of the recommendation and then steps back.

Communities must be encouraged to participate in the criminal justice system and *take responsibility for that system*. Without involvement and responsibility, the community will never identify with the system and without such identification, the system becomes a meaningless oppressor of the community.¹¹⁹ [emphasis added]

Again, the Task Force is pleased to endorse any move that will bring justice closer to the people.¹²⁰

Part of the long-term perspective adopted by the Task Force is a commitment to community-based control of the criminal justice system. This perspective reflects the confidence with which the Task Force views the abilities of Aboriginal communities to assume greater control over the criminal justice system.¹²¹

It is clear that Indian Nations want more than mere accountability; they want to run their own systems of justice.¹²²

119 *Ibid.*, p. 1-5.

120 *Ibid.*, p. 4-10.

121 *Ibid.*, p. 12-2.

122 *Ibid.*, p. 4-7.

After stating these principles, the Task Force then makes some conflicting statements. It reviews the Kirby Report's recommendations for Indian justices of the peace with limited jurisdiction and finds that there is no evidence such a development "has had any appreciable effect in improving the conditions of concern to Aboriginals "¹²³ Despite this lack of evidence, the Task Force then offers as a response to Aboriginal calls for more local control "a system of lay judges, or initiate a vigorous and effective training program for Indian Justices of the Peace ... [who would hear] summary conviction cases (not including dual procedure offences) ... "¹²⁴

The Task Force goes further than a simple justice of the peace recommendation by recommending "a full Provincial Court, composed of an Aboriginal judge, Aboriginal Crown Attorney, Aboriginal defence counsel (included in a roster of choice) and Aboriginal clerks."¹²⁵ The report suggests such a court for a rural circuit and a large urban centre. However, the court would operate within the present justice system.

... The Task Force believes that sovereignty is a political issue and a matter to be settled at a constitutional level, rather than one to be explored by this Task Force. ... Whether an Aboriginal Justice System should exist and its scope and extent, is a matter for negotiation between the Indian and Metis people and the Governments of Canada and Alberta.¹²⁶

123 *Ibid.*, p. 4-11.

124 *Ibid.*

125 *Ibid.*, p. 4-12, 13.

126 *Ibid.*, p. 11-5.

For Aboriginal people, such a response must be a considerable disappointment. The Task Force made all the findings necessary to propose Aboriginal justice systems, yet decided that because the issue will be the subject of negotiation it would not suggest to government what position it should take. The Task Force did, however, suggest government positions on virtually all other possible changes to the system.

The Task Force could have found that Aboriginal justice systems are a question of legal rights, as was found or suggested by the Penner Report, the Canadian Bar Association and the Osnaburgh-Windigo report. The Task Force could have found that Aboriginal justice systems are the only practical solution to many of the persistent problems with the justice system. I submit that there is nothing about Aboriginal Justice systems that makes them inappropriate for task force recommendations.

Later in 1991 the Law Reform Commission of Canada issued its report *Aboriginal Peoples and Criminal Justice*. The report recognizes that "the distinct historical position of Aboriginal persons justifies departing from that general principle"¹²⁷ that the same criminal law and procedure should be imposed on all Canadians. Aboriginal peoples "have constitutional recognition and treaty rights that set them apart from all other Canadians."¹²⁸ In addition to the different constitutional status, the Commission takes note of cultural differences.¹²⁹ The

127 Law Reform Commission of Canada, note 38, *supra*, p. 14.

128 *Ibid.*, p. 15.

129 *Ibid.*, pp. 15-16.

Commission recommends that specific Aboriginal justice system arrangements would be negotiated on a community by community basis. It acknowledges that "basic distinctions, such as that between criminal and civil law, might not be recognized. Communities may wish to safeguard rights and secure fairness in different ways than our system does."¹³⁰ These statements go far compared to the majority of earlier reports. However, the Commission holds back somewhat.

It commissioned a study to examine constitutional questions "concerning whether the federal government has the authority *to allow* Aboriginal Justice systems to be created" [emphasis added] and reports that the opinion of the study is that "the purported constitutional impediments are not substantial."¹³¹ The Commission acknowledges that the authors of the study assert that no special steps need be taken because the authority for Aboriginal justice system lies in already existing Aboriginal rights,¹³² but the Commission itself does not endorse this position. Instead, it falls back to the process of negotiation and agreement. The Commission provides a list of matters participants in the negotiations may wish to explore. Clearly, the list is not intended to be exhaustive, but it is noteworthy that separate Aboriginal criminal law is not specifically mentioned in the list.¹³³

The most complete discussion of Aboriginal justice systems is found in Manitoba's Aboriginal Justice Inquiry report. This report is a landmark for many

130 *Ibid.*, pp. 18-19.

131 *Ibid.*, p. 19.

132 *Ibid.*, pp. 20-21.

133 *Ibid.*, pp. 22-23.

reasons. It provides the greatest discussion and profile to Aboriginal culture, the history of Canadian discrimination against Aboriginal people, the broadest review of Aboriginal rights, and by far the most detailed discussion of Aboriginal justice systems of any of the reports existing in the field. The report finds that Aboriginal justice systems are justified as an Aboriginal right.

Their sovereignty resided in and emanated from the land itself.¹³⁴ ... We believe there is no longer any issue as to whether Aboriginal people have the right to govern themselves in accordance with their customs and traditions. It is clear, we believe, that they have that right. ... This right to self-determination precedes colonization and has never been voluntarily surrendered. ... Further, international law today clearly recognizes the right of peoples to determine their own future.¹³⁵ ... [W]e have concluded that the "aboriginal rights" within subsection 35(1) include the right of self-government. In our opinion, this right to self-government encompasses within it the right to establish and administer a justice system.¹³⁶

The Commissioners explained the principles that it believed should govern the establishment of Aboriginal justice systems. "[E]very component of the justice system: operational within an Aboriginal community [should] be controlled by Aboriginal people."¹³⁷ The Inquiry recognized that negotiation and agreement would be required, but was very clear in saying that the question about jurisdiction was for Aboriginal communities to make by themselves.¹³⁸ The Inquiry

134 Hamilton and Sinclair, note 32, *supra*, p. 55. On Aboriginal justice systems generally, see the report's ch. 7.

135 *Ibid.*, p. 143.

136 *Ibid.*, p. 161.

137 *Ibid.*, p. 314.

138 *Ibid.*, p. 326.

recommended that Aboriginal justice systems would have their own courts of appeal, full jurisdiction over all persons on Aboriginal territory and that Aboriginal laws would be paramount to the *Charter of Rights and Freedoms* (although the Inquiry recommended First Nation governments draft one to apply to their communities).

The Inquiry provided a non-exhaustive list of subjects which reflect areas of customary authority that would fall within the law-making jurisdiction of First Nation governments. The areas listed are:

- criminal law including procedure;
- family law;
- real property including natural resource development;
- personal property including laws of trade and sales;
- estates (in terms of wills and inheritance);
- harvesting of fish, game, waterfowl, fur-bearing animals, wild rice and other foods as well as renewable resources;
- membership within the community;
- recognition and enforcement of traditional laws;
- environmental protection and management;
- jurisdiction over civil disputes including enforcement of contracts; and
- the enforcement and recognition of orders of courts from other jurisdictions.

This list of law-making areas is the most far-reaching of any report released to date.

Two new reports have been issued that touch on the issue of Aboriginal justice systems. The first is from the Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution - A Commentary*. The Royal Commission states that the right of Aboriginal self government is found in the history of Aboriginal peoples and that it has never been relinquished. Further, it feels that "while the Supreme Court of Canada has not yet ruled specifically that a right of Aboriginal self-government is already entrenched in Section 35 of the Constitution, there is good reason to think that the Court would so rule."¹³⁹ The Commission emphasizes that the right is an inherent right, is not dependent on what Parliament permits Aboriginal governments, that Aboriginal powers are paramount over federal and provincial laws and that any statement about Aboriginal rights in the constitution should proceed only with the consent of Aboriginal peoples. These principles would be consistent with the Aboriginal Justice Inquiry and the Penner Report. However, the Royal Commission also says the right is circumscribed. It is unclear to me exactly what the Royal Commission meant by this term.

I believe that all rights are circumscribed in practical application, but not necessarily in theory. Is the Commission talking about the theoretical or the practical? Is the Royal Commission meaning only to say that Aboriginal rights are subject to external pressures like any other rights, that Aboriginal peoples might

139 R. Dussault and G. Erasmus, Co-Chairpersons, Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary*, (Ottawa: 1992), p. 14..

choose to make arrangements that would limit their own rights, as do all peoples, or that living within Canada will result in Aboriginal governments sharing the legislative field with other Canadian governments? If these are the meanings of a circumscribed right intended by the Royal Commission, then the term "circumscribed" is virtually superfluous.

It seems to me there is an inherent contradiction between finding the right to self-government is circumscribed and at the same time saying circumscription of the right is entirely subject to the consent of Aboriginal people. As well, the Royal Commission says on the one hand that an uncircumscribed right would mean competence to legislate in relation to international relations, defence, and external trade, and on the other hand that the federal government's powers are circumscribed under sections 91-95 of the *Constitution Act, 1867*. We know the federal government has competence to legislate in relation to international relations, defence and external trade, so these cannot be indicia of a jurisdiction with "uncircumscribed" powers. The Royal Commission has failed to adequately explain what "circumscribed" means, how to determine in what ways and to what extent Aboriginal rights are circumscribed and the relationship between circumscription and Aboriginal consent.

For me, the more important question is whether the Royal Commission meant to say that the Aboriginal right to self-government is *more* circumscribed than the rights of Canada as a state or of individual provinces. Perhaps the Commission's final report will explore this issue more fully. If, for example, the Commission believes Aboriginal rights to self-government are more limited than provincial rights, one would expect the Commission will explain their rationale for this view.

After outlining the principles applying to Aboriginal self-government rights, the Royal Commission then outlined a number of approaches that could achieve constitutional recognition of Aboriginal rights. In its discussion, the Royal Commission expressly declined to discuss the issue of whether the *Charter of Rights and Freedoms* would apply to Aboriginal jurisdictions.¹⁴⁰

One of the approaches discussed by the Royal Commission was a list of powers. While it is clear the Royal Commission did not intend to provide an exhaustive or definitive list of powers, it is interesting that the list provided was not as extensive as the list found in the report of the Aboriginal Justice Inquiry. Perhaps most significantly, the sample list for First Nation governments included "policing and the administration of justice."¹⁴¹ In the division of powers presently existing between the federal and provincial governments, policing and the administration of justice are provincial responsibilities, while the criminal law and criminal procedure are federal. "Administration of justice" may be a term of art, referring to its meaning as interpreted by the courts under s. 92(14) of the *Constitution Act, 1867*. If this is the sense contemplated by the Royal Commission, it may be implicitly saying that Aboriginal peoples would *not* have jurisdiction to enact their own criminal laws and procedures. Again, perhaps their final report will clarify this issue, but for now, it would appear the Royal Commission is not prepared to go as far as the Aboriginal Justice Inquiry report.

140 *Ibid.*, p. 27.

141 *Ibid.*, p. 30.

Most recently, the Special Joint Committee on a Review of Canada, the Beaudoin-Dobbie Committee, issued its report.¹⁴² It endorsed the Royal Commission's analysis of the Aboriginal right to self-government and recommended that the inherent right be entrenched in the Constitution. It did not list powers but instead suggested that a transition process be entrenched to identify the responsibilities that Aboriginal governments would exercise. The Committee discussed the *Charter of Rights and Freedoms*. In its recommendations, while it did not name the *Charter*, it seems clear the Committee was recommending the *Charter* be applied to Aboriginal governments. While the Committee appears supportive of Aboriginal rights to self-government and recommends against a period of delay at p. 29, the draft amendments at p. 108 of its report say that the rights of self-government will include only those that are negotiated later, which confuses the matter.

The reports have made a very clear progression from 1967 to 1992. The concept of Aboriginal justice systems is now regularly discussed. Recognition and support of Aboriginal self-government are now virtually universally expressed in the official studies. Reports which do not endorse Aboriginal justice systems either avoid comment by saying it is not a matter they can comment on, or endorse the concept but offer little analysis about the legal foundation for such systems and offer little in terms of describing the jurisdictional limits or principles that should govern the establishment of such systems. The two reports that go furthest in addressing these questions are the Penner report of 1983 and the Aboriginal Justice Inquiry report of 1991.

142 G. Beaudoin and D. Dobbie, Co-Chairs, "Report of the Special Joint Committee on a Renewed Canada," (Ottawa: 1992), pp. 27-34.

Despite some limitations, many reports are calling for separate Aboriginal justice systems including the House of Commons Special Committee on Indian Self-Government, the Canadian Bar Association, the Osnaburgh-Windigo Tribal Council Justice Review Committee, the Law Reform Commission of Canada and the Manitoba Aboriginal Justice Inquiry, (with some support expressed by both the Royal Commission into the Prosecution of Donald Marshall Jr. and the Task Force on the Criminal Justice System and its impact on the Indian and Metis People of Alberta). Perhaps the Royal Commission on Aboriginal Peoples will do so as well.

Conclusion

The past 25 years have seen a tremendous amount of effort by governments to study Aboriginal justice issues. The conclusions of their commissions, task forces and inquiries are firm that there is widespread discrimination in the justice system. Increasingly, their reports are calling for Aboriginal justice systems. Governments have not responded adequately to their own studies. They commission more studies. What more is needed? Does government want numbers? The next chapter in this thesis examines why it is so difficult to show discrimination in the justice system statistically.

CHAPTER 7 - EMPIRICAL LIMITATIONS ON FINDING DISCRIMINATION IN THE JUSTICE SYSTEM

This chapter discusses why it is so difficult to measure discrimination in the justice system and some of the problems dealing with the limited data that do exist.

The Department of Justice Discussion Paper says "Aboriginal justice problems are no doubt symptomatic of the underlying social and economic problems confronting aboriginal people across Canada."¹ Dr. Carol LaPrairie, an employee at the Department of Justice, published a paper in 1990 which she described as an

attempt to demonstrate how fragile the criminal justice processing explanation is and to argue the need for the criminal justice system to redirect the issue to where it more properly belongs - in the social, political and economic spheres. ... Although empirical data are lacking, assumptions about the existence of differential, racist charging practices abound.²

The above statements raise two issues: redirecting scrutiny away from the criminal justice system, and the adequacy of the empirical data.

I argue that the criminal justice system should recognize Aboriginal socio-economic conditions, but it must not use those conditions as an excuse to redirect scrutiny away from the operation of the system. I believe that the socio-economic conditions facing Aboriginal people do create circumstances that lead to crime at

1 "Aboriginal People and Justice Administration - A Discussion Paper," (Ottawa: Department of Justice, 1991), p. 20.

2 Carol LaPrairie, "The role of sentencing in the over-representation of aboriginal people in correctional institutions," *Canadian Journal of Criminology*, (July 1990): 429, at pp. 430-431.

disproportionate rates.³ However, "[t]he majority of poor persons, of whatever race or circumstance, are not criminals. Further, the incidence of crime does not coincide consistently with income or employment levels."⁴ Aboriginal rates of incarceration have been increasing at the same time that their socioeconomic conditions are improving.⁵ The relationship between Aboriginal crime and socioeconomics is not a simple one.⁶ Further, the justice system itself contributes to the socioeconomic difficulties facing Aboriginal people.⁷

As well as the role played by socioeconomic conditions, I believe that the criminal justice system is responsible for some of the Aboriginal over-

3 A. C. Hamilton and C. M. Sinclair, Commissioners, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 1, *The Justice System and Aboriginal People*, (Winnipeg: Queen's Printer, 1991). See pp. 85-88: "... either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system. We believe that both answers are correct, but not in the simplistic way that some people might interpret them. ... [W]e believe that the causes of Aboriginal criminal behaviour are rooted in a long history of discrimination and social inequality ... we believe there is a higher rate of crime among Aboriginal people, but we also believe that over-policing and systemic discrimination within the justice system contribute greatly to it." The report reviews crime data showing Indian Bands have 1.8 times higher crime rates than the national rate and 1.5 times higher crime rates on Manitoba reserves than the general Manitoba rate.

4 *Ibid.*, p. 90.

5 C. T. Griffiths and S. Verdun-Jones, *Canadian Criminal Justice*, (Vancouver: Buterworths, 1989), p. 547.

6 W. Head and D. Clairmont, "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System," (Halifax, Royal Commission on the Donald Marshall Jr. Prosecution, 1989). In discussions with 43 community leaders and participants in the justice system "respondents without exception agreed that there is a strong link between poverty and racism in Canadian society." (p. 19)

7 See the discussion in ch. 1, *supra*.

representation in jails. I further believe that if people are concerned about improving the situation of Aboriginal over-representation in jails, they should make their contribution by concentrating on what they know best. I submit that a failure to seriously address the problems created by the justice system, by concluding that "the issue" (singular) lies elsewhere, is a cop-out. There are more than enough problems to go around, and the criminal justice system certainly has its share. There is no reason for criminologists to avoid a careful critique of the justice system, even if they believe socio-economic problems are an important source of some of the problems facing Aboriginal persons.

In this chapter, I discuss the limitations that exist for measuring discrimination using "objective statistics," such as counting the number of persons charged, held on bail, convicted, length of sentence, rate of parole release and so on. I argue that because of the limitations (and even if statistical studies were perfect) other sources must be relied upon. Personal accounts and individual observations must be given value. In chapter 8, I try to locate the discrimination by drawing on a wide variety of literature.

Data Limitations

Zatz describes the development of the research over the years.

Across what I shall term four waves of research on sentencing disparities, conflicting conclusions have been drawn. Research conducted through the mid-1960s (wave 1) indicated some overt discrimination against minority defendants. Re-analysis of these studies during the late 1960s and 1970s (wave 2) concluded that, with the exception of use of the death penalty in the South, findings of discrimination were an artifact of poor research designs and analysis. Original research conducted in this period suggested that minorities were over-represented in prison because of their proportionately greater involvement in crime, rather than as a consequence of a judicial bias. A third wave of research was published in the late 1970s and 1980s, using data from the late 1960s and 1970s. These studies benefited from advances in research design and analytic techniques, and indicated that both overt and more subtle forms of bias against minority defendants did occur, at least in some social contexts. Finally, we are in the midst of the fourth wave of studies, begun in the early 1980s and relying on data from states following determinate sentencing guidelines. These studies show subtle, if no longer overt, bias against minority defendants.⁸

... [R]esearchers are only now starting to return to questions raised fifteen years ago by Quinney (1970), Chambliss and Seidman (1971), and others who argued that cases enter the system in a biased fashion. ... *Are our research designs inadvertently biased against findings of discrimination?* ... Are court processing and decision making systematically biased due to institutionalized discriminations?⁹ [my emphasis]

8 See M. Zatz, "The Changing Forms of Racial/Ethnic Biases in Sentencing," *Journal of Research in and Delinquency*, 24 ,1, (Feb. 1987): 69, at pp. 69-70.

9 *Ibid.*, p. 81.

A plethora of research has been published, without arriving at any definitive answers. Findings over the years have been contradictory, and the quest for answers seen as elusive. With each wave of research, methodological flaws in its predecessors have been discovered. Overall, however, research has consistently unearthed subtle, if not overt, bias.¹⁰

Hagan and Bumiller suggest that what changed in the research is that studies became more selective of the contexts they chose to study, making hypotheses about what kinds of circumstances would most likely result in or reveal discrimination, and then testing those hypotheses. For example, racial discrimination can occur based not on the race of the defendant, but on the race of the victim.¹¹

It is essential to fully understand the limitations of the data before forming conclusions based on the research. I agree with LaPrairie that the data showing discriminatory treatment in the justice system are fragile. Jamieson and LaPrairie¹² wrote a study in 1987 describing data sources on Aboriginal over-representation in jails. The study notes the limitations of the data and suggests a variety of factors that should be collected in order to make the data more reliable and useful. To their list, Clark¹³ adds a number of other items. He also cites an

¹⁰ *Ibid.*, p. 86.

¹¹ See J. Hagan and K. Bumiller, "Making Sense of Sentencing: A Review and Critique of Sentencing Research," *Research on Sentencing: The Search for Reform*, vol. 2, A. Blumstein, J. Cohen, S. Martin and M. Tonry, eds., (Washington: National Academy Press, 1983), p. 21. See Zatz, note 8, *supra*, p. 77.

¹² W. Jamieson and C. LaPrairie, "Native Criminal Justice Research Issues and Data Sources," (Ottawa: Department of the Solicitor General, 1987), p. 4.

¹³ S. Clark, "Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders," (Ottawa: Department of Justice, 1989), pp. 3, 6.

Australian study by Walker¹⁴ which poses a long list of competing explanations for Aboriginal over-representation at various points in the justice system that would require a radically enhanced data base to identify which explanations are most probable.

Clark describes the data needs as "... basic: without meeting them we cannot begin to discern patterns and causality in native criminal justice."¹⁵ In terms of research needs, Havemann notes

[t]here is little Canadian literature on the influence which police, prosecutors, defence counsel, and probation officers have on sentencing decisions. ... [T]his gap in the literature is almost a total one with respect to the sentencing of indigenous people. ... Another piece of basic research is needed in order to have an inventory of appropriate resources in the community available as alternatives to custodial sentences. We would suggest that these are woefully inadequate, particularly in rural areas. This fact alone will have a major impact on sentencing outcomes. ... [L]ittle or no research has been conducted by indigenous people or commissioned for indigenous people. ... [There is a need for the] development of a Native Studies strategic research fund ... for research and for training indigenous people as researchers.¹⁶

Clark emphasizes a need for data from courts and correctional institutions.¹⁷ On the other hand, LaPrairie finds that "police decision-making in criminal justice

14 J. Walker, "Prison Cells with Revolving Doors: A Judicial or Societal Problem," in *Ivory Scales: Black Australia and the Law*, K. Hazelhurst, ed., (Kensington: New South Wales University Press, 1987), pp. 108-109.

15 S. Clark, note 13, *supra*, p. 3.

16 See P. Havemann et al., *Law and Order for Canada's Indigenous People*, (Regina: School of Human Justice, 1985), pp. 170, 171 and 174.

17 S. Clark, note 13, *supra*, p. 28.

processing remains the most critical information gap in accounting for the disproportionate presence of aboriginal people in the system."¹⁸

The data are limited in many different ways. Perhaps most basic, much discrimination is simply not capable of being counted. How does one measure disrespectful treatment, derogatory comments or rudeness? How does one measure unrecognized cultural differences, missed nuances of spoken and body language and different ways of responding to the justice system processes? How can it be determined why individuals adopt particular strategies and what effect those strategies had? How then to determine whether there are similarities in reactive behaviours *within* groups but differences *between* them?

Numerous kinds of discrimination are theoretically capable of being counted but in fact cannot be collected, such as the number of crimes that are not reported and the Aboriginal and non-Aboriginal components of that number. Other kinds of events that can be counted and collected but are not (at least not on a comprehensive or consistent basis), include the number of crimes reported, charges laid, charges dropped, acquittals and dismissals, compared by Aboriginal and non-Aboriginal groups.

Another limitation on statistical surveys is that data may show slight or "statistically insignificant" differences in treatment at a particular point, but fail to show how a series of "statistically insignificant" differences through the various decision points can have an important cumulative effect. The effect of race on sentencing may be especially prone to produce only a small relationship, because

18 C. LaPrairie, note 2, *supra*, p. 431.

the impact of race may be felt most at the earliest stages of the criminal justice system, while sentencing is at one of the latest stages. In this way, statistics at the sentencing stage can effectively hide discrimination in the justice system and unbiased conduct by judges can serve to confirm this perception, but without undoing the discrimination that has already occurred.¹⁹

19 See Hagan and Bumiller, note 11, *supra*, at p. 33: "The weakness of the race-sentence relationship is not necessarily surprising. An important feature of the individual-processual approach is its conceptualization of race as an extended causal chain that includes such intervening variables as offense type, prior record, bail status and recommendations by various control agents ... we should therefore expect that the smallest correlations will occur between those variables that are furthest removed from each other in the causal chain ... i.e., race and sentence."

See M. Radelet and G. Pierce, "Race and Prosecutorial Discretion in Homicide Cases," *Law and Society Review*, 19, (1985): 587, at pp. 618-619: "[T]he selection of homicide defendants for death is the cumulative result of a series of decisions and evaluations, while at any one point race may have only a slight biasing impact, the cumulative product of bias at each point may mean that ultimately the defendant's and victim's races are major determinants of who is selected for execution. Moreover, discriminatory or arbitrary processes and decisions early in the criminal justice process (e.g., in the investigating and building of a case or in the charging decision) will mask evidence of discrimination at later stages. In this way, the criminal justice system, without the venal behaviour of anyone, effectively 'covers its tracks'. ... It appears that not only are prosecutors sometimes motivated to seek a death sentence for reasons that reflect the racial configuration of the crime, but that they do so in a way that greatly reduces the possibilities for discovering evidence of discrimination and arbitrariness when only later stages of the judicial process are examined. Moreover, if prosecutorial actions are discriminatory in their consequences, the most objective and unbiased decisions by the judge and jury can create only an image of justice. They will not correct previously embedded biases."

See Zatz, note 8, *supra*, p. 76. See J. Hagan, "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint," *Law and Society*, (Spring 1974): 357, at p. 361, making the point that statistical, causal and substantive significance may be confused. (I am not well enough versed in statistical analysis to define these terms.) Hagan also calls for analysis of an accused's progress through all stages of the justice system and notes the importance of collecting data on a wide variety of variables. See Head and Clairmont, note 6, *supra*, p. 185: "Racism in a system of formal rationality cannot but be subtle and cumulative. Statistical analysis of the sort

As well, if system results are examined by comparing those in jail, distinctions between those who are sentenced to jail on an offense and those who are in jail for violation of parole or fine default may not be drawn. If the sentencing results show equal or more lenient treatment for Aboriginal offenders, a false impression of no adverse impacts can be created because Aboriginal offenders are more likely to be in jail for reasons other than being sentenced directly to jail on a criminal offense.²⁰

done here may be too blunt a tool to capture this well." See G. LaFree, "The Effect of Sexual Stratification by Race on Official Reactions to Rape," *American Sociological Review*, 45, (Oct. 1980): 842, at p. 852: "Also, the longitudinal nature of this research was unique. While evidence of discrimination was not overwhelming, the cumulative effect of race was consistent and substantial."

See Walker, note 14, *supra*, pp. 110-111: "[O]bserved over-representation could actually be the result of accumulations of relatively minor disadvantageous selection processes. ... The Courts often refer explicitly to prior record as a reason for remanding in custody and for greater severity in sentencing ... [R]emand in custody itself predisposes the court to a negative view of the defendant and prejudices the verdict and severity of sentence." See M. Wilkie, *Aboriginal Justice Programs in Western Australia*, (Nedlands: Crime Research Centre, University of Western Australia, 1991), p. 194: "[T]he level of [Aboriginal] over-representation increases at each (more intrusive) stage. The under-representation of Aborigines among offenders receiving lenient penalties and their gross over-representation among offenders detained and imprisoned cannot be explained by current data or other information."

- 20 C. Canfield and L. Drinnan, "Comparative Statistics Native and Non-Native Federal Inmates - A Five Year History," (Ottawa: Correctional Services of Canada, 1981), pp. 22-23: "Assault, break and enter, and theft demonstrate nearly identical sentence profiles. Sexual offenses, kidnapping and robbery show some differences, perhaps because of the wide range of sentences given by the courts for the various *Criminal Code* offenses in these offence groups. It entirely possible that if sentences for supervision violations were eliminated from the distributions, natives might be shown as receiving longer sentences for similar offenses than non-natives ..." [Aboriginal inmates are much more likely to be admitted for supervision violation than non-Aboriginal inmates - see the discussion of parole and of fines in ch. 8, *infra*, and the discussion of types of offenses in ch. 2, *supra*.]

A further limitation of the data is that some innocent persons do get convicted. It is impossible to know how many and therefore impossible to know whether Aboriginal persons are over-represented in that group. It can be safely assumed that the innocent persons most likely to be convicted are those with the least ability to effectively mount a defence.²¹ In addition, there is evidence that non-Aboriginal persons are less likely to avoid conviction under the defence of insanity.²²

The data are also limited because discrimination that is unduly harsh can be hidden statistically by other treatment that is lenient, creating a statistical image of equal treatment of the whole. An elaborate example of this is provided by Zatz who cited a study that

showed that Native Americans were sent to prison for offenses for which whites received non-prison sanctions. When whites were sent to prison, their court-imposed sentences were longer than those for Native Americans. But parole boards compensated by releasing whites when they had served shorter parts of their sentences than Native Americans.²³

In this example, Aboriginal persons would show up in the statistics as receiving disproportionately harsh sentencing and parole decisions, but shorter sentences. If

21 See T. A. Hickman, Chairperson, Royal Commission on the Donald Marshall Jr. Prosecution, *Commissioner's Report* (Halifax: 1991); see also P. Koring, "Justice tarnished by tainted convictions," *Globe and Mail*, March 9, 1992, p. A1, and T. Barrett, "Court frees native convicted of murder," *Ottawa Citizen*, March 10, 1992, p. A4.

22 S. Moyer, "Homicides involving adult suspects 1962-1984: a comparison of Natives and non-Natives," (Ottawa, Solicitor General, 1987), p. 40.

23 Zatz, note 8, *supra*, p. 76.

only length of sentence is compared, it would appear the system is being lenient when in fact that is not the case.

Some persons argue that even if it is known that Aboriginal people are treated differently by the justice system, this is not evidence that they are treated that way *because they are Aboriginal*. Aboriginal offenders may be over-represented because they disproportionately commit more serious offenses, face more charges or have longer prior records.²⁴ Other factors that may be relevant are the number of previous offenses, the recency of previous offenses, the nature of the previous offenses, whether the accused was under another justice system disposition at the time of the offense (e.g., bail, probation, or parole conditions), whether there is an admission of guilt to police, whether there has been pretrial detention, whether the accused is self-represented or represented by a legal aid lawyer, whether there is a guilty plea, whether there are witnesses to the offense, the race of the victim, the recommendations in a pre-sentence report, the court or offense location, whether the offender is caring for dependants and the offender's income, education, employment, place of residence, sex or age. Many of these characteristics are typically not recorded or are recorded inconsistently.²⁵

24 See the discussion on sentencing in ch. 3, *supra*, which argues that these factors do not provide satisfactory explanations. Also, if seriousness of offense is a satisfactory explanation for Aboriginal over-representation then note Aboriginal over-representation in less serious offenses (fine default admissions, liquor offenses, provincial statutes offenses and bail and parole violations) compared to *Criminal Code* offenses. This is well demonstrated in S. Moyer, F. Kopelman, C. LaPrairie, B. Billingsley, "Native and Non-Native Admissions to Federal, Provincial, and Territorial Correctional Institutions," (Ottawa: Solicitor General, 1985).

25 Zatz, note 8, *supra*, p. 82.

Even if the variables are collected, it is no simple matter to analyze the data. A technique known as multiple regression analysis is required and represents one of the new sophistications in criminal justice research.²⁶ The technique requires that a number of variables be collected and each variable tested to see what effect it has on the observed result (e.g., conviction, sentence to jail). If race is isolated from other variables, such as type of offense, prior record, employment, education, income or language, then it is said it can determine whether racial discrimination is occurring, by "controlling for" the other variables. The problem is that the technique treats each variable as distinct from the others. I am not convinced it is possible to draw these neat distinctions. If the very fact of being Aboriginal leads to a frequent constellation of other factors, and it is determined that those other factors do lead to differential treatment, does this mean Aboriginality was not a factor? If only those persons with low education, unstable employment, Legal Aid lawyers, etc., are compared, then a very large group has been excluded from the comparison, a group that is likely primarily white.²⁷

26 F. M. Fisher, "Multiple Regression in Legal Proceedings," *Columbia Law Review*, 80, (1980): 702. See Hagan and Bumiller, note 11, *supra*.

27 B. Archibald, "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System," *Dalhousie Law Journal*, 12, 2, (Nov. 1989): 383, reports at p. 384 that "[s]ome American jurisdictions have found the correlation between employment status and race so potentially damaging to visible minority groups that they have prohibited reference to employment record in the sentencing process." See M. Feely, *The Process is the Punishment*, (New York: Russell Sage Foundation, 1979), pp. 145-146: "[R]egression analysis ... cannot easily cope with the problems of interaction effects. Two or more variables might be important only in combination, so that examining the direct effects of each in isolation may obscure their importance."

See Zatz, note 8, *supra*, pp. 73-74: "Reanalyses of earlier studies [showing discrimination] were conducted, with results typically interpreted to mean that discrimination was no longer an issue. Critics such as Hagan (1974) and Kleck (1981) argued that the effect of race was in part a proxy for prior record and, once this was controlled for, the direct effect of race would be greatly diminished. These reanalyses

More importantly, the proper application of multiple regression analysis to the criminal justice system depends on an understanding that some variables are legitimate and others are not (i.e., "legal" - relevant to the legal decision; and "extra-legal" - not relevant to the legal decision). The problem with this is that the analysis is usually applied at the sentencing stage, without paying attention to how "legal" variables may have been produced by earlier "extra-legal" considerations. Another problem is that it is not universally agreed what variables should be considered "legal" or "extra-legal."²⁸

often concluded with two very important but unheeded caveats. The first was that race might have a cumulative effect by operating indirectly through other variables to the disadvantage of minority group members. The second was that race and other extralegal attributes of the offender could interact with other factors to influence decision making. ... These caveats were usually lost on readers who later placed such studies squarely in the 'no discrimination found' side of the debate."

See J. Hagan, I. Nagel, and G. Albonetti, "The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts," *American Sociological Review*, 45, (Oct. 1980): 802, at p. 802: "The samples considered in these studies consisted almost entirely of low status defendants, making this research mainly a matter of within - rather than between - class comparisons." See J. Hagan and C. Albonetti, "Race, Class, and the Perception of Criminal Injustice in America," *American Journal of Sociology*, 88, 2, (Sept. 1982): 329, at p. 332: "[C]onflict criminologists have not yet ... developed a clear understanding of the relationship between class and race in the determination of crime-related conflicts."

See Head and Clairmont, note 6, *supra*, p. 166: "[I]t can be expected that race/ethnic bias is becoming more inextricably tied to social class factors which in turn become increasingly 'laundered' in formal rational rules and policies."

- 28 See Hagan and Albonetti, *Ibid.*, p. 332 citing another study: "[T]here is considerable variation from one jurisdiction to another in the procedural law that stipulates what factors are legal versus those that are extra-legal in criminal justice decisions. Second, what is specified in a statute as legal for one stage of criminal justice processing may not be legal another stage, e.g., community ties (flight risk) is generally a legal consideration for pre-trial release status decisions, but not for plea bargaining or sentencing decisions. Third, some variables ordinarily placed in the 'legal' category (e.g., prior record of convictions) may themselves have resulted from some combination of consideration of

For example, if pre-trial custody leads to greater likelihood of pleading guilty, less ability to mount a defence or longer sentences, and we know that pre-trial custody decisions are based expressly (but not exclusively) on extra-legal considerations such as residence and resources, then sentencing might not be based only on legal factors. This problem becomes even more difficult when it is realized that very few bail or sentencing decisions have the reasons recorded.²⁹

legal and extra-legal variables in some prior processing."

H. Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities," *Queen's Law Journal*, 15, 2, (Fall 1990): 327, at p. 335: "The decision of one participant can impact significantly on the exercise of discretion by another. For example ... a charge of 'assault causing bodily harm' instead of 'assault' may impact on the sentencing decisions of the judge. The recommendations in a pre-sentence report will often impact the final disposition."

H. Finkler, "North of 60 - Inuit and the Administration of Criminal Justice in Northwest Territories: The Case of Frobisher Bay," (Ottawa: Department of Indian Affairs and Northern Development, 1975), p. 87: "[G]eneral factors considered by J.P.s [include an] examination of the accused's work record, family stability and relationship, whether the sentence will help the accused or embitter him, and whether it will serve to avoid a repetition of the act ..."

A different problem is whether the decisions are appropriately made. See R. Poirier, "The Handling of Criminal Cases by Defence Lawyers," (Ottawa: Canadian Sentencing Commission, 1988). pp. 40-41: "In some cases, it is difficult for the judge to apply 'reasonable doubt.' As a result, the judge may adopt the middle ground, which consists of passing a judgment of guilty accompanied by a light sentence. ... In such a situation, the accused is not interested in appealing because he is satisfied with the sentence. When the accused is willing to appeal his conviction, it is possible that the Crown might then decide to appeal the sentence." Here, 'difficulty in deciding' is a possible factor - is that a legal or an extra-legal factor?

- 29 J. Ekstedt and M. Jackson, "Justice in Sentencing: Offender Perceptions," (Ottawa: Canadian Sentencing Commission, 1988), p. 18, found in their survey of inmates that 89% think judges should explain the way they sentence. See Havemann et al., note 17, *supra*, p. xvii-xviii.

For another example, if sentencing legitimately depends on prior record,³⁰ if legal aid will not assist persons accused of minor offenses and if lack of legal representation leads to a greater likelihood of conviction, then the prior record may have been produced by the extra-legal factor of income. More importantly, the decisions of whom to police, whether or not to charge and what charge to lay, together with the process of plea bargaining, all work to select which persons will be those who will face conviction and what the seriousness of offense will be, which in turn produce prior records. The decisions leading to prior records may be determined by extra-legal factors, but once the record has been compiled, it is treated as a legal factor.

In addition to the difficulty of determining whether legal or extra-legal variables influence outcomes, it is extremely difficult to know how those influences operate. For example, race of the offender and victim, considered together, may affect the seriousness of charge, but not arrest, or guilt or innocence. Sentences may be related to whether the offender and victim were strangers or relatives,³¹ or they may differ only in a particular sub-set of a given offense. For example, with any offense some fact situations will have particularly aggravating facts, some particularly extenuating facts. In these cases, it would be much less likely for

30 In the survey by P. Landreville, M. Hamelin, and S. Gagnier, "Opinions of Quebec Inmates Regarding Questions Raised by the Mandate of the Canadian Sentencing Commission," (Ottawa: Canadian Sentencing Commission, 1988), one inmate stated, at p. 44: "The criminal record should never be taken into account: I've paid my bill."

31 See LaFree, note 19, *supra*, at p. 852: "[T]he racial composition of the victim-defendant dyad - and not the individual race of either offender or victim - is the most important racial consideration in processing decisions ..." Moyer, note 22, *supra*, p. 18, found that the relationship between the victim and the offender appears to affect sentence length, in that persons who kill relatives receive the least punishment.

discrimination to occur because there would be an obvious result to most observers, thereby reducing individual discretion. It is in cases where there are neither particularly aggravating nor extenuating circumstances that the opportunity for different treatment is greatest. Examining and defining just this sub-set of cases can be very difficult.³²

The problem of analyzing discrimination at the sentencing stage has been described as requiring an assumption of administrative regularity - that every decision leading up to sentencing has been made properly. Such assumptions are unfounded.³³

Even if the variables are fully gathered and adequately considered, if the analysis compares only those who are sentenced or incarcerated, a large group of persons are omitted from the analysis. Hagan found that variables such as defence counsel, initial plea and charge alteration show greater influence on case dispositions when all dispositions are considered than when only sentenced persons are considered.³⁴ Hagan and Bumiller found that examining a wide variety of

32 See R. Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," *Harvard Law Review*, 101, 7, (May 1988): 1399, citing a study of murder convictions in the U.S. where the prosecutors sought the death penalty which arrived at this conclusion.

33 J. Figuera-McDonough, "Gender Differences in Informal Processing: A look at charge bargaining and sentence reduction in Washington, D.C.," *Journal of Research in Delinquency*, 22, 2, (May 1985): 106.

34 J. Hagan, "Parameters of Criminal Prosecution: An Application of Path Analysis to a problem of criminal justice," *Journal of Criminal Law and Criminology*, 65, 4, (1975): 536, at p. 542. See also R. Kueneman, R. Linden and R. Kosmick, "Study of Manitoba's Northern and Rural Juvenile Courts", (Winnipeg: Attorney General, 1986), p. 26. See also Zatz, note 8, *supra*, p. 75, who describes this as selection bias. "When persons who

variables "in various ways have been found to mediate the influence of race and socioeconomic status on sentencing"³⁵ but that "the increased tendency to control for legitimized variables in sentencing studies has *not* resulted in fewer findings of discrimination."³⁶ [emphasis added]

Perhaps most importantly, it may be that Aboriginal persons are disproportionately represented among those offenders who have the least bargaining power - they have no information the police want (such as the location of stolen goods, information about other offenses, information about other criminals) or their cases may be particularly easy to prove, so that the police and prosecutor have less need to give substantial charge and sentence concessions in exchange for guilty pleas.³⁷ Wynne and Hartnagel found in their study that Aboriginal persons engaged in plea negotiations less often and benefited less from them.³⁸ Ericson found

Detectives routinely turned a blind eye in relation to persons who were implicated in property offenses as receivers of stolen property, and who

were filtered out of the system at earlier decision points are excluded from a sample, variation in sentencing outcomes due to race/ethnicity, as well as social class and gender, may be inappropriately removed."

35 See Hagan and Bumiller, note 11, *supra*, p. 30.

36 *Ibid.*, p. 32.

37 See J. Klein, *Let's Make a Deal: Negotiating Justice*, (Toronto: Lexington Books, 1976) generally, and pp. 21, 38. See R. Ericson, *Making Crime - A Study of Detective Work* (Toronto: Butterworths, 1981), p. 125.

38 D. Wynne and T. Hartnagel, "Race and Plea Negotiation: An Analysis of Some Canadian Data," *Canadian Journal of Sociology*, 1, 2, (1975): 147.

cooperated by returning the property and by implicating the person(s) who had allegedly committed the thefts of the property.³⁹

Hagan et al. found

there is a general tendency across districts for white-collar crimes to result in lighter sentences than common crimes. ... [C]ommon crimes of common criminals result in the most severe sentences.⁴⁰ ... The infrequency of these [white collar] prosecutions derives not only from the power of the persons involved but also from the manner in which these criminal activities are organized. Most common crime involves victims or witnesses and is pursued reactively in response to their complaints. In contrast, most white-collar crime involving white-collar persons is characterized by a diffuseness of victimization and an absence of unimplicated witnesses. As a result, a proactive organization of legal resources usually is required to seek out and build these white-collar cases. Since, frequently, only the participants in these criminal events can provide the information necessary to build successful cases, prosecutorial negotiation becomes a key part of the proactive prosecution of these cases. The overall implication ... is, of course, that white-collar persons will receive lenient sentences for their white-collar crimes. However, it is important to note that this disparity might be expected only where the prosecution of white-collar cases is proactive enough to generate a large volume of cases. [The corollary is that without proactive prosecutions there are significantly fewer prosecutions.] This is, of course, exactly what we found in our data.⁴¹

Differences between white collar and property offenses' bargaining positions and common offences against persons would result in disproportionately harsh treatment of Aboriginal offenders that a comparison of sentences among only one type of charge would fail to discover.

39 Ericson, note 37, *supra*, p. 125.

40 Hagan, Nagel, and Albonetti, note 27, *supra*, p. 802.

41 *Ibid.*, at p. 818.

Further, Aboriginal offenders may be disproportionately represented among those offenders who commit the crimes that are most likely to attract police attention. Ericson's study of detective behaviour showed that cases with identified suspects, especially if they are in custody, attracted more priority, time, interviews, clearances by charge and were dealt with more quickly than any other type of crime situation.⁴² Ericson also found that there is not a consistent police approach to all offenses.

The majority of cases (59 percent) were "filed" by detectives, usually after little or no investigative effort. ... A further 20 percent of cases were cleared by "caution" of a suspect and/or made "unfounded" by detectives. ... The other 21 percent of the cases resulted in clearance by charging a suspect.⁴³ Our data clearly indicate that many reported events were not investigated.⁴⁴

For cases with suspects in custody, 83 percent resulted in charges.

42 Ericson, note 37, *supra*, p. 86: "If there was no suspect identified in any form on the initial occurrence report, the case was much less likely to be given priority, to be worked on during the first week, to be worked on for more than one hour, to involve non-suspect citizen interviews, to involve actual contact with a suspect, and to be completed during the first week ... These differences in investigative activity are in turn reflected in the dispositions that each type received." See also p. 88.

43 *Ibid.*, p. 215.

44 *Ibid.*, p. 214.

In sum, the detectives' task was to process readily available suspects.⁴⁵ ... [D]etectives did not even attempt full enforcement. They enforced selectively, in the context of organizational criteria.⁴⁶ ... In addition to the greater likelihood of the victim identifying a suspect in violence and other interpersonal cases, these cases tended to be more thoroughly screened by patrol officers.⁴⁷

While patrol officers filed reports less frequently for interpersonal cases (25.8% compared with 70.8% of property cases), when they did file for interpersonal cases the cases were likely to involve a serious allegation and therefore more likely to receive some detective attention compared with minor property disputes. Ericson also found that detectives had greater difficulty constructing evidence for prosecution in interpersonal cases, even if a suspect was available, than they did for property cases, but the major problem with property cases was identifying suspects.⁴⁸

In chapter 2 statistical research was reviewed to show that Aboriginal persons are likely over-represented in unsophisticated crimes where their identity is easy to establish. This suggests that Aboriginal persons would be more likely to fall into that group attracting more police attention. This would have a clearly adverse impact in comparison to other offenders, but one that is not motivated by racial considerations.

⁴⁵ *Ibid.*, p. 136.

⁴⁶ *Ibid.*, p. 214.

⁴⁷ *Ibid.*, p. 89.

⁴⁸ *Ibid.*

I believe the above situations do occur, with the result that Aboriginal offenders benefit less from plea bargains and hence face more serious charges and are subject to extra police activity. In neither of these areas does there need to be any racial consideration at all - it is simply administrative expediency. Police investigate and follow-up some types of cases more than others because they are substantially easier to complete, and some types of cases are especially likely to produce charge and sentence concessions because their successful prosecution is substantially more difficult.

The problem with both of these beliefs is that they are extremely difficult to test empirically. In chapter 2 there is a discussion of the types of crimes committed by Aboriginal persons. The data cited there lend support to my belief that Aboriginal offenders are over-represented in the group of crimes which attract the most attention and leave the offender in the worst bargaining position - unpremeditated, unconcealed offenses against the person and minor offenses of relatively high visibility (e.g., alcohol related offenses).

One major problem in testing this theory is finding the comparison group. By definition, the comparison group will escape detection in most cases and receive lighter charges and sentences in other cases. Comparing Aboriginal and non-Aboriginal sentenced offenders convicted of similar crimes would miss the point entirely. Further, there is extremely limited empirical research similar to Klein's and Hagan et al.'s work on plea bargaining or Ericson's work on police practices. As well, even Ericson's study did not determine whether reported property cases resulting in no charges (because few suspects are identified) is a greater or lesser problem than unreported offenses against persons. The data suggest Aboriginal

persons are over-represented among cases that result in charges for offenses against the person. Would they also be over-represented in *unreported* cases?

As the wide variety of variables shows, even a comprehensive collection of data with all the variables included will produce few directly comparable cases relative to the total numbers of offenders. This is testimony to the individual nature of crime. But the fact is comprehensive data are not available. This leaves the collection of data to *ad hoc* empiricism - small studies in particular places at particular times, all constrained by sample selection methods, variables collected and data analysis techniques.⁴⁹ Moreover, the methodologies of the surveys do affect the findings, with the result that studies finding no discrimination do *not* necessarily mean discrimination is not happening, but may mean that the questions asked or variables collected were not the right ones to find the discrimination or to make definitive findings that it does not exist.⁵⁰

49 There are a number of surveys of these studies. See Hagan and Bumiller, note 12, *supra*, who examined 51 studies, found that 53.8% of studies after 1969 that controlled for offense and record found discrimination and 56% of the pre-1969 studies (whether they controlled for offense and record or not) found discrimination. Hagan and Bumiller use 1969 as a demarcation year when controlling for variables became more prominent. For those studies pre-1969 that controlled for offense and record, only 27.3% found discrimination. See also Zatz, note 8, *supra*, p. 69; Clark, note 13, *supra*; Moyer, note 22, *supra*; S. Verdun-Jones and G. K. Muirhead, "Natives in the Criminal Justice Systems: An Overview," *Crime and Justice*, 7/8, 1, (1979/80): 3; and Note, "Developments in the Law - Race and the Criminal Process," *Harvard Law Review*, 101, 7, (May 1988): 1472.

50 See Hagan and Bumiller, note 11, *supra*. See also Moyer, Kopelman, LaPrairie, Billingsley, note 24, *supra*, stressing the importance of research to discover differences among varied environments, p. 6.11.

Even methodologically good *ad hoc* empirical studies do not provide data about what is happening in other jurisdictions, to other groups, at other times, or in other parts of the system, instead, readers are required to consider for themselves the likelihood that any particular finding applies to a broader spectrum. However, drawing inferences from the specific to justify conclusions about the whole can be criticized for overstating the importance of the smaller studies. The justice system forces data collection to be done on an *ad hoc* basis and then can shield itself from criticism by pointing to the *ad hoc* nature of the research.

A further problem with the statistics is that they measure system outcomes, but not the penalties imposed by having to go through the system. In other words, for minor offenses, the ordeal and cost of being arrested, interrogated, charged and processed can be worse than any penalty that actually results, in these cases, the process *is* the punishment, but the statistics will not find it.

For every defendant sentenced to a jail term of any length, there are likely to be several others who were released from jail only *after* and *because* they pleaded guilty. [emphasis in original] For each dollar paid out in fines, a defendant is likely to have spent four or five dollars for a bondsman or an attorney. For every dollar they lose through fines, defendants who work are likely to have lost several more from docked wages. For every defendant who has lost his job because of a conviction, there are probably five who have lost their jobs as a result of simply having missed work in order to appear in court. And for every defendant who would like a trial, there are dozens who do not even bother to appear in court. ... Furthermore, pretrial costs do not distinguish between innocent and guilty ...⁵¹

In addition, the above factors are only numerical values. How does one begin to take into account the non-numerical punishments of going through the system?

⁵¹ See Feely, note 27, *supra*, p. 30, see also pp. 123-124 and 143.

The result of the various limitations on the data is that very little can be definitively established. Adverse impact as measured by over-incarceration is the single best statistic in the justice system. The question of discrimination often degenerates into those alleging it being told they must prove it numerically. Because of the limitations of the data, this is very difficult. However, this reverses what I believe should be the proper burden of proof. The justice system should have the burden for explaining Aboriginal over-representation.

Perhaps more important than any of the above limitations is that the objectives of the justice system cannot be measured, such as justice, equality, rehabilitation and deterrence. As a result, the system turns to measuring other outcomes which may be related to those goals: e.g., offense clearance and conviction rates, sentence lengths and repeat offenses. In fact, some of these measures may *reduce* the rate at which the system achieves its goals. They create incentives for actors within the system to pursue multiple charges, plea bargaining, petty charges and encourage offenders to inform on others. These strategies can even lead to the commission of extra crimes to give the accused better bargaining abilities (stolen property, drugs, names of other offenders to provide to the police and prosecution.) The justice statistics that do exist, however limited, may actually be counter-productive, or perhaps are simply irrelevant, to the actual goals of the justice system.⁵²

As is said at the beginning of the introduction in chapter 1, the ultimate problem from my perspective is not whether Aboriginal persons are treated worse by the justice system, it is whether Aboriginal persons are receiving justice - is

52 J. Klein, note 37, *supra*.

society, including and perhaps especially Aboriginal society, being protected, and second, is the system intruding too much and unfairly into the lives of Aboriginal people?

Proving discrimination in the justice system is not a requirement for proving that the system is ineffective and needs to be changed. However, proving discrimination can be a powerful argument for making changes where other arguments have not succeeded. Of course, discrimination is a problem in and of itself.

Because the criminal justice system is a continuum of decision-making points, the choice of how to conduct policing, the selecting of crimes on which to focus and the decisions of who will be brought into the system and on what charges are, to my mind, by far the most important data required before there can be an adequate statistical explanation of Aboriginal over-representation.⁵³

53 LaPrairie, note 2, *supra*, at pp. 430-431, quoted above, and see Finkler, note 28, *supra*, p. 40: "[T]he value of crime statistics declines the further we are removed from the offense itself, judicial records were our only alternative because police files, kept at the local detachment, were unavailable throughout the period in the field." The importance of policing decisions is recognized by the criminal justice system in its allocation of resources. See Havemann et al., note 16, *supra*, p. 22: "According to the Solicitor General's *Selected Trends in Canadian Criminal Justice* (1979), 'nearly two-thirds of expenditures in criminal justice are devoted to policing.' This compares with one-fifth to adult corrections and one-tenth to court services [and] very small expenditures ... made for legal aid and direct compensation to victims."

In my view, it is the decisions that determine who enters the system that are the most important area of the justice system and can contain the most important sources of discrimination such as differential charging practices.⁵⁴

54 For example, see Havemann et al., *Ibid.*, p. 3: "A lower proportion of native children are let off with a warning than the national rate (15 percent compared to 46 percent)." At p. 20: "[D]runks who can supply an address are often driven home while homeless, unattached drinkers are more likely to be arrested." At p. 114: "Differential charge rates were evident ... in a Regina study of public drunkenness analyzed by Harding. Of those arrested for public intoxication, 30% of the Indian people, 21% of the Metis people and only 11% of the non-Native people were actually charged ..." Finkler, note 28, *supra*, p. 41, found that while 91.9% of reported crimes were cleared, only 26.1% were cleared by charge. See C. Reasons, "Crime and the American Indian," in *Native Americans Today: Sociological Perspectives*, H. M. Baker, B. A. Chadwick, R. C. Day, eds., (New York: Harper and Row, 1972), at p. 320: Between 1950 and 1968 "Indians consistently have an arrest rate approximately three times that of blacks and ten times that of whites."

F. Gale and J. Wundersitz, "Aboriginal Youth and the Criminal Justice System in South Australia," in Halzelhurst, note 14, *supra*, pp. 122-123: "[A]lthough Aboriginals accounted for 8.1 per cent of all youth appearances in South Australia. they constitute 16.6 per cent of all arrest-based appearances. ... [F]or an arrested youth it is simply not possible to avoid at least some form of court appearance ... [T]he court often has not had sufficient time to gather the necessary social background ... [O]nly 31.3 per cent [of Aboriginal appearances] were 'diverted' to Aid Panels [while for] non-Aboriginal appearances ... 63.1 per cent took place before an Aid Panel." At p. 131: "[T]he very fact that police have decided to arrest an individual may strongly influence the subsequent decision of the Screening Panel." At p. 132: "[T]he youth's employment status was one of the most important in the Screening Panel's decision, with unemployed youths being significantly more likely to be directed to the Children's Court than were students or employed youths."

See Note, note 49, *supra*, p. 1496: "[M]ost studies ... reveal what many police officers freely admit: that police use race as an independently significant, if not determinative, factor in deciding whom to follow. detain, search, or arrest." At p. 1506: "[A]lthough courts reject race as a blanket criterion for suspicion, they nevertheless allow police to use race in less intrusive, but nonetheless significantly injurious ways ... courts inflate the probative value of race as a basis for suspicion ... courts underestimate the harm posed by racially discriminatory police behaviour."

At pp. 1524-1526: "[R]acial discrimination ... at the screening stage can result in a more severe assessment of the crime and a decision to pour resources into the investigation. This decision, in turn, makes it more likely that incriminating material will be discovered

Ericson found

our empirical study, along with other socio-legal research, points to the fact that the entire system - the law, the organization of the courts, and the police organization - is ideally designed to ensure that detectives control the making of crime and criminals.⁵⁵ ... Several researchers have concluded that conviction and even sentencing outcomes for accused persons are fundamentally influenced by the police.⁵⁶

The police control the whole process because of their positional advantage compared to the other agents of criminal control. Police have low visibility and control the information that goes to the other agents without any routine independent checks on how the police have made their case. Others have neither the time nor the resources to consider competing truths.⁵⁷

Even data at the police end would be problematic because of the limitations mentioned above. The limitations are so fundamental that there is not even

and that the suspect will be found guilty. Moreover, racial discrimination at the charging stage might result in a more severe charge and a more severe sentence. Indeed, even if the defendant chooses not to go to trial, the initial, more serious charge will probably result in a stiffer plea bargaining agreement. ... These studies [citations omitted] suggest that minority defendants - because of their own race or the race of their victim - receive disproportionately harsher treatment at each stage of the prosecutorial decision making process: the initial assessment of the severity of the offense, the decision concerning what specific charges to file ... results showed that whites were statistically more likely than blacks or Hispanics to have the charges against them rejected by the prosecutor at the initial screening."

55 Ericson, note 37, *supra*, p. 224.

56 R. Ericson and P. Baranek, *The Ordering of Justice: A Study of Accused Person as Dependans in the Criminal Process*, (Toronto: University of Toronto Press, 1982), p. 41.

57 Ericson, note 37, *supra*, p. 22-24.

adequate data on how many Aboriginal persons there are in society generally,⁵⁸ or in specific geographic locations, or even within jails. Nor is there adequate data on Aboriginal crime rates - as the rates that are known are usually confined to registered Indians or reserves.

I believe the data gaps are so great that they call into question the validity and utility of every statistical study on the influence of race in the justice system. I do not say the studies have no value, but their limitations must always be borne in mind. Statistical research in criminal justice has manifestly failed to create or influence improvements in the over-representation of Aboriginal persons in jails. What it has accomplished is to develop ever more sophisticated statistics and analytic techniques, which serve the criminologist far better than they serve the justice system, victims or offenders.

Given the inability of the data to shed much light on these topics, other methods of assessing the justice system are required. One such method is opinion surveys. Another method is through public inquiries that examine particular cases in minute detail, listen to broad public opinion, consider existing research and draw on the considerable personal experience of the chosen experts. This method, as shown in chapter 6, has concluded that Aboriginal persons are discriminated against by virtually every part of the justice system. The alternative to statistical research is not necessarily "assumptions." There are other legitimate ways to come to conclusions about how the justice system treats people.

58 See Chapter 2, *supra*. See Jamieson and LaPrairie, note 12, *supra*, p. 34, who report that "the total Native population counts in 1981 included approximately 5,000 persons of Indo-Pakistani or other origins."

Indeed, it may be that the sheer repetitious counting of Aboriginal over-representation is counter-productive, producing negative stereotypes and reducing hope, without contributing anything positive.⁵⁹

'The criminologist is in practice if not in theory a government paid obscurantist.' ... 'Criminology was easily adopted by the system since it represented the short-term solution, the 'facade,' the time-gaining device, which the social control institutions badly needed to cover up for their own inadequacies.' ... [C]riminological research and policy considerations have tended to ignore the structure and function of law and, as such, have expended their energy on *ad hoc* empiricism and piecemeal reformism. ... [P]olicy research is an ongoing, endless piecemeal depiction of problems which is good for the business of criminology and for those who benefit from the existence and expansion of the criminal justice system. It is, however, not particularly good for either advancing our understanding of the actual workings of the criminal justice system or enhancing justice in the society at large. ... A pronounced characteristic of many of these criminologists is that they have collected and ordered data on crime and criminals but they do not have the data to do away with crime. ... Criminology itself is part of the problem.⁶⁰

59 G. Bird, "Field Work in South Australia," in Hazelhurst, note 14, *supra*, p. 62. D. Parker, "The Administration of Justice and its Penal Consequences," in Hazelhurst note 14, *supra*, p. 140: "Nor do I believe that more research in 'Aboriginal criminology' will help Aborigines. We have been collecting for almost half a century evidence of the spectacular injustices which were perpetuated on Aboriginal Australians by dispensers of Anglo-Saxon law ... Yet we allow these injustices to continue as we add to the historical, anthropological and legal records."

60 K. Couse et al., "False Promises of Criminology and the Promise of Justice," Regina School of Human Justice, paper presented to the Learned Societies Conference. June 1983, pp. 11, 12, 21, 24, 25, and 45. The opening quotes are found in Couse et al., the first being a quote from Peter McNaughton-Smith, at p. 11, the second a quote from Yvon Dandurand, at p. 12.

The methods adopted by public inquiries are better than statistical methods in assessing the operation of the criminal justice system, in large part because of the fragility of the data.

The overwhelming conclusions of discrimination by the public inquiries, reinforced by the consistent findings of discrimination by *ad hoc* empirical studies, must be accepted. The larger problem is that Aboriginal communities and victims are not adequately protected from offenders or from the system. It is unacceptable to insist that more empirical research is required before conclusions are drawn or changes made. More data will not significantly change the picture.

CHAPTER 8 - LOCATING DISCRIMINATION

IN THE JUSTICE SYSTEM

Introduction

In chapter 6, major trends in the official studies of the past 25 years were reviewed, including the general conclusions being drawn by those studies. In chapter 7, the difficulties with finding discrimination statistically were discussed. The purpose of this chapter is to draw from the studies that exist precisely where discrimination takes place in the justice system and to demonstrate the scope of the discrimination. However, despite the expansive nature of the review provided here, it does not investigate every minute element of the justice system and I believe there is more unfairness and discrimination in the justice system than this chapter discusses.

I have not yet encountered in other studies an identification of discrimination as it occurs in a chronological presentation as a person passes through the justice system (although this chapter does not provide the level of detail for particular problems that can be found in other studies). I think the three areas of discrimination that are especially missing from other studies are the process of selecting accused persons, the guilty plea process and what happens inside the jails. As well, in my view, the various studies do not place enough emphasis on how unfairness that applies to all who are in the justice system results in systemic discrimination against Aboriginal people for the simple reason that they are over-represented in the group exposed to the unfairness. This chapter is an attempt to provide that emphasis. Finally, this chapter provides specific examples of

discrimination providing confirmation for many of the findings of the Manitoba Inmate Survey.

The important thing to take from this chapter is the staggering incidence of discrimination, not so much measured in statistical terms, as in the wide variety of opportunities for discrimination to occur through the process and the numerous examples of unfairness that will have adverse impacts on any group that is disproportionately subject to the system's processes, especially Aboriginal persons. The criminal justice system is replete with unfairness, practices that fail to respect the laws and an unwillingness (or inability) to accommodate differences. The Law Reform Commission of Canada spent twenty years studying these problems and proposing reforms, the vast majority of which have gone unimplemented.

Before beginning a review of the system, it is useful to note some areas this chapter does not examine. The chapter does *not* deal with overt discrimination. That instances of it occur is undeniable and much needs to be done to create a justice system where it is possible to find the overt discrimination and weed it out.

The justice system, despite all its fine rhetoric of fairness and openness, does not provide open processes to scrutinize the agents who carry out justice. Judges judge judges, in private; lawyers judge lawyers, usually in private; the police are subject to somewhat greater scrutiny, but are generally not exposed to processes that even come close to approaching civil court procedures; civil servants are generally immune from outside scrutiny; and jail staff face perhaps the least degree of scrutiny of all. Most agencies do not have a code of conduct that defines what constitutes improper racially motivated behaviour or that explicitly names improper racial behaviour as a ground for dismissal. The Winnipeg Chief of Police heard

derogatory statements from his police officers about Aboriginal people and did nothing about them.¹ Structural changes need to be made to reduce overt discrimination.²

Another area that this chapter does not canvass is the differences in how Aboriginal persons and European Canadians conceive of law. There is a growing body of literature into this fascinating subject. For my purposes, the most important difference to note is that the questions "what is law?" and "how should wrongs against others be controlled and good behaviour encouraged?" raise fundamentally different responses. What is essential is to respect those differences, rather than assuming that the European Canadian concepts are better.

1 A. C. Hamilton and C. M. Sinclair, Commissioners, Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 2, *The Deaths of Helen Betty Osborne and John Joseph Harper*, (Winnipeg: Queen's Printer, 1991). See Chapter 9 (Osborne) and Chapter 10 (Harper).

2 A. C. Hamilton and C. M. Sinclair, Commissioners. Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, vol. 1, *The Justice System and Aboriginal People*, (Winnipeg: Queen's Printer, 1991), find that the complaint process governing the Winnipeg police is not as independent, open or effective as it should be and does not provide enough assistance to complainants. The report also finds that the RCMP public complaints process is not in the public interest and is designed to protect the RCMP. The Commissioners recommend a significantly revamped process and suggest a similar process be applied to complaints about prison treatment, lawyers, judges, social workers and civil servants. At p. 635: "It is clear there needs to be a greater effort by all concerned to demonstrate to the public, and especially Aboriginal people, that their complaints will be fully and fairly dealt with, no matter what component of the justice system is involved." See also Prof. H. A. Kaiser, "The Criminal Code of Canada: A Review Based on the Minister's Reference," a paper prepared for the Law Reform Commission of Canada, 1992, pp. 152-161, including his call for a "quality of justice monitoring committee."

What I have found frustrating is trying to learn more about these differences because I have found relatively little literature that explains Aboriginal concepts in a way that is easily understood by a non-Aboriginal person such as myself. Reasons for this apparent lack of literature³ include the European Canadian system's imposition of its justice concepts and systems, imposition of a new method of Aboriginal leadership and of making community decisions, together with oppression of Aboriginal religions, languages and relationships with the land. This legacy has had very serious impacts on the ability or freedom of Aboriginal people to practice and retain expertise in their traditional concepts and systems and in their ability to articulate their concepts of law and justice in an atmosphere of mutual respect and tolerance.

One of the great self-serving myths of colonialism in Canada is that Aboriginal peoples had no laws - first because they were "savages" living in the uncontrolled state of nature, and now, for the very reason that they have been removed from their traditions over the past centuries. Denying that there is Aboriginal law permits Canadian law to be imposed.

The literature that I have found convinces me that Aboriginal concepts of law are alive today, are finding new voices to express those concepts to reluctant non-Aboriginal listeners and Aboriginal peoples continue to resist efforts to create Aboriginal self-government in the image of the European Canadian model.⁴

3 I say "apparent" because I suspect the problem is more with where I am searching for information (primarily non-Aboriginal legal sources) than the lack of that information.

4 See Hamilton and Sinclair, note 2, *supra*, ch. 2; Clare Brant, "Native Ethics and Rules of Behaviour," *Canadian Journal of Psychiatry*, 35, (August 1990): 534; Freda Anenakew, Cecil King, and Catherine Littlejohn, "Indigenous Languages in the Delivery

This chapter reviews the specific operation of today's criminal justice system and the structural unfairness and discrimination that exists within it, essentially following a chronological passage through the system, starting from knowing what the law says through to parole, and includes a brief discussion of young offenders, child welfare, victims of crime and employment discrimination.

Presumption of knowledge of non-Aboriginal laws

The presumption that ignorance of the law is no excuse is weaker for Aboriginal persons, who have considerably less access to the law, legal education, and lawyers.⁵ Almost no materials about the law are produced in Aboriginal languages and there continue to be prosecutions of Aboriginal persons who are practising Aboriginal rights to hunt and fish.

of Justice in Manitoba," (Winnipeg: Aboriginal Justice Inquiry, 1990), ch. 2; James Youngblood Henderson, "First Nations' Legal Inheritances," n.p., n.d.; R. Ross, *Dancing With a Ghost*, (Toronto: Butterworths, 1992); R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused," [1989] 3 C.N.L.R. 1; R. Ross, "Cultural Blindness and the Justice System in Remote Native Communities," paper prepared for the 'Sharing common Ground' Conference on Aboriginal Policing Services, Edmonton, May 1990; R. A. Cawsey, Chairperson, Alberta, Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, vol. 1, (Edmonton: 1991). ch. 9; H. Lilles, "Administration of Justice in Remote and Isolated Communities," *Queen's Law Journal*, 15, 2, (Fall 1990): 327; H. Finkler, "North of 60 - Inuit and the Administration of Criminal Justice in Northwest Territories: The Case of Frobisher Bay," (Ottawa: Department of Indian Affairs and Northern Development, 1975), pp. 10-13; and Menno Wiebe, *Native Culture and Canadian Law: A Cultural Look at Native People and the Canadian Justice System*, (Kingston: Queen's Theological College, 1984).

5 Hamilton and Sinclair, note 2, *supra*, p. 104. See also the discussion in ch. 5, *supra*, on location of the courts.

Havemann found that "[l]aw enforcement personnel are charged with the enforcement of inherently discriminatory laws" and that "[t]he Canada-wide application of a single *Criminal Code* is the antithesis of the rhetoric of the Canadian plural mosaic."⁶

Moreover, the laws do not reflect the realities of life on reserves. For just one example, traffic laws and automobile regulations lose relevance in places that are only connected by road a few months of the year, in areas where people have few funds and limited access to driver licensing and automobile registration offices.

Police surveillance, arrest, interrogation and charging

As discussed in chapter 7, Aboriginal persons are more visible than the white majority and attract special police attention. The literature reveals that Aboriginal persons are stopped for no reason in situations where non-Aboriginal persons would not be stopped.⁷

6 See P. Havemann et al., *Law and Order for Canada's Indigenous People*, (Regina: School of Human Justice, 1985), pp. 161 and 163. See the discussion in ch. 6, *supra*, concerning cultural differences. See also Finkler, note 4, *supra*.

7 Gilbert Monture, Project Committee Chairperson, Canadian Corrections Association, *Indians and the Law, a survey prepared for the Hon. Arthur Laing*, (Ottawa: Department of Indian Affairs, 1967), p. 37; W. Kirby, Alberta Board of Review, Provincial Courts, Report No. 4, *Native People in the Administration of Justice in the Provincial Courts of Alberta*, 1978, pp. 15-20; Bob Daudlin, Chairperson, Canada, Special Committee on Visible Minorities in Canadian Society, *Equality Now!*, (Ottawa: House of Commons, 1984), p. 68; Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice*, (Ottawa: 1992), p. 47; Hamilton and Sinclair, note 2, *supra*, p. 595; Lilles, note 4, *supra*, p. 330; Havemann, note 6, *supra*, p. xii. See also re: other visible minorities, W. Head and D. Clairmont, "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System," (Halifax, Royal Commission on the Donald Marshall Jr. Prosecution, 1989), pp. 25-26.

An example of this is the death of J. J. Harper, who was a heavy set 37 year old Aboriginal male, walking slowly towards the scene of a crime. He was stopped by a police officer looking for a slim, 19 year old Aboriginal male who was running away both from the scene and from the police. Harper was stopped by the officer *after* the actual suspect was arrested and this was broadcast on police radios. The altercation resulted in his death and police attempted "to construct a version of events which would, in effect, blame J. J. Harper for his own death" when the event "started as an unnecessary, racially motivated approach to an Aboriginal citizen."⁸

Another example was cited in *Justice on Trial*, where Edmonton and Calgary police used a program called Serious Habitual Offenders Comprehensive Action

M. Zatz, "The Changing Forms of Racial/Ethnic Biases in Sentencing." *Journal of Research in Crime and Delinquency*, 24, 1, (Feb. 1987): 69. at pp. 83-84: "Our stereotypic perceptions of who and what is threatening rests on the fear of immediate, visible danger. Yet the visibility of danger is to some extent socially conditioned. That is, we learn to fear, and to actively guard against, certain threats (e.g., street crime) and not others (e.g., offenses occurring in the privacy of one's home or office). In addition to learning what and where to fear, we also learn whom to fear ... minority members are stereotypically perceived as more threatening to society than are whites. ... The indicators of 'aggravating circumstances' and the factors invoking sentence enhancements, however, are based on our socially learned fears of persons using guns, inflicting great bodily injury, or who are 'habitual' criminals. These fears do not typically extend to such harmful acts as corporate crime or violence against women behind the gates of middle- or upper-class homes. Such acts may be injurious or even fatal to thousands of people and maybe occur habitually, but, if defined as crimes and prosecuted, they are not accorded harsh statutory sentences."

See Note, "Developments in the Law - Race and the Criminal Process," *Harvard Law Review*, 101, 7, (May 1988): 1472, at p. 1505: "[P]olice often lower their standards of investigation when a suspect has been described as a minority, thus intruding upon a greater number of individuals who meet the racial description than if the suspect had been described as white."

8 Hamilton and Sinclair, note 1, *supra*, p. 113 (Harper).

Program which focused special attention on youth with the greatest likelihood of reoffending.⁹ As seen in the Manitoba Inmate Survey, Aboriginal youth are more likely to become involved with the law at an earlier age and are even more over-represented in jail than Aboriginal adults. Special surveillance only exacerbates the problem. The program was considered to have a disproportionate impact on Aboriginal children by the Alberta Task Force. Further, RCMP Assistant Commissioner Head wrote in his report "Policing for Aboriginal Canadians: The R.C.M.P. Role," "over the years there have been numerous examples of members of the force displaying racist attitudes toward Native people."¹⁰

The Donald Marshall Jr. Royal Commission found "[i]t is clear the police do not consistently exercise their independent right to commence an investigation and

9 Cawsey, note 4, *supra*, p. 2-47.

10 Quoted in Cawsey, note 4, *supra*, p. 2-50. See also Hamilton and Sinclair, note 1, *supra*. Similar experiences are found in Australia: See R. White, R. Underwood and S. Omelezuk, "Victims of Violence: The view from Youth Services," *The Australian and New Zealand Journal of Criminology*, 24, 1, (March 1991): 25, at p. 32: "In the case of complaints about police, however, the incidence reported by those working predominantly with Aborigines was more than 60% higher than those working in the main with non-Aborigine young people. ... [T]here is ample supporting evidence that harassment, discrimination, maltreatment and abuse of legal rights is widespread in police dealings with these young people." See M. Wilkie, *Aboriginal Justice Programs in Western Australia*, (Nedlands: Crime Research Centre, University of Western Australia, 1991), pp. 32-33: "In a survey conducted in Roebourne and Jigalong ... Aboriginal respondents were asked whether they had experienced police violence, whether physical, verbal or 'social.' ... 90% of Aboriginal respondents considered that the police discriminated against them and the most common complaint was 'rough handling' in the arrest situation. ... An overwhelming feature of the evidence by Aboriginal and Islander people in relation to racist violence was complaints against police officers."

lay a charge."¹¹ This problem continues into the prosecutor's office, according to a judge familiar with justice in the Northwest and Yukon Territories.

Surprisingly, [Crown attorneys in the Yukon and Northwest Territories] appear to be reluctant to exercise any significant prosecutorial discretion, as evidenced by the aggressive prosecution of relatively minor charges and the reluctance to withdraw or stay charges during a proceeding where it is apparent that the main Crown witness simply has not produced the evidence anticipated. ... [I]t is likely that as career Crowns, they are less willing to over-rule or disagree with the police. ... In the result, Crown prosecutors may be more amenable to taking directions from the police and to exercising prosecutorial discretion in only rare instances, in the clearest of cases.¹²

In other circumstances, Aboriginal persons may need to call in the police because other, more appropriate or less intrusive alternatives, are not available.¹³

11 T. A. Hickman, Chairperson, Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution, *Commissioners' Report*, volume 1, (Halifax: 1989), p. 231.

12 Lilles, note 4, *supra*, at 340, quoted in Law Reform Commission of Canada, note 7, *supra*, p. 49.

13 Lilles, note 4, *supra*, p. 336. See Havemann, note 6, *supra*, p. xxi: "[P]olice appear to be coercive substitutes for the adequate provision of other services (e.g., housing, health care, educational and recreational facilities). A question to be explored is whether less policing and equivalent or more expenditures on these other services would lead to less involvement with the criminal process for both Indigenous and non-Indigenous people." R. Ericson, *Reproducing Order: A Study of Police Patrol Work*, (Toronto: University of Toronto Press, 1982), p. 19: "The 'lower orders' frequently use the police for this purpose [assistance in handling their own troubles and conflicts] and also mobilize them to handle interpersonal conflicts because other forms of social control have failed, are unavailable, or are absent."

Consistent with the Manitoba Inmate Survey results, once arrested, Aboriginal persons are less likely to understand their rights, less likely to have access to a lawyer, more likely to be deferential and less likely to exercise their rights.¹⁴

¹⁴ Monture, note 7, *supra*. See also A. Arcuri, "Lawyers, Judges and Plea Bargaining: Some New Data on Inmates' Views," *International Journal of Criminology and Penology*, 4, (1976): 177, at p. 178. This is a study of 118 inmates in New Jersey. Half reported they did not receive warnings and did not understand their right to have a lawyer during questioning by police, 43% claimed they were physically "pushed around" or "beaten up" by police. See Head and Clairmont, note 7, *supra*, p. 117: "Blacks are significantly more likely to report that they were not advised of their legal rights when charged than non-Blacks." See Law Reform Commission of Canada, note 7, *supra*, p. 32 re: right to an interpreter at police interrogation. See Finkler, note 4, *supra*, at p. 14, who reviews Annual Reports of the RCMP and finds in 1922 that statutory warnings "were entirely beyond [Inuit] comprehension" and a reference in the 1935 report notes a similar lack of understanding of a subpoena. In the 1931 report, a member attending a meeting with the Inuit in Southampton found "that the Natives were under the impression that the police would kill any native who had committed a wrong." At p. 15, Finkler notes: "The traditional meaning of a policeman underwent a change from 'someone who helps' to 'one who maintains order.' " At p. 118: "[I]n situations where the police ask if they can come in to search the house, many do not realize that they have the right to refuse by demanding a search warrant."

Police interrogations pose special problems for Aboriginal persons.¹⁵ Testimony in the Helen Betty Osborne hearings admitted that it was, at least in the early 1970s, regular practice to take persons to remote places and put a little pressure on them during interrogations. The investigation of the J. J. Harper shooting shows that police give preferred treatment to police officers subject to interrogation. The Aboriginal Justice Inquiry found that police have taken advantage of Aboriginal people when questioning them.¹⁶ Police forces have refused to implement audio or tape recording of interrogations.

The Donald Marshall Jr. Royal Commission found that there is clearly a two tier system of justice in operation, where persons of status receive preferred treatment. The report *Justice on Trial* states "the rules of evidence provide that statements tɛ'.ən [when the accused is under the influence of alcohol] are

15 See Finkler, note 4, *supra*, p. 20: "According to Morrow ... confessions and admissions [are] often obtained as a result of the accused's desire to please the police." P. 98: "The problem concerning confessions is that the majority of Inuit do not realize that they will be used against them in court. Despite the fact that they are forewarned, frequently a source of confusion in itself, many still do not seem to appreciate the significance or consequences of their signature on a confession."

For the Australian experience, see: J. McCorquodale, "Judicial Racism in Australia? Aboriginals in Civil and Criminal Cases," in *Ivory Scales: Black Australia and the Law*, K. Hazelhurst ed., (Kensington: New South Wales University Press, 1987), at p. 45: "Northern Territory Aboriginals who are 'unsophisticated' and 'have had little contact with white society are, by upbringing, inclined to be not only polite, but cooperative and frank with authority'..." J. Coldrey, in Hazelhurst, *Ibid.*, pp. 82-83: "In prefacing those guidelines [governing the interviewing of Aboriginal suspects] Mr Justice Forster remarked: 'Some Aboriginal people find the standard caution quite bewildering even if they understand that they do not have to answer questions because, if they do not have to answer questions, then why are the questions being asked?' "

16 Hamilton and Sinclair, note 2, *supra*, p. 610.

inadmissible"¹⁷ yet given the very frequent incidence of alcohol related crimes, particularly for Aboriginal inmates, this rule seems not to be applied in many situations. One reason may be, as discussed below, most cases never go to trial so the issue is never raised.

There are no court workers or interpreters at the vast majority of police interrogations. The court worker and court communicator systems that exist across the country vary considerably, with some provinces not having any service at all.¹⁸ Generally, the role of the persons is to interpret non-Aboriginal procedures to Aboriginal persons, not to interpret Aboriginal culture to non-Aboriginal personnel. Court workers can have conflicts of interest when they are asked to work on behalf of the court and on behalf of the accused at the same time. In some circumstances court workers are asked to assist the police in their interrogations.¹⁹ Typically, the interpreters will not have any special training²⁰ and they are no substitute for a trained interpreter or a lawyer.²¹

17 Cawsey, note 4, *supra*, p. 2-57.

18 E. Shewchuk, "Report on Courtworkers in Canada," (Winnipeg: Aboriginal Justice Inquiry, 1989).

19 Hamilton and Sinclair, note 2, *supra*, p. 370.

20 Law Reform Commission of Canada, note 7, *supra*, p. 34; Hamilton and Sinclair, note 2, *supra*, p. 370.

21 S. Zimmerman, "The Revolving Door of Despair: Native Involvement in the Criminal Justice System," (Ottawa: Law Reform Commission of Canada, 1991), p. 30. See also J. Hathway, "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Court Worker Program," (1985) 49 *Sask. L. Rev.* 201.

Interpretation problems in the justice system are considerable and they exist at every stage, from arrest, to interrogation, to bail hearings, to understanding plea bargains, to giving evidence, to jails and parole.²²

Matters of nuance can make the difference between giving an inculpatory or exculpatory statement to the police, between being believed or disbelieved, between being convicted or acquitted and between receiving a harsh or lenient sentence.²³

A particular problem with language is that an individual may understand and speak English in daily life, but not understand specialized legal words or be reluctant to admit a language deficiency.²⁴ A problem that can arise at any time, but especially with persons with limited English language skills, is for the police to attribute statements to the accused that the accused did not make. When the

22 Kirby, note 7, *supra*, p. 48. See also *R. v. Koonungnak* (1963), 45 W.W.R. (N.S.) 282 (N.W.T. Terr. Ct.), Zimmerman, note 21, *supra*; R. Ross, "Dancing with a Ghost: Leaving Our White Eyes Behind," note 4, *supra*.

23 Law Reform Commission of Canada, note 7, *supra*, p. 32.

24 In this chapter I refer to problems dealing with English because this is the problem in most areas of Canada and particularly in the areas dealt with by the studies I am citing. Of course for court proceedings in French, the problems are the same for those who do not speak French.

Hamilton and Sinclair, note 2, *supra*, p. 40; R. Ericson and P. Baranek, *The Ordering of Justice: A Study of Accused Persons Dependents in the Criminal Process*, (Toronto: University of Toronto Press, 1982). pp. 193-194: "Carlen (1974) argues that the formal language of the law creates the boundaries of formal symbolic control in court ... a restricted linguistic code is created. ... As Roland Barthes ... stated in 1972: To rob a man of his language in the very name of language: this is the first step in all legal murders.'... The universe and definitions of the accused are denigrated and refined in a number of different ways." P. Carlen, *American Criminal Justice: The Defendant's Perspective*, (Englewood Cliffs, N.J.: Prentice Hall, 1972), and Barthes, cited in P. Carlen, *Magistrates' Justice*, (London: Martin Robinson, 1976).

accused does not have a lawyer, or will have a lawyer with little time to check into the case or little ability to review the police statement with the client, the problem can be aggravated.²⁵

Problems with police investigations include excessive aggressiveness in pursuing one theory to the exclusion of other scenarios, superior officers failing to provide adequate supervision, inadequate training, organizational deficiencies, a failure to disclose evidence, failing to inform offenders of their rights to remain silent or to have a lawyer, lack of constraints on searches and even physically abusing suspects.²⁶ Generally, "[t]he accused is made to feel not only that he

25 J. Baldwin and M. McConville, *Negotiated Justice: Pressures to Plead Guilty*, (London, Eng.: Martin & Robertson & Co., 1977), p. 68.

26 For police behaviour generally, see R Ericson, *Making Crime - A Study of Detective Work*, (Toronto: Butterworths, 1981), p. 144: "In our observations, detectives did not often state the right to silence cautions up to the point that suspects provided written statements ... interrogation was geared toward generating a verbal confession, and if this verbal confession was forthcoming, the detectives would then ask the suspect to 'volunteer' a written statement which contained the caution. If the detective could not obtain the accused's signature, he could still use the 'verbal' as evidence ... regardless of when the detective decided to charge the accused, he could always indicate that it was at the point the suspect 'volunteered' a statement and point out that the statement was duly recorded with the rights caution written in." Only 13 of 96 suspects observed were known to have received right to silence cautions at any point prior to interrogation and only one of 96 was known to have been informed of a right to counsel. This study was conducted before the 1982 *Charter of Rights of Freedoms* was enacted.

P. 153: "[T]he detectives effectively controlled all facets of their searching actions in spite of legal ideals to the contrary ... detectives were selective in choosing the Justices of the Peace they routinely did business with ... detectives invariably obtained search warrants, usually without question." P. 148: "Justices routinely issued warrants without question, having little or no means to independently investigate the grounds on which the police officer seeks the warrant. Moreover, there is a common law right allowing police officers making an arrest without warrant to enter private property to effect the arrest. ... Furthermore, the legal rules can be circumvented by obtaining the expressed or implied consent of the suspect. And, in terms of their goal of obtaining evidence to

doesn't understand the system but also that he is incapable of understanding it."²⁷
Ericson and Baranek state

The period during which the accused is directly subject to police ordering is not a time for raising fundamental issues of rights, for being obstreperous, or even for bickering over details of what charges are the proper ones. ... [A]ccused persons under police orders are highly perceptive (and wise) in showing a tendency to follow the course of least resistance.²⁸

sustain charges and obtain a conviction, detectives are able to have evidence obtained from illegal searches used as legitimate evidence against the accused in court."

Ericson and Baranek, note 24, *supra*, pp. 49-53: "[T]he police have an array of interrogation strategies and tactics which mean that this right to silence is usually negated in practice. ... [M]ost suspects do not successfully resist giving a confession ... later negotiations about plea and sentence were more successful if there had not been a confession." Among the pressures to confess include a "belief that cooperation would yield some immediate or future form of police leniency, e.g. charge reduction, not charging certain counts, not blocking bail, earlier release from police custody, a favourable report to the crown attorney and in court, not pursuing further investigations against the accused and/or his friends."

²⁷ Ericson and Baranek, note 24, *supra*, p. 83.

²⁸ Ericson and Baranek, note 24, *supra*, p. 75.

The result of surveillance, arrest and interrogation are charging decisions. This again involves considerable discretion and can lead to discriminatory decisions, systematic over-charging or highly questionable charges.²⁹ Police also act as prosecutors, although the practice is less frequent now than in previous times.³⁰

29 See J. Ekstedt and M. Jackson, "Justice in Sentencing: Offender Perceptions," (Ottawa: Canadian Sentencing Commission, 1988), whose survey of B.C. inmates revealed perceptions of over-charging (pp. 28, 46). See Ericson, note 26, *supra*, at p. 198 noting "[t]he detectives' practice of charging everyone for everything possible ..." See Ericson and Baranek, note 24, *supra*, pp. 71, 115, 150. In their study, they found 38.5% of charges were withdrawn. They concluded this was evidence of over-charging and not Crown leniency. See Note, "Developments in the Law - Race and the Criminal Process," note 7, *supra*, pp. 1546-7: "[P]rosecutors take into account convictability, public outrage, and similar factors when making their charging decisions ..." See also the discussion of differential charging in ch. 7, *supra*.

J. Hagan and K. Bumiller, "Making Sense of Sentencing: A Review and Critique of Sentencing Research," in *Research on Sentencing: The Search for Reform*, vol. 2, A. Blumstein, J. Cohen, S. Martin and M. Tonry, eds., (Washington: National Academy Press, 1983). They found, summarizing primarily American studies, at p. 5: "[O]ffenders with more extensive cases (i.e., involving multiple offences) are more likely to experience alterations in charges. This finding supports a hypothesis that offenders often may be systematically "over-charged" in anticipation of "rewards" to be distributed later in the bargaining process."

The charging decision also involves the prosecutor. See M. Radelet and G. Pierce, "Race and Prosecutorial Discretion in Homicide Cases," *Law and Society Review*, 19, (1985): 587. Their study shows at p. 615: "[B]etween the time a police department classifies a homicide and the time the case is presented in court there can be significant changes in the characterization of the homicide. These changes, which relate ultimately to the imposition of the death penalty, are associated with both the defendant's and the victim's races." The article argues that prosecutors may find white victims more credible than black victims, or that the troubles of white victims are more worthy of full prosecution than blacks. In this way, "racism will enter the legal system through the prosecutor's office even if the prosecutor never explicitly attends to race." (p. 617)

30 Finkler, note 4, *supra*, pp. 68, 79.

The impact of police decisions should not be under-estimated, as they exercise influence through virtually all stages of the justice system.³¹ Ericson and Baranek found that the police play a pivotal role in negotiations.³² It must also be emphasized that the "facts" do not speak for themselves, their description and proof are a continually evolving process that can be presented in very different ways.³³ During the period between charge and court appearance, facts can be manufactured, such as the accused seeking rehabilitation, showing remorse or paying restitution.³⁴ Of course, this is easier to do when the person is not in

31 See Ekster and Jackson, note 29, *supra*, whose survey of B.C. inmates asked probationers their views of the police. "They held a very negative view of the police. In addition to examples of police brutality and overcharging, the probationers stated that they 'lie through their teeth' and 'back each other up in court.' " (p. 83) A different group of inmates interviewed in the study said "that the police lack accountability and that they have too much influence with judges, who, for example, will deny bail on the request of the police." (p. 94) Reporting on the views of a different group interviewed, it was said the police "affect who gets sentenced through their discretionary practices. It was perceived that police influence all aspects of the sentencing process from arrest to parole ... Disparity in sentencing is dependent upon the people working in the criminal justice system. The attitudes of the judge, prosecutor and the police have an effect on the selection and prosecution of offenders." (p. 98) See P. Landreville, M. Hamelin, and S. Gagnier, "Opinions of Quebec Inmates Regarding Questions Raised by the Mandate of the Canadian Sentencing Commission," (Ottawa: Canadian Sentencing Commission 1988), pp. 91-93, who emphasize the overwhelming role of the police throughout the entire system. At p. 55: "The report [to the Parole Board] includes charges of which the accused was convicted, plus police suspicions against him. Since the inmate does not have access to the entire report, he cannot refute any false allegations it might contain. Moreover, a police officer's word to the effect that the person is undesirable is enough to prevent parole being granted. ... After being paroled, the former inmate is still subject to police pressure, either indirectly through a parole officer, or directly when he must report to a police station."

32 Ericson and Baranek, note 24, *supra*, p. 59.

33 M. Feely, *The Process is the Punishment*, (New York, Russell Sage Foundation, 1979).

34 *Ibid.*, p. 173. See Head and Clairmont, note 7, *supra*, at p. 179: in their study of theft cases, there were 13 cases of presentence atonement, only one by a Black: "[V]irtually

pretrial custody and has financial resources and access to programs - areas where Aboriginal offenders are under-represented.

If there are problems with police behaviour, the existing complaint mechanism, at least in Manitoba, is inadequate to see that inappropriate police behaviour is detected and corrected.³⁵

Court appearances - failure to appear

Court appearances are often more difficult for Aboriginal persons, due to geographic remoteness and lack of private transportation or funds for public transportation. It is also more difficult due to weather conditions in the north and due to hunting and fishing seasons. It is more difficult due to the use of English-only written forms. Poor telephone service in remote areas and fewer funds for private telephones or long distance calls make it more difficult to communicate with court officials about problems in attending court. Failure to appear charges will affect later chances at pretrial release and may affect sentencing decisions, security level decisions in jail, temporary absences in jail, and parole decisions.³⁶

all those engaging in pre-sentence atonement were either employed and/or had trade credentials or high education."

35 Hamilton and Sinclair, note 2, *supra*, pp. 628-636. See also Ericson and Baranek, note 24, *supra*, p. 199; and see Note, "Developments in the Law - Race and the Criminal Process", note 4, *supra*, p. 1498: "[C]itizens who are victimized by police face an enormous set of practical obstacles to bringing suits against the police." At p. 1499: "[T]he law governing the police lacks an adequate language of racial equality."

36 On appearance notices, see Law Reform Commission of Canada, note 7, *supra*, pp. 48, 57; Alan Grant, Chairperson, Osnaburgh-Windigo Tribal Council Justice Review Committee, (Toronto: Department of the Attorney General, 1990), p. 55; Hamilton and Sinclair, note 2, *supra*, p. 224.

One of the strategies employed by Aboriginal persons is to minimize their exposure to the system which can lead to failing to appear in court, giving inappropriate guilty pleas, and being passive during proceedings.³⁷ This is not unique to Aboriginal persons. An American study has found that

{f}or the overwhelming majority of defendants, however, trial is simply *not* a viable alternative ... The more common question among defendants in this court [characterized by minor offenses] is not whether to go to trial, but whether to show up in court at all.³⁸ [emphasis in original]

Access to lawyers

In Alberta at least, there is little information provided to accused persons about how to obtain the services of a lawyer.³⁹ As shown by the inmate survey and the discussion of police above, many accused are not informed of their right to a lawyer at all. Generally, lawyers are provided once the police case is complete and the police and prosecutor are satisfied a conviction is likely, but lawyers are rarely available for police interrogations or immediate bail applications.

37 Hamilton and Sinclair, note 2, *supra*, p. 253. See Law Reform Commission of Canada, note 7, *supra*, p. 54; the discussion concerning pressure to plead guilty *infra*; Finkler, note 4, *supra*, p. 19, and at p. 115: "Inuit rarely play an active role in their defence or contest the validity of the charge..."; and D. Parker, "The Administration of Justice and its Penal Consequences," in Hazelhurst, note 15, *supra*, p. 144: "[T]he most frequent response is to withdraw from the situation, mentally, emotionally and visually."

38 See Feely, note 33, *supra*, p. 187.

39 Cawsey, note 4, *supra*, pp. 3-4, 4-27.

Once in court, Aboriginal persons are more likely not to be represented by a lawyer.⁴⁰ This is because there are few lawyers in Aboriginal communities, Aboriginal persons do not have funds to hire lawyers and Legal Aid schemes discriminate against persons charged with minor offenses and against the unemployed (Legal Aid schemes will often represent persons who risk losing employment in a court appearance but not those who have no risk of losing employment or of going to jail).

The lack of representation by a lawyer in so-called minor cases hurts an accused in many important ways. First, the accused may be kept in pre-trial detention even though they are not likely to be sentenced to jail upon conviction. Some studies suggest being held in pre-trial detention increases the likelihood of being sentenced to jail on conviction.⁴¹ Second, sentences that result in fines can often turn into automatic jail sentences if there is fine default.⁴² Third, convictions for minor offenses can have a cumulative effect and become a factor in judges imposing jail sentences and longer jail sentences where there are subsequent charges. Fourth, Legal Aid does not act in hunting and fishing rights cases, requires a strong likelihood of winning on appeal before it will sponsor an appeal

40 See discussion on lawyers in ch. 3, *supra*. See also A. C. Birkenmayer and S. Jolly, "The Native Inmate in Ontario," (Toronto: Ontario Native Council on Justice, 1981). pp. 6-7; generally Hamilton and Sinclair, note 2, *supra*, chapters 6 and 8; and Finkler, note 4, *supra*, p. 16, where it is found that 65% of all criminal cases in the Northwest Territories in 1973 were disposed of by justices of the peace, but at p. 18, "the present legal aid scheme does not provide for any legal counsel in matters brought before the Justice of the Peace Court."

41 Hamilton and Sinclair, note 2, *supra*, pp. 108, 222.

42 *Ibid.*, pp. 419-427.

and does not act in a variety of non-criminal matters. All of these policies have disproportionate impacts on Aboriginal people.⁴³

In some cases, a person granted Legal Aid may later be found not to qualify under the means test. Some Legal Aid schemes will require reimbursement and go so far as to take money posted by friends and relatives for bail as reimbursement, even though those persons never realized their money could be taken for that purpose.⁴⁴

Even where the accused is represented by a lawyer, this is no guarantee that the case will be dealt with properly. As has been shown in chapters 3 and 5, Legal Aid duty counsel, due to time demands, are not able to give as much time to their clients and may have incentives to reduce their workload by encouraging guilty pleas.⁴⁵ Further, lawyers representing clients on Legal Aid certificates may not be sufficiently compensated and there may be incentives to take on more cases at the expense of the time given to some individual cases.⁴⁶ Some inmates (and lawyers)

43 On legal representation generally, see Law Reform Commission of Canada, note 7, *supra*, and Hamilton and Sinclair, note 2, *supra*, p. 108.

44 Cawsey, note 4, *supra*, p. 3-16, re: Alberta.

45 See Ekstedt and Jackson, note 29, *supra*, p. 87, whose survey of B.C. inmates confirmed this perception. Ericson and Barrnek, note 24, *supra*, pp. 85-86. The accused in this study confirmed the lack of faith in legal aid lawyers. Several lawyers in their survey agreed, with one saying "[i]t's a big game. Whoever has the most money wins" and another saying "all legal aid does ... is that it allows for the noises of a defence."

46 See Ekstedt and Jackson, note 29, *supra*, p. 99. See also Arcuri, note 14, *supra*, a U.S. study, at p. 179: "Half of the inmates who were represented by private counsel reported being contacted by their lawyers within 24 hours after arrest. ... Respondents with public defenders reported waiting significantly longer ... Respondents with private counsel were visited for longer periods of time and more frequently than those who were represented

believe the quality of defence lawyer's work depends entirely on money.⁴⁷ Lawyers may find themselves in conflict situations, where they will make concessions that favour relationships with other actors rather than benefiting the accused.⁴⁸ More importantly, the service the defence lawyer provides to the smooth operation of the system is very important.

[T]he system allows the accused to be provided with an advocate and then uses this advocate, trusted by both accused and prosecution, to order the accused through the court process.⁴⁹

[T]he element of trust is normally 'one-way' from the client to the professional rather than reciprocal. Some lawyers seemed more likely to do credibility checks on their clients than on the police construction of the case against their clients. ... Among the lawyers we interviewed, a prevailing view was that it is necessary for the lawyer to make decisions ... because the accused simply does not understand the process. ... [The relationship is marked by] blind trust. From where the accused sat, literally, justice was blinded.⁵⁰

by public defenders."

47 Landreville, Hamelin, and Gagnier, note 31, *supra*, Parker, note 37, *supra*, p. 143: "The class position of the defendant is crucial, for instance in the determination of how much time and effort is expended before the trial by the defendant's lawyer to explain the legal situation, the defendant's rights, the forthcoming proceedings and their possible outcomes. This same class position will also usually determine the skill and experience of the legal representative and the number of days he or she is to devote to the preparation and the conduct of the case, as well as the treatment the defendant has received at the hands of the police in pre-trial proceedings."

48 Ericson and Baranek, note 24, *supra*, p. 24.

49 *Ibid.*, p. 78.

50 *Ibid.*, pp. 94-100.

Lawyers routinely *accept* the 'facts' as they are constructed by the police, and consequently the 'truths' built upon these facts, even if they may not entirely *agree* with them.⁵¹ (emphasis in original)

[I]t is of advantage to the criminal control agents to have the accused represented by a lawyer who knows the court's order of things and will keep the accused in order.⁵² ... As ongoing members [of the system], lawyers do not wish to upset the ordering of justice.⁵³

Even if the lawyer has not acted properly, the accused will almost never be in a position to develop an independent assessment of the lawyer's performance.⁵⁴ This situation is aggravated by the rushed state of negotiations preceding court, where the accused has no opportunity to question the lawyer or to consider what is transpiring in a deliberate, reflective way.⁵⁵

51 *Ibid.*, p. 169.

52 *Ibid.*, p. 84.

53 *Ibid.*, p. 169.

54 *Ibid.*, p. 93.

55 *Ibid.*, pp. 189-190.

Pre-trial detention

Chapter 3 reviewed data from Manitoba showing that after arrest Aboriginal persons are more likely to be detained in custody and less likely to be successful with their bail applications. They are more likely to stay longer in pretrial detention. They are more likely to be removed from their communities during pre-trial detention and often are released from pre-trial detention with no way to get home.⁵⁶ They are more likely to have their bail releases revoked.⁵⁷ Often, there is no opportunity to apply for immediate release and Crown Attorneys and defence lawyers are not available on a 24 hour basis. Pre-trial detention hearings rely excessively on police information.⁵⁸

Hagan and Morden, Ericson and Baranek, and Griffiths and Verdun-Jones discuss pre-trial custody practices and show that persons considered by police to

56 On bail generally, see Hamilton and Sinclair, note 2, *supra*, pp. 221-224. Also see Cawsey, note 4, *supra*, p. 6-43, summarized by the Indigenous Bar Association, "The Criminal Code and Aboriginal People," (Ottawa: Law Reform Commission of Canada, 1991), at p. 17, as follows: "The Alberta Task Force observed that, notwithstanding the fact that the Crown objected less to the release of Aboriginal peoples and that there were fewer failures to appear by Aboriginal peoples, 49% of Aboriginals are detained compared to 31.7% of non-Aboriginals. In Edmonton, the Alberta Task Force noted that while Aboriginal people made up 18% of the city police work load, they comprised 44% of the remanded prisoners in the Edmonton Remand Centre." See also S. Jolly, "Native People in Conflict with the Criminal Justice System: The Impact of the Ontario Native Council on Justice," a paper for the American Society of Criminology, 34th Annual Meeting, Toronto, Nov. 4, 1982.

57 S. Moyer, F. Kopelman, C. LaPrairie, B. Billingsley, "Native and Non-Native Admissions to Federal, Provincial, and Territorial Correctional Institutions," (Ottawa: Solicitor General, 1985), p. 7.

58 B. Apter, "A Report on Pre-Trial Release and Detention in Winnipeg," submitted by the John Howard Society to the Hon. James McCrae, Attorney General, Fall 1988.

be uncooperative may be more likely to be detained in pre-trial custody. They also note that police may engage in pre-trial custody as a bargaining tool to secure cooperation.⁵⁹ Cooperation can simply mean being less abusive to the police, or it can mean giving information (names of co-accused), or confessing to the crime.⁶⁰ Could Aboriginal persons be more likely to be perceived as uncooperative by police due to bias or cultural misunderstanding, or would Aboriginal accused in fact be more likely to be uncooperative because of their understanding or perception of the role the justice system has played in oppressing Aboriginal people?

For bail considerations, Aboriginal accuseds are less likely to have a fixed address and less likely to have property or friends and relatives with property to use as a guarantee they will not miss their next court appearance. Finding sureties is all the more difficult given that on reserves individuals do not own land or houses which can be used as collateral. Aboriginal accuseds are less likely to have a job and less likely to have ties to the community (where the offense is in an urban community). All of these factors affect the success of their bail applications.

59 J. Hagan, C. P. Morden, "The Police Decision to Detain: A Study of Legal Labelling and Police Deviance," in *Organizational Police Deviance: Its Structure and Control*, C. D. Shearing, ed., (Toronto: Butterworths, 1981); Ericson and Baranek, note 24, *supra*, p. 61; C. T. Griffiths, S. Verdun-Jones, *Canadian Criminal Justice*, (Vancouver: Butterworths, 1989), p. 195.

60 For an Australian view of how police view cooperation, see White, Underwood and Omelczuk, note 10, *supra*, pp. 25-39, at p. 36, citing O'Connor and Sweetapple: "Police officers may either interview, interrogate, threaten, bully, bash or befriend their juvenile charges. Often police behaviour seems to be determined by the degree of 'co-operation' shown by the child. A child's co-operation may be evidenced by their willingness to waive basic common law rights, or by a prompt confession and a declared intention to plead guilty to the charge.

In fact, "[e]mployment can be important in deciding whether to release a person on bail or whether to impose a jail sentence."⁶¹

Pre-trial detention can result in persons losing their employment, and for persons whose work is seasonal, the result may mean missing all or a significant portion of the seasonal employment opportunity. This would particularly affect hunters and trappers. A further basic consequence is that pre-trial detention disrupts family life.⁶²

Pre-trial detention is often more crowded and has conditions that are more oppressive than most other jails,⁶³ usually with little opportunity for exercise, undue restrictions on family visits and phone calls, lack of access to fresh air and sunlight, a lack of basic hygiene facilities (showers, toothbrushes, etc.), and even less privacy than in ordinary jails (more double-bunking). They are almost always maximum security facilities. Suicides are relatively common in pre-trial detention facilities. There are rarely any programs. Pre-trial detention prevents inmates from seeking counselling or otherwise taking steps to prove their good character or

61 Hamilton and Sinclair, note 2, *supra*, pp 103-104. Zatz, note 7, *supra*, at p. 84: "[D]ecisions to release defendants on their own recognizance or on unsecured bonds are based primarily on the strength of community ties, determined largely by steady employment and home ownership. Such indicators tend to favour middle-class whites over poorer whites and minorities. ... [F]inancial resources become important where attempts at acquittals or dismissals require delaying case processing until the evidence stales or public interest in the case dissipates ... Finally, the wealthy executive who is an upstanding 'pillar of the community' may be viewed as having 'suffered enough' if conviction results in loss of position, wealth, or reputation, but these same losses are apparently not sufficient for the poor and minorities who fill our prisons."

62 Hamilton and Sinclair, note 2, *supra*, p. 222.

63 Apter, note 58, *supra*.

remorse. It makes it more difficult for them to assist in the preparation of their defence⁶⁴ or even to seek out character references or non-incarceration options. Pre-trial detention mixes murderers with persons guilty of minor offenses and sometimes those guilty of nothing other than being drunk in public. There is a perception that time spent in pre-trial custody will not be taken into account if found guilty and sentenced later.⁶⁵ Pre-trial detention may result in longer sentences.⁶⁶ These conditions exert enormous pressure to plead guilty and get it over with⁶⁷ while providing little evidence of a presumption of innocence. Because

64 See R. Poirier, "The Handling of Criminal Cases by Defence Lawyers," (Ottawa: Canadian Sentencing Commission, 1988), p. 4.

65 Ekstedt and Jackson, note 29, *supra*, p. 28.

66 Zatz, note 7, *supra*, citing at p. 75 a study by Lizotte that "the defendant's race and occupation indirectly influenced sentencing through their effects on bail status. That is, blacks and persons in lower occupational strata were more likely than whites and persons in higher prestige occupations to be detained pending trial, and detention increased the length of the prison sentence." At p. 76: "[W]hile Lizotte and LaFree were unable to control for income (since court records rarely include economical data), they argued that economic status may help explain why minority defendants and labourers received less favourable pre-trial release outcomes."

Feely, note 33, *supra*, p. 205: "Whether they are detained for a few hours or several days, people who are held in custody until disposition are at a special disadvantage. Research has consistently shown that those unable to post bond are more likely to be convicted than those who have been released prior to trial, and if convicted they are more likely to receive harsher sentences. These studies have concluded that those who are detained do not have easy access to their attorneys and cannot aid in the development of their defence. They are at a disadvantage when they enter a courtroom, often dressed in prison garb and always under the watchful eye of a guard who views them as 'convicts.' These studies suggest that someone who is detained is more likely to plead guilty, in hopes of either being transferred to a prison which has better facilities, or of being released altogether. The findings in my sample supported these general arguments. ... These figures still held up even when controls for seriousness of the offenses and other factors were introduced." (citations omitted)

67 Cawsey, note 4, *supra*, p. 6-11.

Aboriginal accuseds are more likely to be in pre-trial detention, the adverse consequences weigh most heavily on them.

Pressure to plead guilty

The criminal justice system depends on a very high proportion of cases being decided by guilty pleas. On the one hand, the process excludes the victim and the community from the process, which is contrary to Aboriginal concepts of justice. On the other hand, the system depends on cooperation, trust and agreement between Crown and defence,⁶⁸ which violates the non-Aboriginal principle of adversarialism. One of the accused persons interviewed by Ericson and Baranek noted the practice of lawyers calling each other friends. "When you're in court and you hear things like that it sounds like they're working together [rather] than against each other."⁶⁹

However, for me the most important point about guilty pleas is that there are numerous and strong reasons for accused persons, both Aboriginal and non-Aboriginal, to plead guilty which have little to do with whether the person is actually guilty or whether the guilty plea is in the person's best interests (in terms of conviction or sentence). I feel at least some of these pressures are unfair and overall they obscure and impair the ostensible objective of the process - determining who is guilty. Further, because the pressures are not felt equally by

⁶⁸ Feely, note 33, *supra*, pp. 180, 198, 282; Poirier, note 64, *supra*; Ericson and Baranek, note 24, *supra*, p. 24.

⁶⁹ Ericson and Baranek, note 24, *supra*, pp. 182-183.

different groups of accused persons, there may not be "equal protection of the law."

Authors from the Northwest Territories have found the pressures to plead guilty are greater for Aboriginal accused.⁷⁰ Plea bargaining occurs in a system where there are no rules governing plea bargaining, only limited compulsions to disclose evidence and certainly no disclosure procedures as elaborate as exist for civil proceedings. Moreover, in remote courts and overburdened courts, duty counsel

70 Lilles, note 4, *supra*, p. 340: "Indians are considered by legal professionals to make poor witnesses who often change their testimony when they reach the witness stand. Defence counsel may consider the client's cultural background as an impediment to 'winning,' and because of this, view a guilty plea, perhaps to a lesser offence, or a plea bargain as to sentence, as an outcome which is in the client's best interest. The client whose cultural background is different from the other participants in the justice system, and who has a limited education and inferior verbal skills, is more likely to accept the plea-bargained 'deal' put forward by her defence lawyer. Moreover, she is less likely to understand the most fundamental tenant of the criminal justice system; namely, that she is innocent until the state proves her guilty beyond a reasonable doubt."

See Finkler, note 4, *supra*, p. 20: "According to Morrow ... the reasons for the frequency with which indigenous people plead guilty have been attributed to their lack of understanding of the proceedings, language difficulties, the desire to please the authorities, and to be finished with the proceedings as quickly as possible. ... [A]nother contributory factor to the preponderance of guilty pleas has been the neglect by the prosecution to apply the concept of *mens rea* or to find out whether the accused had any knowledge of the wrongfulness of the alleged act, essential to the determination of guilt. Furthermore, Hayes (1970) in his discussion of Inuit and the law believes that if the element of *mens rea* were applied in accordance with Inuit norms rather than Canadian law, 'the Eskimo would not be guilty!' " At p. 95: "[T]he majority of statutory offences are punishable irrespective of the existence of *mens rea*." At p. 102: "Several lawyers shared the view that many Inuit plead guilty because they felt 'bad' about having committed the offence. This has also contributed to numerous instances where the accused will plead guilty to whatever charge was originally laid by the police. Furthermore, though counsel may have determined that the accused had reasonable grounds for a defence, many Inuit, as has been the case with other Indigenous groups, still opted for a guilty plea." See also Head and Clairmont, note 7, *supra*, p. 118, concerning Blacks feeling particularly pressured by the police.

have little time to learn the strength of the case, either from the Crown or from the accused and have less opportunity to bargain diligently.

A 1975 study from Iqaluit identified reasons why Aboriginal persons may plead guilty in situations where non-Aboriginal persons would not.

[M]ain reasons cited for the frequency with which Inuit enter a plea of guilty [include] absence of legal counsel, the belief that they have no case, being overwhelmed by an unfamiliar and imposing structure, feeling that 'they will get into trouble if they protest,' having been impaired to the point where they are unable to sufficiently recall the circumstances of the offence, indifference to the consequences or stigma of conviction as compared to non-Inuit, believing that they will only be fined, as a matter of expediency, feeling that they should be punished so they can be redeemed, or their basic honesty ... [and] a lack of awareness that they may have a defence in situations where extenuating circumstances would exonerate them from any intent to commit the act ...⁷¹

While a number of court cases indicate that courts will be more lenient if the accused pleads guilty, this does not appear to be the case for most Aboriginal persons.⁷²

The motivation to plead guilty increases for any person (such as Aboriginal persons) who feels the system is discriminatory and there is no realistic expectation of a fair hearing even if they plead not guilty, or who feels that the result cannot

⁷¹ Finkler, note 4, *supra*, p. 116.

⁷² Hamilton and Sinclair, note 2, *supra*, p. 109, stating despite more guilty pleas, Aboriginal people are sentenced more harshly; but see Ericson and Baranek, note 24, *supra*, pp. 169-170: "Empirical evidence suggests that judges do offer more lenient sentences in exchange for guilty pleas." See Oonagh Fitzgerald, *The Guilty Plea and Summary Justice*, for cases rewarding guilty pleas.

be influenced by anything the accused does. If the plea bargain is generally seen as accepting a smaller imposition that is certain for an imposition that is potentially larger but no less certain, the "not guilty" plea merely delays the inevitable, while requiring unethical behaviour by not being honest, by being confrontational or by not being strong enough to accept what is coming. In such a situation, the choice to plead guilty is an easy one. The choice is even easier where an accused decides to minimize exposure and participation in the system.

The possibility of entering a guilty plea when it may be inappropriate increases for persons who do not fully understand what is meant by "guilt." Interpretations such as "are you being blamed" and "did you do it" are grossly inadequate.⁷³ It is increased as well for those who have difficulty communicating extenuating circumstances, such as provocation or necessity, or in identifying possible defence witnesses. Difficulties of this sort can be related to language problems and they can be related to memory lapses due to alcohol impairment at the time of the offense.

There are a variety of pressures to plead guilty that are felt by all accused. Multiple charges and overcharging are frequent occurrences.⁷⁴ Prosecutors offer to reduce charges, to make submissions for reduced sentences, to exclude the

73 Monture, note 7, *supra*, and Cawsey, note 4, *supra*, discuss factors contributing to Aboriginal guilty pleas. See the discussion in ch. 7, *supra*, re: language differences.

74 T. Landau, "Views of Sentencing: A Survey of Crown and Defence Counsel," (Ottawa: Canadian Sentencing Commission, 1988), p. viii: "The defense are of the view that an offender faces multiple charges relating to a single transaction in more than half of the cases they handle, and that the police lay more (or more serious charges) to gain a stronger position in negotiations."

description of certain facts and to end interrogation or pre-trial detention in exchange for guilty pleas.

In some cases, an accused may feel he or she is guilty of a particular offense, but is asked to plead guilty to a number of offenses. The accused may do so thinking the sentence bargain is in his or her best interests, but may forget later impacts of the multiple convictions, including parole, or the effect of the convictions on any future charges. An accused may plead guilty to avoid delays in going to trial, or, if the accused has a long criminal record, out of a concern that there would be a presumption of guilt if the case went to trial. In addition to pleading guilty, part of the plea bargain may involve informing on others (incentives to inform on others are provided throughout the system, at substantial risks to justice).⁷⁵ The practice of having persons who wish to plead guilty be called first on dockets, with persons intending to plead not guilty being set down until later, is another systemic pressure to plead guilty.⁷⁶

75 Landreville, Hamelin and Gagnier, note 31, *supra*, pp. 94-95. The report notes that informing is linked to plea bargaining, jail transfers, temporary absences and parole. It creates incentives to inform on persons and therefore to lie to advance one's own position.

76 Ericson and Baranek, note 24, *supra*, p. 180.

There are other reasons to plead guilty, irrespective of guilt or innocence.

Given the pervasive leniency of the courts as a whole, it is not at all clear that there is much to be gained by prolonging contact with them through active negotiations. There is clearly much to be lost by extending the process and increasing the cost of participation to the defendant. ... Since it is often more expensive to invoke rights and remedies than to suffer injustices in silence, it is problematic if the rights and remedies actually would either protect individual rights or control official behaviour.⁷⁷

Ericson and Baranek make the same point, that there are penalties for involving rights and prolonging contact. They note that the police have the power to "produce reality" by selecting the way information is presented, controlled as much by choosing omissions as what to include.

To have challenged the legitimacy of these 'facts' would itself have been tantamount to deviance: better to bow out to powerful versions of the truth than to discover even more forcefully just how powerful they can be. ... [T]he accused is ... on the bottom rung of the hierarchy of credibility. The accused can play little or no part in constructing the reality about his case.⁷⁸

Ultimately, the pressure to plea bargain can be felt by all parties, mainly for administrative convenience, with a system of discount justice the result.⁷⁹ Ericson found

77 Feely, note 33, *supra*, pp. 32-33.

78 Ericson and Baranek, note 24, *supra*, pp. 21-22.

79 Baldwin and McConville, note 25, *supra*, p. 109.

the production of court outcomes took place backstage in discussions among detectives, lawyers and Crown attorneys. ... In this process, the judge serves more as an agent of ratification than adjudication, in the vast majority of cases, the accused pleads guilty, and since the common law system accepts a guilty plea without proof, there is no inquiry in court concerning the construction of the case.⁸⁰

The pressures to plead guilty mean guilt or innocence become only one factor for accused to consider and perhaps a minor one at that. Ericson and Baranek's study, and other studies cited by them, demonstrate that a significant percentage (10-20%) of accused plead guilty even though they consistently assert their innocence in research interviews.⁸¹

The various pressures to plead guilty, even though the accused may be innocent, or the prosecution may have a weak case, could be a significant contributor to Aboriginal over-representation in jails, especially because they are subjected to more of those pressures than non-Aboriginal persons. Further, the guilty plea precludes the courts from examining any discriminatory behaviour that preceded the plea.⁸²

80 Ericson, note 26, *supra*, p. 221.

81 Ericson and Baranek, note 24, *supra*, p. 158.

82 *Ibid.*, p. 56.

Juries

There is considerable discrimination in the operation of the jury system.⁸³ For most of Canada's history, Aboriginal persons were forbidden from serving on juries because they were not entitled to vote. Following the granting of the vote to Aboriginal persons, in Manitoba, jury lists were required of municipalities but not from Aboriginal communities. Following this period, lists were to be prepared from electoral lists in all communities, but these lists suffered from a lack of

83 This analysis is drawn from Hamilton and Sinclair, note 2, *supra*, ch. 9, which provides by far the best analysis of jury problems and Aboriginal people of all the "official" reports. By contrast, the Law Reform Commission of Canada, note 7, *supra*, p. 91, said it believes Aboriginal problems with the justice system are more or less the same as the problems faced by other visible minorities.

See Note, "Developments in the Law - Race and the Criminal Process", note 7, *supra*, a U.S. study, at pp. 1558-1615: "[U]nder-representation [of minorities on juries] continues today, attributable in large part to current methods of jury selection and prosecutorial abuse of pre-emptory challenges. ... Both empirical data and mock trial experiments indicate that minority defendants face a greater risk of receiving unjust verdicts when their jury does not adequately represent minorities ... [I]n a system in which largely white juries predominate, nonwhite defendants are more likely than white defendants to be found guilty and to be punished severely. ... [W]hen the defendant is a minority, particularly a black, white jurors are less likely to show compassion, and are less likely to be influenced by group discussion. The race of the defendant's attorney also has been shown to affect the jury's determination of guilt; white jurors have exhibited a bias against defendants with black lawyers ... [W]hen the victim is a minority, white jurors are less likely to be moved by her testimony or committed to seeing justice done in her case. Conversely, white jurors are more likely to find the defendant guilty when the victim is white. ... [U]nderrepresentation on juries deprives minority citizens of their basic democratic right to participate in the community's administration of justice [and] leads to group stigmatization. By excluding minority groups from jury service, such a system undermines the dignity of minority persons by suggesting that they are somehow incapable of fulfilling their citizenship role in our society. These effects ... undermine the legitimacy of the criminal justice system. ... Because no single juror is completely impartial, an impartial jury must be created by balancing the prejudices of individual jurors against each other ... This [Note] agrees that the standard governing the admissibility of evidence and assessment of racism in the jury room is too restrictive."

attention and were not regularly updated, neither Aboriginal nor non-Aboriginal communities. "For a century the legal system made it clear that it did not want or need Aboriginal jurors."⁸⁴ The problem continues to this very day. While today's jury lists in Manitoba are fair and complete, drawn from the provincial health records, the process of summoning jurors ensures a disproportionately small number of jurors will present themselves for jury service. This is accomplished by the sheriff's office sending out more summons than necessary and accepting the first to respond until a sufficient number have responded.

Sending summons to communities with poor mail service (no door to door delivery), to persons who are quite mobile or transient, to persons who may not have access to telephones to respond to the summons, to persons who may have a difficult time reading court documents and to persons who may feel so alienated from the justice system that they avoid it as much as possible, ensures a low response. The response is further reduced by disqualifying potential jurors for being unable to speak English and by failing to provide costs of transportation, hotels and meals for remote residents in advance of their incurring expenses.

Once the jury panel is assembled, lawyers have numerous opportunities to dismiss potential jurors without having to state their reasons. This discretion ensures that lawyers have the freedom to dismiss jurors because of their race. In the trial for the murder of Helen Betty Osborne in 1987, defence counsel dismissed all Aboriginal jurors who were called, without stating their reasons. The result was an all white jury in a part of the province where at least 30% of the population is

84 Hamilton and Sinclair, note 2, *supra*, p. 379.

Aboriginal.⁸⁵ In fact, the Aboriginal Justice Inquiry estimated that 61 % of northern Manitoba's population is Aboriginal (although the area immediately surrounding The Pas has a much greater proportion of non-Aboriginal people).⁸⁶ Even a fairly assembled jury can be subject to unfair decision-making processes which cannot be known because juries in Canada cannot discuss their findings.⁸⁷

Evidence

Just as with the plea bargaining stage, Crown disclosure is a problem throughout the process. The Donald Marshall Jr. prosecution was marked by a critical failure of the Crown to disclose its case.⁸⁸ The J. J. Harper investigation showed police do coordinate their evidence among themselves. In that case, there were numerous examples of irregularities with officers notebooks, which are supposed to reflect only their personal observations at the time of the incident recorded. Irregularities included an officer who rewrote his notes, officers who consulted with each other and with radio broadcast transcripts before writing their notes, an officer who took notes on a scratch pad and lost those notes and a general failure to record statements made by other officers.

85 Hamilton and Sinclair, note 1, *supra*, p. 86 (Osborne).

86 Hamilton and Sinclair, note 2, *supra*, p. 8.

87 Landreville, Hamelin and Gagnier, note 31, *supra*, quote an inmate at p. 47: "Because they believe in justice, jurors have an unshakable confidence in the police, the Crown, judges, and often even the media ..."

88 Hickman, note 11, *supra*, p. 238.

The Crown has vast resources to ensure prosecution witnesses testify, while the defence usually has minimal resources to find and ensure attendance of defence witnesses. The ability to present a strong defence is significantly enhanced for those accused persons with sufficient funds to ensure the defence case is properly researched and witnesses produced.

One of the most important facts to realize about representation and ability to contest a charge is the extreme disparity in resources between the state and an accused.

Under an equitable system, there would be equal resources allocated to the defense and to those bringing the allegation, instead of the present situation where the police receive 66 per cent of criminal control spending, correctional agencies 21 per cent, and legal aid a paltry 1.6 per cent.⁸⁹

During trials, the Aboriginal accused and witnesses are forced into culturally foreign ways of adversarialism. They are subjected to cross-examinations that challenge their ethic of honesty and take advantage of respect for authority, a non-confrontational ethic (which can lead to deference to the questioner), and a lack of concern for minor details of time, distance and place. Finally, there are a number of ways for a picture of guilt to be created, through multiple charges, being held in custody, or shows of force in the courtroom by police or sheriffs for security reasons.⁹⁰

89 Ericson and Baranek, note 24, *supra*, p. 222.

90 Landreville, Hamelin and Gagnier, note 31, *supra*.

In trials and other court appearances, just as in police dealings, understanding the proceedings can be very difficult. Ericson and Baranek describe the orientation of the courts this way:

Seldom are attempts made to ascertain whether the accused understands. Given that the accused rarely speaks or is given the opportunity to speak, it is highly unlikely that a benevolent, well-meaning court would have any knowledge of the accused's comprehension. Rather than the court attempting to make proceedings comprehensible, the onus is on the accused to inform the court that he does not understand. However, given the anxiety and stage fright that most accused suffer, this is unlikely. Carlen ... documents that even when asked if they understand, accused are reluctant to say no because they feel powerless, they don't want to appear incompetent, and/or they are too nervous to say anything.

It might be assumed that it is the lawyer's role to ensure that the accused comprehends the court's discourse. On the contrary, the lawyer is usually left to 'do the understanding' for the accused and to order the accused in a way that does not encourage the accused even to seek understanding, let alone acquire it.⁹¹

Where the accused does speak, the rules of evidence and of legal relevance and analysis narrowly confine the accused's evidence.

The suppression of ambiguity is yet another way in which the accused is prevented from explaining his position, and the court definition prevails. As Carlen ... observes, everyday life is full of ambiguities but in court ambiguities are not only not tolerated but also must be eradicated. Matters that have as many shades as a chameleon in a box of crayons are made into black and white. The accused is not even allowed to suggest there is a residue of grey.⁹²

91 Ericson and Baranek, note 24, *supra*, p. 186, citing Carlen, *Magistrates' Justice*, note 24, *supra*.

92 *Ibid.*, p. 201.

In addition, the accused must be especially careful to be deferential. "Any defiance of or autonomy from the hearings asserted by the accused by staring at the judge, not using deferential forms of address, laughing, or grinning is a threat that must be punished."⁹³ All of above problems make the process of evidence in court especially weighted against Aboriginal persons.

Pre-sentence report recommendations

One of the factors for the court to consider in sentencing are reports and recommendations from probation officers. There is evidence to suggest Aboriginal persons may receive less favourable recommendations than non-Aboriginal persons.⁹⁴ Certainly the potential for discrimination exists and cannot easily be detected.⁹⁵ LaPrairie discusses the problems with pre-sentence reports for Aboriginal youth (I believe these observations are valid for adults as well).

93 *Ibid.*, pp. 206-207.

94 J. Hagan, "Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice," *Social Forces*, 55, 3, (March 1977): 597 at p. 599. Hagan finds "probation officers' recommendations for sentence are a source of unfavourable treatment for Indian and Metis offenders." Havemann, note 6, *supra*, p. 123, citing Michalis and Badcock: "Non-Native probation officers, it is suggested, concentrate on jobs, income and education in their recommendations, where Natives would concentrate on individual and family strengths."

95 E. Boldt, L. Hursh, S. Johnson and K. Taylor, "Pre-Sentence Reports and the incarceration of natives," *Journal of Criminology*, 25, (1983): 269; Zimmerman, note 21, *supra*, at pp. 47-48; C. Frazier, E. Bock, J. Henretta, "The Role of Probation Officers in Determining Gender Differences in Sentencing Severity," *Sociology Quarterly*, 24, (Spring 1983): 305. This study finds that being female greatly increases the likelihood of a non-incarceral sentence recommendation which, in turn, is the primary predictor of final criminal court dispositions.

The very nature of the information collected and presented in presentence reports may adversely affect the chances of a youth receiving probation rather than detention ... personal and socioeconomic characteristics, such as family background, education, employment history, and drug and alcohol use, are an integral part of judicial decision making in considering sentencing options, it would seem reasonable to conclude that if nothing else, the kind of background information that is presented on the majority of aboriginal youth, and the severe lack of community resources, greatly reduces the ability of judges to adopt many of the available sentencing options.⁹⁶

There is also evidence to suggest fewer pre-sentence reports may be prepared for Aboriginal offenders.⁹⁷

Sentencing

At sentencing the accused faces a *Criminal Code* that provides no statement of purposes for judges and suggests a maximum penalty of jail for virtually every single offense, but mentions few other penalties except in a part of the *Code*

96 C. LaPrairie, "The Young Offenders Act and Aboriginal Youth," in *Justice and the Young Offenders Act in Canada*, J. Hudson, J. Hornick, B. Burrows, eds., (Toronto: Wall & Thompson, 1988), at p. 165.

97 D. Schmeiser, H. Hermann and J. Manning, "The Native Offender and The Law," (Ottawa: Law Reform Commission of Canada, 1974), at p. 74: "[P]re-sentence reports were not as available in rural areas as in urban areas ... in the Regina region ... 22.1% of all offenders who received pre-sentence reports in 1971-72 were Natives, but 36.7% of all sentenced individuals from the region in 1970-71 were Natives. ... The proportion of Native pre-sentence reports (22.6%) was significantly smaller than the proportion of Native incarcerations in provincial correctional centres (60.6%)."

removed from the specific offenses. This emphasis on incarceration affects all convicted persons, a group where Aboriginal persons are over-represented.⁹⁸

The accused faces a system that spends more on jails than on other sanctions. Manitoba spends approximately five and a half times more on jails than on all other kinds of sentences combined, and employs seven times as many jail staff than are employed to implement all other forms of sentences combined.⁹⁹ It is a system that has excessive sentencing variations between judges.¹⁰⁰ It is a system that sentences more harshly those who have not been successful in obtaining pre-trial release.¹⁰¹

In some cases, accused persons have past offenses for which they were sentenced to probation and did not reoffend while on probation. Once off

98 While actual data to show Aboriginal over-representation among convicted persons generally does not exist, it is clear Aboriginal people are over-represented among offenders sentenced to jail and the Manitoba Aboriginal Justice Inquiry finds that Aboriginal crime rates are higher than non-Aboriginal crime rates. See Hamilton and Sinclair, note 2, *supra*, pp. 87-88.

99 *Ibid.*, p. 396.

100 Canadian Sentencing Commission, *Sentencing Reform, A Canadian Approach*, (Ottawa: Supply and Services, 1986), p. 58. See also J. Hogarth, *Sentencing as a Human Process*, (Toronto: University of Toronto Press, 1971), p. 358.

101 Hamilton and Sinclair, note 2, *supra*, p. 222; Griffiths and Verdun-Jones, note 59, *supra*, p. 195; M. Clements, "Sex and Sentencing," *Southwestern Law Journal*, 26, (1972): 894, citing "Comment, Texas Sentencing Practices: A Statistical Study," *Texas L. Rev.* 45, (1967): 471; J. Hagan, I. Nagel and C. Albonetti, "The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts," *American Sociological Review*, 45, (Oct. 1980): 802, at p. 819: "[W]e also found that bail decisions have pronounced effects on the sentencing of common criminals. A theoretical implication of this finding is that bail outcomes may constitute one of the most salient kind of legal labelling that common criminals experience."

probation, they reoffended. Many judges consider this to be evidence that probation failed, rather than evidence that it succeeded. The result is a jail sentence for the new offense and not probation.¹⁰²

While offenders from any place in Canada can be put in jails the rest of the possible sentences are only available in a patchwork way, with relatively little effort made to inform judges of what is available in particular communities. There is virtually no information kept or available to judges about the effectiveness of the various sentences. There is rarely any information provided to the judge giving an in-depth appreciation of the person the judge must sentence. When such reports are available, the person who wrote them generally is not available to be in court to personally present the report, and the report author is typically non-Aboriginal.¹⁰³

In many communities, either there are no probation officers and fine option coordinators or they are paid on a per case basis, which ensures there is no full-time, regular program. Probation services are not equally accessible in Aboriginal communities.¹⁰⁴

The offender faces a system that, in Manitoba at least, incarcerates large numbers of persons who fail to pay fines, whether the persons are dangerous or not, whether the person is even capable of paying the fine and despite the presence of fine option programs (754 persons were admitted to provincial jails for fine

102 Hamilton and Sinclair, note 2, *supra*, p. 416.

103 *Ibid.*, p. 398.

104 Monture, note 7, *supra*, p. 39.

default in 1988). Aboriginal people are considerably over-represented in this group.¹⁰⁵

Fine option programs give judges a false sense of security that fine defaulters will not go to jail and therefore that it is less important for judges to determine ability to pay or to set fine amounts geared to the offender's ability to pay. Fine option programs get over-burdened because they accept anyone, including those quite capable of paying. Often, police and court offices fail to provide adequate information to those seeking to use fine option. If the offender is a single parent, fine option - which requires community work - can be an impossible option because of a lack of child care. Default of fines often results in automatic imprisonment, without a judge deciding the accused should go to jail.¹⁰⁶

In some provinces, such as Ontario, persons drunk in public are charged with offenses and placed in jail. Aboriginal people are considerably over-represented in this group.¹⁰⁷ The accused faces a system that carries presumptions that

105 L. Messer, "Manitoba Fine Option Program: A Survey of Fine Defaulters," (Winnipeg: Aboriginal Justice Inquiry, 1990); Moyer, Kopelman, LaPrairie, Billingsley, note 57, *supra*, p. 2.4, Table 2.2; Zimmerman, note 21, *supra*, at pp. 52-56; Hamilton and Sinclair, note 2, *supra*, pp. 419-421. See also A. Duckworth, C. Foley-Jones, P. Lowe and M. Laller, "Imprisonment of Aborigines in North Western Australia," *The Australian and New Zealand Journal of Criminology*, 15, 1, (March 1982): 26, at p. 33: "Given that Aborigines as a group do not have strong concepts of personal property and cash changes hands freely, fines are probably often imposed on a family or community rather than on the individual committing the offence. It could in fact even be that the group is exercising a social control function in that its discretion as to whether a fine should be paid for a given individual could determine whether he is imprisoned."

106 Kirby, note 7, *supra*, p. 49; Hamilton and Sinclair, note 2, *supra*, pp. 419-427.

107 Moyer, Kopelman, LaPrairie, Billingsley, note 57, *supra*.

particular offenses must draw jail sentences.¹⁰⁸ Some inmates feel offenses reported in the media get longer sentences.¹⁰⁹

Not surprisingly, the above conditions lead to a high use of incarceration with few checks on discretion. The result is adverse impact for Aboriginal people, who appear before judges in disproportionately large numbers. Use of unduly harsh penalties generally, especially jail, will produce the adverse impact that justifies a finding of discrimination. LaPrairie explains the point this way:

What remains a greater problem for the criminal justice system is the "over use" of incarceration for aboriginal people when criteria for existing options for sentencing cannot be met. ... Existing data, although limited and incomplete, would suggest the disproportionate sentencing of aboriginal people to periods of incarceration in the absence of other sentencing options. ... It is this group which appears to be incarcerated for less serious offenses because its members do not qualify for probation, and few options but incarceration are available to judges. Their deprived socio-economic situation acts against aboriginal people at sentencing and against communities in the development and maintenance of community-based alternatives. The geographic location of the majority of reserves makes access to universal sentencing alternatives difficult and often impossible. The sentencing of aboriginal people to shorter periods of incarceration as a way of "balancing" harsher dispositions has a long-term revolving door effect in addition to the short-term unpleasantness of being put in jail. Over time, the revolving door syndrome which creates a large group of aboriginal people with long records of incarceration which acts against them in subsequent court appearances.¹¹⁰

108 See *R. v. Naquitarvik* (1986), 26 C.C.C. (3d) 193 (N.W.T.C.A.).

109 Landreville, Hamelin and Gagnier, note 31, *supra*, p. 42.

110 Carol LaPrairie, "The Role of Sentencing in the over-representation of aboriginal people in correctional institutions," *Canadian Journal of Criminology*, (July 1990): 429, at p. 437.

Beyond the system's preference for jail sentences, there are special problems facing Aboriginal offenders. The system generally does not take into account the fact that Aboriginal persons have shorter life expectancies. Thus, numerically equal sentences take a greater proportion of an Aboriginal person's life. For example, five years in jail from a life expectancy of 65 years is 7.69% of a person's life, compared to five years of a life expectancy of 75 years, which is 6.6% of that person's life.¹¹¹ Some sentences involve the prohibition of the possession of firearms. For Aboriginal persons who earn their living hunting, this can have impacts far more serious than on offenders who do not need firearms for economic activity, although the courts may be starting to recognize this as an unconstitutional result.¹¹² However, perhaps the most important source of Aboriginal specific sentencing discrimination is a failure to take culture into account.

To the extent that there is a philosophy of sentencing, it is one that denies the relevance of culture, insists on incarceration for certain offenses, regardless of the particular circumstances, and discounts the effects of community sanctions. As a result, court decisions seldom reflect the values, beliefs or traditions of Aboriginal communities.¹¹³

111 Finkler, note 4, *supra*, p. 20: "Morrow (1967, 1972a, 1973) noted that some of the modifications in the sentencing of Indigenous persons [in the North] ... take into account their shorter life span." W. G. Morrow, "Mr. Justice John Howard Sissons," *Alberta Law Review*, 5, 2, (1967): 254; W. G. Morrow, "Law in an Age of Protest," paper presented at the Conference on Law in an Age of Protest, Edmonton, 1972; W. G. Morrow, "Administration of Justice and Native People," paper presented at the Symposium on Law and Native Peoples, Saskatoon.

112 See the discussion of relevant cases in *Martin's Criminal Code*, 1992 edition. See also C. M. Sinclair, "Dealing with the Aboriginal Offender - Indians and the Criminal Law," *Provincial Judges Journal*, 14, (June 1990): 18 at 19.

113 Hamilton and Sinclair, note 2, *supra*, p. 390.

It is virtually impossible for a judge, particularly a non-Aboriginal judge who has never lived in an Aboriginal community, either in remote areas or downtown Winnipeg, to understand the circumstances of the accused, and the community factors that bear on the offence, which should be taken into consideration in sentencing.¹¹⁴

To the contrary of the present practices, the Aboriginal Justice Inquiry calls for culture to be considered during sentencing. It prescribes a list of questions for judges to ask themselves. I believe these are questions that should be asked by each person with discretionary power in the justice system.

[They] should ask themselves in each case how culture may be a factor, and whether it might explain:

- An apparently undue deference to authority.
- A reluctance to explain or defend one's action.
- Any apparent lack of effect of the penalty (no apparent remorse or understanding of the seriousness, no deterrent rehabilitative effect).
- A willingness to admit guilt (poor understanding of English, deference to authority, belief the system cannot be impartial towards him or her, or that it cannot understand his or her motivations).
- The offender's anger or despair that led to the offence.
- Whether the sentence may be viewed by the victim, community or offender as ineffective.

[They] must also ask themselves if their own culture has biased their views of the offender, the offence, the victim or the penalty. Judges must then ask if a culturally specific sentence is available and would be more appropriate than incarceration. For apparently assimilated Aboriginal people, [they] must ask what the effect is on the offender not belonging to, or not having a clear identity with, his or her culture.¹¹⁵

114 *Ibid.*, p. 409.

115 *Ibid.*, pp. 408-409.

It is not necessary to find that judges sentence Aboriginal people more harshly than non-Aboriginal people to find adverse impact, although some studies have made this finding.¹¹⁶ In literature reviews focusing primarily on studies of the

116 See Moyer. Kopelman, LaPrairie, Billingsley, note 57, *supra*, which shows longer sentences for Aboriginal inmates in provincial custody, at pp. 4.9, 4.10, although the authors caution that other factors may affect an interpretation that Aboriginal inmates are sentenced more harshly *because* of race. Ekstedt and Jackson, note 29, *supra*, in a survey of B.C. inmates found at pp. 19-20 that the inmates believed "[w]omen, native Indians, the poor, urban/rural individuals receive sentences different from their counterparts. ... Racial sentencing disparity relative to native Indians was felt to exist for 59% of the offenders."

Havemann, note 6, *supra*, p. xxiv: "The research literature does tend to confirm the existence of inappropriate sentences and institutional services in addition to the existence of differential charge, arrest and sentencing rates [for indigenous offenders]." At p. 124: "The question of differential sentencing is a preoccupation in much of the literature. Schmeiser (1974), Hartman and Muirhead (1975), and Bienvenue and Latif (1973) all note differences in the lengths of sentences imposed upon Indigenous people when compared to non-Indigenous offenders." At p. 125. citing Hagan: "Based upon an analysis of inmate files he concluded 'that although Indian and Metis offenders tend to receive shorter sentences, this pattern is largely explained by the group's disproportionate involvement in minor offences ... [T]he popular belief that Native offenders receive differentially *lenient* treatment from the courts is not supported by this phase of the analysis.' " (emphasis in original) At p. 141: "[T]hroughout the admission studies completed in Canada (Schmeiser, 1974; Hartman and Muirhead, 1975) there is evidence that the use of probation is disproportionately less frequent for Indigenous offenders."

See S. Clark, "Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders," (Ottawa: Department of Justice, 1989). One of the studies cited by Clark, at pp. 22-25, in D. Lewis, *An Exploratory Study into Sentencing Practices in Summary Conviction Court in British Columbia*, (Vancouver: Legal Services Society of British Columbia, 1989), which found "individuals of Native ancestry with prior criminal convictions were acquitted less frequently and found guilty more often [of theft under \$1,000] than non-Native individuals in similar circumstances. Individuals of Native ancestry free of prior convictions were granted stay of proceedings more frequently, and found guilty less often than individuals of non-Native ancestry. Single, unemployed individuals of Native ancestry living off reserve were sentenced to jail time more often than those of non-Native ancestry."

treatment of Blacks in the U. S. justice system, Zatz found that "Race/ethnicity is a determinant of sanctioning, and a potent one at that ..." ¹¹⁷ while Hagan and Bumiller found "the increased tendency to control for legitimized variables in sentencing studies has not resulted in fewer findings of discrimination." ¹¹⁸

The empirical evidence that exists, limited as it may be, suggests Aboriginal people do receive harsher treatment at sentencing. This is confirmed by the findings discussed in chapter 3 above. What is more important is to remember all the differential treatment that leads to Aboriginal persons facing sentencing in

See Wilkie, note 10, *supra*, pp. 8-10 (re: Australia): "Aborigines are much more likely than non-Aborigines to be arrested ... Aborigines who are arrested are likely to spend more time in police custody ... Aborigines are also less likely to be released to bail ... Aborigines are more likely to be imprisoned ... Aboriginal juveniles are also likely to receive harsher penalties ... Aborigines tend to be imprisoned for shorter periods and are much less likely to be released to parole."

117 Zatz, note 7, *supra*, at p. 87.

118 Hagan and Bumiller, note 29, *supra*, p. 32. See also Hagan, Nagel and Albonetti, note 101, *supra*, at p. 819: "[T]he lenient sentencing of college educated white-collar criminals in our proactive district apparently is associated with the less serious charges placed against these offenders and with a rewarding of their guilty pleas. The sense is of a style of prosecution that gives preferential treatment to highly educated white-collar offenders. ... Among the less educated white-collar criminals in District C, we found that employment and mental illness were prominent factors in determining sentences: employment led to leniency, while treatment for mental illness resulted in severity." See Note, "Developments in the Law - Race and the Criminal Process," note 7, *supra*, p. 1493: "Racism still pervades the United States criminal justice system in part because the Court's equal protection doctrine means little in the face of unarticulated and unconscious racism." See R. Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," *Harvard Law Review*, 101, 7, (May 1988): 1398, citing a study of over 200 murder cases between 1973 and 1979 that found no discrimination based on the race of the defendant, but "the Baldus study indicated that the odds of being condemned to death were 4.3 times greater for defendants who killed whites than for defendants who killed blacks, a variable nearly as influential as a prior conviction for armed robbery, rape, or even murder."

disproportionate numbers. As well, given the lack of sentencing options, among other reasons, seriousness of offense does not justify significant numbers of Aboriginal incarcerations.

Appeal

For the vast majority of accused, appeals are not an option. If their strategy or response to pressures was to be passive, if they pleaded guilty, and unless they received a truly exceptional sentence, there is no reason to appeal. Further, Legal Aid rules can severely limit appeals, requiring a strong possibility of success, and covering lawyer's expenses only to the point of sentencing. Anything that happens to the accused after that point is generally done without a lawyer defending the person's rights. "[M]ost Legal Aid lawyers do not bother even discussing appeals with their clients."¹¹⁹ When there is an appeal, the accused is completely silenced and is not a participant in the proceedings.¹²⁰

¹¹⁹ Ericson and Baranek, note 24, *supra*, p. 109.

¹²⁰ *Ibid.*, p. 217. See Poirier, note 64, *supra*, at p. 39: "The decision not to appeal is often linked to financial considerations. Defence lawyers who discussed this matter all mentioned that appeal costs were always very high ... lawyers in private practice claim that legal aid fees are so low that they are unable to take on appeals under such conditions" and "[t]he defence lawyer's workload may also present problems: 'I must admit that perhaps we don't appeal often enough is because our case load is too heavy.' [This comment was made by a legal aid staff lawyer.]

Jail

Once in jail, the injustice and unfairness get even worse.¹²¹ Jails are inherently more difficult for Aboriginal persons because they are non-Aboriginal institutions where Aboriginal languages are not spoken, Aboriginal culture is not understood, programs are delivered in culturally inappropriate ways and some jail staff have not accepted the validity or importance of respecting Aboriginal cultures in jail.¹²²

121 The majority of this critique of the jail system is drawn from the Canadian Bar Association Committee on Imprisonment and Release, *Justice Behind the Walls*, Ottawa: 1988. This study cites a number of other studies and court decisions that support the critiques presented. However, the study is limited by its *ad hoc* empirical nature, and draws primarily on studies from British Columbia in a few jails, especially M. Jackson, "Justice Behind the Walls: A Study of the Disciplinary Process in a Canadian Penitentiary," 12 *Osgoode Hall L. J.* 1 (1974); M. Jackson, "The Right to Counsel in Prison Disciplinary Hearings." (1986) 20 *U.B.C. L. Rev.* 221; M. Jackson. "Justice Behind the Walls Revisited," n.p., 1986; John Anderson, *Prison Discipline in Four Maximum Security Jails: A Rift in the Veil of Secrecy*, n.p., 1983; and Christine Irvine, *The Application of the Duty of Fairness to Prison Disciplinary Hearings at Luke Institution*, n.p., 1988.

See also Margaret Shaw et al., *Survey of Federally Sentenced Women*, (Ottawa: Solicitor General, 1990). On sentencing generally, over-use of incarceration, the effects of jails and the history of government reports commenting on them, see the Canadian Sentencing Commission, note 99, *supra*, and Hamilton and Sinclair, note 2, *supra*, ch. 10. See also Landreville, Hamelin and Gagnier, note 31, *supra*, p. 77: "Western society has passed from corporal punishment to psychological punishment, the death penalty has evolved in the same way. Psychological death has replaced the physical death penalty."

122 See Task Force on Aboriginal Peoples in Federal Corrections, *Final Report*, (Ottawa: Correctional Services of Canada, 1988), p. 66; David Daubney, Chairperson, House of Commons, Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections, *Taking Responsibility*, (Ottawa: House of Commons, 1988), at p. 214; Zimmerman, note 21, *supra*, at p. 82.

Aboriginal spirituality is generally not respected within the institutions. Elders are not given the same treatment as Christian Chaplains. Elders are forced to submit to more frequent and intrusive searches of their spiritual items, are required to be escorted by guards more often and have less freedom to conduct ceremonies.¹²³ Guards do not understand the holistic nature of Aboriginal spirituality and try to draw distinctions between cultural expressions and spirituality. Guards mistakenly relate the use of sweet grass to drug use and generally have not learned about items of spiritual significance to Aboriginal inmates.¹²⁴

Temporary absences for funerals and spiritual ceremonies are especially important for Aboriginal inmates. Aboriginal persons have larger and closer extended families, a much higher rate of sudden deaths and a lower life expectancy. It can be expected that Aboriginal inmates will have a more frequent need to attend funerals. Aboriginal spirituality is not located in physical structures and depends heavily on a relationship with nature. This makes it more important to be able to leave a jail environment.

Most jails have exceedingly high levels of security and conduct themselves with an obsession for security, rather than programs.¹²⁵ Aboriginal inmates are often put

123 *Ibid.*

124 On treatment of Aboriginal spirituality in jails, see Cawsey, note 4, *supra*, pp. 6-27-29; Law Reform Commission of Canada, note 7, *supra*, p. 80; Hamilton and Sinclair, note 2, *supra*, pp. 443-447.

125 Monture, note 7, *supra*, p. 48 (the report generally finds Aboriginal inmates are well treated by jail guards, except for some situations that "smack of segregation"). Birkenmayer and Jolly, note 40, *supra*, p. v, found that "[a]lthough over 3/4 of the

in higher security facilities than is needed for them, sometimes because these are the main facilities that exist in their regions (as in the case of Manitoba).¹²⁶ The higher the security level, the fewer programs that are available to the inmates. Aboriginal inmates, whose culture and history teaches them not to trust foreign "helping" services, are seen as uncooperative and this contributes to their being kept in high security, denied passes and delaying parole.¹²⁷

In addition to discrimination specific to Aboriginal persons, one of the more important ways that Aboriginal persons face discrimination in the justice system is their exposure to unfair practices in jails, practices which are unfair for all, but because of Aboriginal over-representation among jailed offenders, has a particularly adverse impact on Aboriginal persons.

The best source I have found to describe these practices is *Justice Behind the Walls*, a report of the Canadian Bar Association Committee on Imprisonment and Release, written by Prof. M. Jackson in 1988. This report stresses how much discretion exists within the institutions, how little the rule of law and principles of fundamental justice apply, and how harsh treatment in jail can be. I can only highlight a few of the areas and issues raised by that paper.

inmates were recidivists, almost 2/3 of them were not considered to be security risks during their trials" which calls into question the need for jails for these persons.

126 Task Force on Aboriginal Peoples in Federal Corrections, note 123, *supra*, pp. 23-25, Hamilton and Sinclair, note 2, *supra*, p. 439.

127 Task Force on Federally Sentenced Women, *Creating Choices*, (Ottawa: Solicitor General, 1990), pp. 65-66. See also pp. 95 and 112 concerning excessive security classifications.

- Jail means losing control over not just your liberty of movement, but over your own body. Searches of inmates and visitors occurs on a regular, sometimes daily basis, even if the inmate has earned enough trust to be granted private family visits and unescorted trips away from the jail on day passes.¹²⁸ Inmates have virtually no choice over what they eat or the medical treatment they receive. Incidents of self-mutilation are treated as security problems rather than mental health problems.¹²⁹

- Jail means being subject to a range of disciplinary offenses that are so vague and uncertain that they violate a fundamental

principle of legality - that penal statutes be defined with precision ... they invite abuses of authority by permitting those charged with enforcement to use their own values and prejudices in exercising their discretion.¹³⁰

Charges include cases where an inmate "fails to work to the best of his ability," "behaves toward any person, by his actions, language or writing, in ... [a] disrespectful manner," or "does any act that is calculated to prejudice the discipline or good order of the institution." Prisoners who threaten staff with legal action may be convicted of a charge of using threatening language.¹³¹ A negative performance notice thought not serious enough to warrant a disciplinary charge can

128 Landreville, Hamelin and Gagnier, note 31, *supra*, p. 77: "The institution, by bothering and harassing visitors, drives them away."

129 Task Force on Federally Sentenced Women, note 127, *supra*.

130 *Justice Behind the Walls*, note 121, *supra*, p. 46.

131 *Ibid.*, see pp. 45-46, 89.

still result in lost remission time (that portion of the jail sentence permitted to be served in the community) and delayed parole.¹³²

- Disciplinary hearings usually or often take place without fair or independent procedures, and with great inconsistency between jails and between individual decision makers. Requirements that charges be in writing and provided in advance are often ignored. Often prisoners are denied the right to be represented by counsel, either because of jail rules or because of Legal Aid plan rules. There are no rules of admissible and inadmissible evidence, evidence can be given with the inmate excluded from the proceedings, and often the inmate cannot question the accuser. Sometimes the accusing officer will be involved in deciding either the guilt of the inmate or the penalty to be applied. The value of maintaining staff morale can be considered in deciding how to dispose of a charge.¹³³ The process is slow and its lack of fair procedures cannot be justified on the basis of a need for speedy dispositions.¹³⁴ The appeal process is slow, is often not explained to the inmate,¹³⁵ is rarely used and almost never upholds the inmates' objections.¹³⁶ Appeal delay means many penalties being appealed are served before an appeal can be heard or decided.

132 *Ibid.*, pp. 128, 132.

133 *Ibid.*, pp. 54, 61-70, 102, 164-165.

134 *Ibid.*, p. 91.

135 *Ibid.*, p. 113.

136 *Ibid.*, pp. 113-114.

The Aboriginal Justice Inquiry quoted Superintendent Dennis Lemoine of Headingley provincial jail in Manitoba on his understanding of justice in jails:

[W]e are not bound by the system, we are not a judicial body. We are an administrative board. We try to follow the fundamental principles of justice but we are not bound by its technicalities or complexities. ... Certainly there are inconsistencies and problems for some of the people who appear before the Board. I make no apologies for that.¹³⁷

The inquiry found procedures at this jail did indeed breach the rules of natural justice. The Canadian Bar Association cites a number of Supreme Court decisions that hold, in legal theory at least, prison tribunals are subject to the principles of fundamental justice.¹³⁸

- With the unfair disciplinary procedures in the jails goes a very broad range of punishments, including whether the inmate will be allowed temporary absences, either escorted or unescorted; will receive negative performance notices, job demotions, loss of prison job or withholding of pay; will be denied visiting privileges (or simply denial of visits where touching is permitted); will be denied evening recreation or exercise privileges; will be restricted to solitary confinement (which means being locked up 23 hours a day, with one hour in a small area that permits little more than pacing for exercise, television, radio and visitors, other than a lawyer, are prohibited, and it will result in a more difficult time getting parole); will be denied remission time; and will be transferred from jail to jail and

137 Hamilton and Sinclair, note 2, *supra*, p. 453.

138 *Justice Behind the Walls*, note 121, *supra*, pp. 9-10, citing *Marrineau v. Matsqui Institution Inmate Disciplinary Board* (No. 2) (1979), 50 C.C.C. (2d) 353; *R. v. Solosky* (1980), 50 C.C.C. (2d) 495; *Cardinal and Oswald v. Director of Kent Institution*; *The Queen v. Miller* and *Morin v. National Special Handling Unit Review Committee*; each at (1985), 23 C.C.C. (3d) 119 et seq.

security level to security level. At least one study shows that segregation is used without restraint and is the most frequently imposed penalty for disciplinary offenses.¹³⁹

- Administrative penalties can be imposed with even less regard for fairness, independence or restraint than disciplinary punishments. Even where an inmate is found not guilty, or is merely suspected of an offense but is not charged, the jails still impose penalties.¹⁴⁰ These are called administrative segregation and involuntary transfers. The only decision required is that such treatment be made for the "maintenance of good order and discipline of the institution in the best interest of the inmate."¹⁴¹ While administrative segregation has a few more privileges than punitive segregation (e.g., access to TV, radio and reading materials), it is permitted to go on for months, while punitive segregation has a maximum of 15 days. Administrative segregation has been called "cruel and unusual punishment" in at least one court.¹⁴² When involuntary transfers put a prisoner into a Special Handling Unit (super maximum security), release back into a lower security environment can be delayed well after it is recommended based on the inmate's performance because the placement of the inmate sometimes becomes a matter of negotiation between regional offices of the Correctional Services of Canada.

139 *Justice Behind the Walls*, note 121, *supra*, p. 112, citing John Anderson, *Prison Discipline in Four Maximum Security Jails: A Rift in the Veil of Secrecy*, 1983.

140 *Justice Behind the Walls*, note 121, *supra*, p. 137.

141 *Ibid.*, p. 138.

142 *Justice Behind the Walls*, note 121, *supra*, p. 139, citing *McCann v. The Queen*, [1976] 1 F.C. 570 (T.D.).

- Remission time decisions apply unequally and unfairly in a number of ways. A person serving a life sentence or an indeterminate term cannot benefit from remission and therefore cannot be punished by its forfeiture. Loss of remission operates with disproportionate severity on a prisoner serving a short sentence. Finally, the rules provide that time is lost for both the month of the disciplinary offense and the month in which sentence for the offense is decided. This leads to what is known as the "lunar" theory of punishment,¹⁴³ where severity of punishment depends entirely on the time of month the offense occurs.

On the whole, it would appear that justice is a foreign concept behind the walls. "As the criminal law process has been called discount justice, so the law of corrections has been equated with that of the jungle, out of the reach of the courts in most instances."¹⁴⁴

A final example of the adverse impact jails have on Aboriginal inmates is that jails appear to have no rehabilitative effect, and in fact, may affect inmates in ways making them more likely to commit crimes in the future. If this is true, then the group most over-represented in jails will be disproportionately subject to these effects. More than a century of different reports have commented that jails teach persons to be criminals or to be more serious offenders. They do not teach respect for justice or teach people how to trust. Virtually nothing that occurs in jails is designed to build the self-esteem of the inmate. In fact, the whole institution is

143 *Ibid.*, p. 127.

144 J. Mohr, "New Directions in Sentencing," in *New Directions in Sentencing*, B. Grosman, ed., (Toronto: Butterworths, 1980), p. 25.

designed to do just the opposite. "Correctional institutions do not teach responsibility, but dependence."¹⁴⁵

The non-rehabilitative effect of jails impacts most harshly on Aboriginal inmates, who are over-represented within the jails and spend more time in them. The lack of support programming and the serious effects of the jails contribute to inmates reoffending, building longer criminal records and spending more time in jail. The lack of justice within the walls has an adverse impact on the group most over-represented and exposed to that system - Aboriginal offenders.

Parole (and conditions imposed at parole and probation)

Once jail nears its end, the parole process begins, which is considered by a large proportion of inmates to be discriminatory.¹⁴⁶ Parole is heavily influenced by

145 Hamilton and Sinclair, note 2, *supra*, p. 395.

146 See ch. 4, *supra*. See Ekstedt and Jackson, note 29, *supra*, whose survey of B.C. inmates found at pp. 44-45: "[T]he groups were unanimous in the expression of dissatisfaction with regard to the make-up of the Parole Board, the 'arbitrariness' of the conditions attached to parole, the lack of clarity with regard to the criteria used in granting and revoking parole, and the lack of positive support and assistance while under supervision. ... Nearly all groups believe the Parole Board appointments to be political ... Nearly everyone believed that the parole process should be more 'open' and that reasons for decisions should be more effectively communicated to the inmate."

Landreville, Hamelin and Gagnier, note 31, *supra*, quoting various inmates, p. 49: "It's a totalitarian system, you have no right to appeal. They send you back to the penitentiary on mere suspicion." At p. 51: "Everything I do that is good doesn't count. Everything bad has a hundred times more weight." At p. 53: "[A]ppearing at a parole hearing means being judged all over again ... One inmate says that he was acquitted of a charge for which his parole had been suspended ..." At p. 55: "The report [to the Parole Board] includes charges of which the accused was convicted, plus police suspicions against him. Since the inmate does not have access to the entire report, he

classification officers who are non-Aboriginal assessing the readiness of Aboriginal inmates to be released into the communities. It is influenced, especially in rural and remote communities, by non-Aboriginal police officers assessing whether the community can provide a supportive environment for successful parole. It is influenced by psychiatric assessments that use non-Aboriginal behaviour as the standard for comparison. Of course, it is most heavily influenced by the parole officers and parole board members who are not representative of the community. The profile for National Parole Board members calls for a minimum high school education, with at least half having university degrees,¹⁴⁷ which ensures that the members will have little in common with the people they are judging.

One of the choices inmates have is to waive their right to a parole hearing. Many Aboriginal people do not apply for parole or agree to waive it, for a variety of reasons.

cannot refute any false allegations it might contain. Moreover, a police officer's word to the effect that the person is undesirable is enough to prevent parole being granted. ... After being paroled, the former inmate is still subject to police pressure, either indirectly through a parole officer, or directly when he must report to a police station." At p. 56: "The [National Parole Board] encourages inmates to become informers. It seems that if an individual 'squeals' on someone else, he is released, on either temporary absence or full parole. Otherwise, the inmate is declared unsuitable for parole ... Once this system is established, anyone can say anything to win favours ..." At p. 65: "If you have to report, the cell has just gotten bigger, that's all." At p. 66: "Outside, for \$500 in tickets, you get one day ... here, you do one more day because your bed is not made properly." At p. 85: "Multiple charges can have an unfavourable influence on jurors, judges and, especially, correctional service and parole board personnel." At p. 87: "[T]he Board is very sensitive to police pressure, and may rely on police information based on mere suspicion, without the inmate being able to defend himself." At p. 88: "The relationship between former inmates and parole officers is based more on supervision than on assistance."

147 Hamilton and Sinclair, note 2, *supra*, p. 467.

- Many do not understand the prison and parole system.
- There are few Aboriginal people in the prison system to offer information and advice to those who might wish to apply for parole.
- They feel alienated by the way they are treated in the institution and have given up all hope of having any control over their own lives.
- They hear of Aboriginal people being returned to jail when their conduct out of jail has been found unsatisfactory by the parole officer or the police.
- The unnecessary or unrealistic parole conditions being imposed.
- Some are improperly encouraged to waive their right to apply for parole.
- Some may feel that they are not prepared for life in the community.¹⁴⁸

Parole is frequently denied to Aboriginal inmates because there is no parole supervision or alcohol treatment programs or other supports in their communities.¹⁴⁹ There are very few halfway facilities in Aboriginal communities or in rural areas generally. Parole may also be refused if the release plans of the inmate are not considered adequate. Employment plans and opportunities are important factors to consider, which has an adverse impact on Aboriginal inmates, especially those wishing to return to their reserves if there is high unemployment there.¹⁵⁰ There is little help for release planning and little support after release.¹⁵¹

148 Hamilton and Sinclair, note 2, *supra*, p. 466. See also Daubney, note 122, *supra*, at p. 214: "[I]t appears that Native inmates are often not as familiar with release preparation processes and the conditional release system as other inmates." See also Task Force on Aboriginal Peoples in Federal Corrections, note 123, *supra*, p. 6.

149 Hamilton and Sinclair, note 2, *supra*, pp. 106, 466. See also Zimmerman, note 21, *supra*, at p. 79.

150 Monture, note 7, *supra*, p. 49.

151 Task Force on Federally Sentenced Women, note 127, *supra*, p. 62; Zimmerman, note 21, *supra*, at p. 85.

One possible explanation for Aboriginal difficulties in obtaining parole is culturally inappropriate assessment of the inmate.

[A]ssessors are invariably non-Aboriginal, and the standards of comparison against which judgements and assessments are made are virtually always non-Aboriginal in source and content. The Task Force is of the view that psychiatric assessment procedures could be a contributing factor to differential release treatment.¹⁵²

Aboriginal inmates are refused parole more often than non-Aboriginal inmates, receive parole later in their sentence with more conditions attached and have their parole more frequently revoked.¹⁵³ Harman and Hann, in a study of more than

152 Cawsey, note 4, *supra*, p. 6-13. For support of this view, see R. Ross, "Cultural Blindness and the Justice System in Remote Native Communities," note 4, *supra*, at pp. 9-10.

153 Task Force on Aboriginal Peoples in Federal Corrections, note 123, *supra*, p. 5. See also Moyer, Kopelman, LaPrairie, Billingsley, note 57, *supra*, Table 5.2; W. Jamieson and C. LaPrairie, "Native Criminal Justice Research Issues and Data Sources," (Ottawa: Solicitor General, 1987), p. 19: "For some time it has been observed that only a small proportion of the Native inmate population participate in conditional release programs such as the Temporary Absence Program ... and parole, compared to the non-Native population. Most Native inmates are released towards the end of their sentence, under mandatory supervision." See also B. D. Maclean and R. S. Ratner, "An Historical Analysis of Bills C-67 and C-68: Implications for the Native Offender," *Native Studies Review*, 3, 1, (1987): 31. See Havemann, note 6, *supra*, p. xiii: "It is suggested that indigenous offenders may not have equal access to some prison programs, to early release on parole and temporary absence, and to the standard option to prison, supervised probation. ... [W]ithin specific corrections areas (probation, parole and alternative dispositions such as fine option) there is evidence of inappropriate criteria for eligibility and evidence that the use of these programs is disproportionately less frequent for Indigenous offenders." See Law Reform Commission of Canada, note 7, *supra*, p. 81.

One study that found Aboriginal inmates spent less time in jail is J. Bonta, "Native Inmates: Institutional Response, Risk and Needs," *Canadian Journal of Criminology*, 31, 1, (1989): 50. Bonta found parole rate differences "were statistically unreliable." His study drew a sample of 126 inmates from three provincial jails in northern Ontario.

50,000 inmates from 1971 to 1985, found that "[o]verall, the ratio of Mandatory Supervision Releases to Parole Releases is about 5 to 3 ... [while] the Native Race Cohort ratio [is] 17 to 3. Very few Native Race inmates are released to Parole."¹⁵⁴

Aboriginal inmates are more likely to be released to mandatory supervision (expiration of two-thirds of sentence) instead of parole (generally eligible at one-third expiration of sentence) and are more likely to be released from higher security institutions.¹⁵⁵ This suggests that Aboriginal inmates will face the greatest

By its selection method, it eliminated all federal inmates, which was the topic of the Task Force on Aboriginal Peoples in Federal Corrections, and eliminated all inmates serving three months or less. The representativeness of the sample may also be questioned because the unemployment rates of both Aboriginal and non-Aboriginal inmates in the survey were the same - 84%. Bonta found parole revocation for offenses committed while on parole and for violations of parole conditions were the same, but did not investigate these two factors separately. (Bonta's findings might add support to the finding in ch. 2 that equal numbers of Aboriginal and non-Aboriginal offenders had prior records.) Bonta cites other, more extensive surveys that confirm the finding that Aboriginal inmates do face greater difficulties in obtaining parole than non-Aboriginal persons, including Bynum, "Parole Decision-making and Native Americans," in *Race, Crime, and Criminal Justice*, R. L. McNeely and C. E. Pope, eds., (Newbury Park, Cal.: Sage, 1981) and Harman and Hann, note 154, *infra*.

- 154 W. Harman and R. Hann, "Release Risk Assessment: An Historical Descriptive Analysis." (Ottawa: Solicitor General, 1986), p. 5-3.
- 155 C. Canfield and L. Drinnan, "Comparative Statistics Native and Non-Native Federal inmates - A Five Year History," (Ottawa: Correctional Services of Canada, 1981). At p. 24: "The contrast between native and non-native types of release is one of the sharpest and perhaps most significant difference dealt with in this study ... Over the five year period, only one in eight natives were released to parole, while one in three non-natives were released to parole. As a result, three-quarters of all natives were released to mandatory supervision and only one half of all non-natives were released to mandatory supervision." At p. 25: "Over eighty-five percent of all native offenders are released from maximum security institutions, this is true for only seventy-one percent of non-natives." At p. 27: There is an "exclusively non-native impact of 'cascading' and its associated case preparation for parole decision-making." P. 35: "To some extent, the non-native population demonstrates positive evidence of cascading. ...

difference in living conditions and may be the least prepared, when they are released.

The differences in parole releases cannot simply be explained as a difference in seriousness of offenses, because even Aboriginal inmates sentenced to short terms have more difficulty getting parole than non-Aboriginal inmates.¹⁵⁶

The native inmate population shows none of these trends." See also H. Johnson, "Getting the Facts Straight: A Statistical Overview," in *Too Few to Count Women in Conflict with the Law*, E. Adelberg and C. Currie, eds., (Vancouver: Press Gang Publications, 1987), at p. 43: "Research has shown that Native women are less likely to be granted full parole, and those who are released early are more likely to have parole revoked."

- 156 Canfield and Drinnan, note 155, *supra*, p. 28: "One in seven native releases with sentences of two up to three years is released to parole; one in three non-natives is a parole release. One in five native releases with sentences of three up to four years is released to parole; two in five non-natives is a parole release. Two in nine native releases with sentences of four up to five years is released to parole; four in nine non-natives is a parole release. For releases with sentences of five years and longer, percent of natives are released by parole and over half of non-natives is a parole release." At pp. 29-31: "[O]nly one in ten native robbery releases leaves to serve parole, while four in ten non-native robbery releases is to parole ... [N]on-native break and enter releases are proportionately three times as likely for theft to be parole releases ... only two in seven native drug offenders released received parole while four in seven non-natives with drug offences are released by parole. ... [T]here is not a single offence group where native releases are more likely than non-natives to be parole releases rather than mandatory supervision releases. ... There is a smaller proportion of natives released with no previous penitentiary history than non-natives. ... Nearly half of all non-native releases of offenders with no prior penitentiary history are parole releases. Just over one in five native releases with this correctional experience are parole releases."

See Havemann, note 6, *supra*, p. 145, citing Demers: "Notwithstanding the general lack of corroboration for the hypothesis of legal bias, the analysis does reveal significant relationship between race and parole system decision-making. Although race exerts nondirect impact on board decisions in the selection process, Indian and Metis candidates are less likely to receive favourable officer recommendations than their white counterparts. In fact, the analysis indicates, that parole officers differentiate between racial groups in selecting and weighing information when formulating parole evaluations. ... Thus, it would appear that officer assessments can indirectly produce

A study of federal inmates from 1977 to 1981 found

... in every characteristic examined, natives have a lower proportion of parole releases as compared with mandatory supervision than do non-natives. Regardless of security classification of the institution, sentence length, offence or previous penitentiary history, natives are consistently more likely than non-natives to be released on mandatory supervision rather than parole.¹⁵⁷

The Task Force on Aboriginal Peoples in Federal Corrections

confirmed that Aboriginal offenders face unique difficulties in obtaining and completing parole, and that, even when they face the same problems as non-Aboriginal inmates, unique solutions are required because of their cultural and socio-economic backgrounds.¹⁵⁸

Parole, as with probation and bail, is often accompanied by a variety of conditions.¹⁵⁹ These conditions can have particularly adverse impacts for Aboriginal inmates.

racial inequalities with references to parole selection."

157 Canfield and Drinnan, note 155, *supra*, p. 34.

158 Task Force on Aboriginal Peoples in Federal Corrections, note 123, *supra*, p. 10.

159 For parole problems generally, see National Conference on Native Peoples and the Criminal Justice System - *Native Peoples and Justice*, Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, both held in Edmonton, Feb. 3-5, 1975. (Ottawa: Solicitor General of Canada, 1975). p. 11; Kirby, note 7, *supra*; Daubney, note 122, *supra*; Task Force on Aboriginal Peoples in Federal Corrections, note 123, *supra*; Task Force on Federally Sentenced Women, note 127, *supra*; Hamilton and Sinclair, note 2, *supra*, ch. 12.; Cawsey, note 4, *supra*, p. 6-44; Law Reform Commission of Canada, note 7, *supra*, p. 62,73; Maclean and Ratner, note 153, *supra*, pp. 31-58.

Numerous commissions, including the Task Force on the Release of Inmates and the federal working group on conditional release, have concluded that parole conditions are too vague and general, that they are often misunderstood, and that they are sometimes so unrealistic that they are virtually impossible to respect. Yet, the use of such conditions by the board has continued unabated.¹⁶⁰

One condition sometimes imposed is that the offender not associate with anyone with a criminal record. This condition fails to take into account that Aboriginal communities may have higher crime rates.¹⁶¹ It also fails to take into account that given the close communities and large immediate and extended families, Aboriginal inmates are much more likely to know persons with criminal records, as the results of the Manitoba Inmate Survey show (see chapter 2 above), and perhaps more importantly, the police, parole officer and inmate are more likely to know whether or not a person with whom the inmate is in contact has a criminal record.

Aboriginal persons may be required to abstain from alcohol. This condition may be imposed whether or not there are alcohol treatment programs available in the offender's community (let alone culturally appropriate ones) and whether or not alcohol was related to the offense. It is frequently believed that non-Aboriginal decision-makers have a stereotypical view of Aboriginal offenders as being

160 Hamilton and Sinclair, note 2, *supra*, p. 471.

161 *Ibid.*, citing statistics showing higher crime rates on Manitoba reserves, p. 87.

alcoholic (the Manitoba Inmate Survey, chapter 2 above, shows this belief is probably more prevalent than actual Aboriginal alcohol abuse levels).

Conditions may be imposed which are thought to be for the benefit of the accused but which address behaviour that is not directly related to the offense. This is unwarranted intervention into a person's life and simply makes it easier for the person to breach conditions and be put in jail.¹⁶² The obligation to report regularly to a probation or parole officer can have a disproportionate impact on persons living in remote and rural areas and on persons who are engaged in hunting and trapping activities.

Of those inmates released on mandatory supervision and parole who are returned to the penitentiary, Aboriginal inmates are more likely to be returned for technical violations (as opposed to committing new offenses), than is true for non-Aboriginal offenders.¹⁶³

¹⁶² *Ibid.*, p. 412-413.

¹⁶³ Canfield and Drinnan, note 155, *supra*, at p. 14: "Mandatory supervision violations are nearly as significant as simple warrants of committal for natives: three in eight admissions are for mandatory supervision violations. For non-natives this type of admission occurs less than two times in eight admissions. ... For natives just over half of admissions for mandatory supervision violations are due to technical violations, whereas with non-natives the reverse is true: just over half of mandatory supervision violation admissions are due to conviction for new indictable offences. ... [F]or parole violations here, too, natives are admitted more frequently for technical violations of parole, rather than conviction for a new offence. Over the five years [1977-1981], fifty-five percent of native parole violation admissions were for technical violations, while for non-natives, technical violations accounted for only forty percent of all parole violation admissions." At p. 16: "Although one in eleven admissions to federal penitentiary by a simple warrant of committal is a native offender, one in six admissions for violations of mandatory supervision is a native offender."

Young offenders

Just like adults, youths receive severe treatment.¹⁶⁴ Jail is frequently imposed. In Manitoba, pretrial detention, "open" custody and "closed" custody are all served in the same institution. Virtually all of the problems faced by adults are also faced by youth. In Manitoba, youth are transported around the province more than adults because of a lack of facilities. This makes it difficult for parents to attend court. It is equally difficult for parents to attend police and prosecution interviews of the youth.

The problems of Aboriginal persons in the criminal justice system were often created by being subject to the old youth justice regime, the *Juvenile Delinquents Act* (repealed in 1985). This Act was very intrusive into the lives of youth and did not require that youths had committed an offense, only that they were "delinquent." Under the Act, judges could commit a child to the charge of any children's aid society.¹⁶⁵ There was no need to equate the seriousness of the child's act with the court's disposition. Procedural rights were routinely denied. Since

See Havemann, note 6, *supra*, p. 145, citing Demers: "it would appear that incarceration in a federal prison exerts a particularly pernicious influence on native offenders. Whereas 71% of the whites paroled from federal institutions were eventually revoked, fully 93% of the natives released from federal prisons were reincarcerated by reason of revocation. Thus it may be that incarceration in a federal penitentiary creates problems of social reintegration that are particularly acute for native parolees." See Finkler, note 4, *supra*, p. 118: "[W]hile the majority understood the conditions of a probation order, a number have failed to realize that they could be charged for breaching its terms."

164 This discussion is drawn primarily from Hamilton and Sinclair, note 2, *supra*, ch. 15.

165 *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, s. 2(1)(h).

then, courts have become even more punitive in their dispositions although they are now generally respecting procedural rights under the *Young Offenders Act*.

Parents and community are not being used sufficiently by police, prosecutors and courts in the cases of Aboriginal young offenders. The least possible interference with the youth is a principle of the Act that is not being followed. Aboriginal youth are especially at risk in the justice system, being disproportionately represented, having higher needs and lower resources, and suffering more geographic isolation with the problems of fewer services and fewer alternatives for police and judges.¹⁶⁶ Some of those problems include high turnover of staff, inexperienced prosecutors and defence lawyers, and lack of legal representation because the matters are frequently not serious enough for Legal Aid. The youth justice system is failing Aboriginal youth. The adverse impacts are worse than for adults and contribute to the high rates of Aboriginal people coming before the adult criminal justice system.

Child welfare

Usually preceding involvement with the criminal justice system is the child welfare system. Aboriginal children come into the child welfare system in disproportionate numbers.¹⁶⁷ The child welfare system suffers virtually all of the same problems as the criminal justice system. Cultural differences concerning family matters are particularly important, as discussed above. The present child welfare system still harms Aboriginal children by putting too many into

¹⁶⁶ See also LaPrairie, note 96, *supra*, at p. 163.

¹⁶⁷ On child welfare generally, see Hamilton and Sinclair, note 2, *supra*, ch. 14.

institutions, foster homes and non-Aboriginal environments, and by failing to find ways to support Aboriginal parents having difficulties.

It seems an inescapable conclusion that the institutionalization of Aboriginal persons, from very early ages, is a significant contributor to later anti-social behaviour. At the very least, it must be concluded the institutionalization has no rehabilitative effect.

Victims of crime

Beyond the experience of accused and offenders in the criminal justice system is the experience of Aboriginal victim and the experience of the general Aboriginal population. While special attention is given to the surveillance of Aboriginal persons, and stopping them for no reason (resulting in over-policing), under-policing also occurs. Police may be reluctant to act in domestic violence situations, situations that appear to be more common in Aboriginal communities.¹⁶⁸ As well, due to the location of police detachments and poor phone service, police response times to many Aboriginal communities is measured in hours and sometimes days. The police protection that the majority of Canadians take for granted is not part of the Aboriginal experience in many communities.¹⁶⁹

Once into the system, the victims find themselves denied any meaningful participation in the justice system and usually are denied access to information about the case. They are not involved in plea bargains and not informed of bail,

168 On victims generally, see *Ibid.*, ch. 13, and Grant, note 36, *supra*.

169 Hamilton and Sinclair, note 2, *supra*, pp. 106, 596.

trial, sentence or parole decisions. Their particular needs are not seen as a responsibility of the criminal justice system.

The justice system does not provide emergency shelters for battered women and children.¹⁷⁰ In Manitoba, this falls under the jurisdiction of the Department of Community Services. The few shelters that exist do not have the funds to help poor women with transportation costs and have maximum stay rules which often result in the victim returning to the community and home situation where the abuse occurred.

When the justice system does respond, the response is inconsistent and unpredictable, and usually far too late to help the victim. The response to domestic violence is usually to encourage the victim to leave the home, rather than to force the abuser to leave the home.¹⁷¹ Aboriginal women who are victimized are usually put in a position of having to tell personal and painful experiences to non-Aboriginal males employed in the system. This simple fact alone likely contributes to under-reporting of crime, not to mention the numerous other pressures on a victim of family violence. Some reports estimate women endure at least 35 incidents of abuse before reporting them.¹⁷²

The justice system is not preventing victimization and serves victims poorly, especially Aboriginal victims.

170 See *Ibid.*, ch. 13.

171 Hamilton and Sinclair, note 2, *supra*, p. 488.

172 *Ibid.*, p. 483.

Unemployment in the criminal justice system

Aboriginal persons are almost completely excluded from being employed in the criminal justice system. Before discriminatory hiring practices are even considered, Aboriginal employment is limited from the outset by what has been called the chill factor.¹⁷³ This means Aboriginal people who perceive racism in the agency and decide employment in the agency will only result in being stereotyped, subjected to racist treatment and being kept in lower positions will not even apply. When the agencies of the justice system make public statements against affirmative action programs, make rules that braided hair is not permitted and conduct themselves in the ways seen in the J. J. Harper, Helen Betty Osborne, Donald Marshall Jr. and Blood Tribe cases, among others, it is easy to understand why the agencies have a difficult time recruiting Aboriginal applicants.

Where Aboriginal persons are employed, it is usually in jobs associated with the successful prosecution and imprisonment of the accused. The police, probation services and jails have the best hiring records of Aboriginal persons, and even their performance is unacceptable. The worst employment records are for administration, policy making lawyers, and judges (going by comments from the Alberta Task Force and Manitoba Aboriginal Justice Inquiry).¹⁷⁴

173 Daudlin, note 7, *supra*, p. 80.

174 Cawsey, note 4, *supra*, p. 8-46. See Hamilton and Sinclair, note 2, *supra* re: lawyers: p. 667; police: p. 620; young offenders services: p. 588; child welfare, p. 541; parole: pp. 467, 468, 470; jail staff: p. 452; probation staff, pp. 414-415; judges and various other court staff, pp. 416-420.

Exclusion of Aboriginal persons from decision-making in the justice system cannot simply be explained as a lack of qualified candidates. This is clear by the exclusion of Aboriginal jurors, a position which has no education requirements. Moreover, education for Aboriginal persons does not ensure they will be hired by the system as other ways of excluding them can and have been found. The justice system agencies provide little in the way of education enhancement and the education criteria of many agencies are higher than they need to be.

The education requirements are unfair because often they have no specific relationship to the requirements of the job and because they fail to acknowledge that Aboriginal persons do not have an equal opportunity to succeed in school. This is due to a variety of factors. For a large proportion of today's Aboriginal parents, school meant residential school, and residential school meant cultural oppression, abuse and removal from family. It did not mean employment success at the end of the day. Even today, few Aboriginal communities have their own high schools, the large majority of persons teaching Aboriginal students are non-Aboriginal and there are very few teaching materials that recognize the value of Aboriginal culture, let alone help students learn more about it.¹⁷⁵

When Aboriginal people apply for jobs and are told they do not have adequate education, many times this can be unfair. When they are then told that their knowledge of Aboriginal issues and ability to communicate and work in Aboriginal communities is not a factor that stands to their credit, this is both unfair and short-sighted. A study of Manitoba's civil service hiring practices found

¹⁷⁵ Hamilton and Sinclair, note 2, *supra*, p. 614, 620; note 1, *supra*, pp. 101-109 (Harper).

there has been an unwarranted increase in the level of credentials required for positions being filled in recent years. This increase in qualifications requirements is viewed as not being the result of *bona fide* job requirements and therefore, as a means of discriminating on the basis of education.¹⁷⁶

Affirmative action hiring could address these problems, but these suggestions are criticized for "lowering standards." The Ontario Task Force on Policing examined this argument:

The Task Force takes unequivocal exception to the notion that employment equity "lowers standards." The phrase is merely an excuse for resistance to change ... Moreover, it is an extremely patronizing concept. It says expressly that visible minorities ... are, by nature, simply not good enough to be part of the institution. ... It is code for "white males only need apply." This notion must be thoroughly rejected.¹⁷⁷

If hired, Aboriginal people will often find themselves expected to behave in culturally foreign ways in order to fit in and not to try to express their cultural distinctiveness while at work.¹⁷⁸

As stated in chapter 1, the justice system's failure to employ Aboriginal persons contributes directly to poverty and also contributes to negative stereotypes of Aboriginal people.

176 Hay Management Consultants, *Report - Review of the Recruitment Selection, and Classification Processes within the Manitoba Civil Service*, (Winnipeg: 1991), p. 35.

177 Clare Lewis, Chairperson, Ontario Task Force on Race Relations and Policing, *Report*, (Toronto: 1989), p. 65; see also Cawsey, note 4, *supra*, p. 8-47.

178 Cawsey, note 4, *supra*, p. 8-40.

Inquests

Another area of the law that fails to give Aboriginal people justice is in the conduct of inquests. Inquest problems were found in the Policing in Relation to the Blood Tribe inquiry, the AJI inquiry into the death of J. J. Harper, and by the Osnaburgh-Windigo Tribal Council Justice Review Committee. The latter committee called for more frequent use of inquests for reasons of prevention and education, to dispel rumours and to draw public attention to the socio-economic conditions that often lead to tragic, sudden deaths. Inquests should be primarily to inform the community about what happened in a particular case, even if the medical examiner and police believe they know what happened. As the AJI report shows, weaknesses in inquest laws, from a lack of independence of the Crown to overly restrictive limits on evidence, to confidentiality rules, prevent communities from finding out what happened in particular cases. This is of considerable concern to Aboriginal communities whose rates of sudden deaths and of wardship in Government institutions, are disproportionately high (often inquests are required when deaths involve government agencies).

Conclusion

All of the above is merely a whirlwind tour of the criminal justice system and some of the problems it has. The Law Reform Commission of Canada has spent the past 20 years researching the system and proposing major reforms, which may be added to the above list. The Commission says "the *Criminal Code* and related statutes are defective and do require change."¹⁷⁹ Most of the "official" reports

179 Law Reform Commission of Canada, note 7, *supra*, p. 3.

describe many of the problems in greater detail and with greater supporting evidence than is provided here.

The basic proposition of this thesis is that the inmates are correct - Aboriginal persons are treated differently and negatively in the justice system. Further, if there is a problem with the justice system, if it operates unfairly in any respect, it will have an adverse impact on those persons who are most likely to be subject to the unfairness. In the criminal justice system, that means there is adverse impact against Aboriginal persons in particular. This is called discrimination.

This thesis is not arguing that the majority of Aboriginal persons brought to the system are innocent, it is arguing that if the system acted fairly and accommodated Aboriginal differences, then penalties would be less severe, rehabilitation would be more effective, and there would be less recidivism. Aboriginal persons would continue to be held accountable for their actions. If the system operated in a perfectly even-handed manner, Aboriginal people would get all the benefits of discretion and lack of attention accorded to non-Aboriginal people.

This thesis is also arguing that the discrimination faced in the justice system is cumulative. Discrimination at the first step leads to greater involvement in the second step and so on. Over-policing leads to over-charging and unfair interrogations. Lack of access to counsel contributes to the inability to defend oneself. Pre-trial detention contributes to the pressures to plead guilty. Once there is a guilty plea, or a finding of guilt in a trial process that poses special problems for Aboriginal inmates, the excessive disparity allowed in sentencing, combined with few sentencing options and an over-use of incarceration, operate against all offenders, of whom Aboriginal persons are disproportionately represented. Fines

and a lack of sentencing options are especially problematic for Aboriginal persons. Jails operate with virtually no sense of the principles of fundamental justice and create special problems for Aboriginal inmates. Parole also poses special problems for Aboriginal inmates.

At every stage of the criminal justice system factors are at play that discriminate against the poor, the illiterate, the non-English speaking, the unemployed and those who reside in remote communities. Each of these discriminations has an adverse impact on Aboriginal persons who are disproportionately represented in these groups. In addition, the criminal justice system makes no effort to understand or make reasonable accommodation for Aboriginal cultures.

While data do not exist to compare comprehensively the Aboriginal and non-Aboriginal presence in crime, charge, court appearance, guilty plea, conviction, jail or parole approval rates, the figures that do exist suggest that Aboriginal persons become increasingly over-represented in the system the deeper into the system they go. Discrimination is an important contributor to this phenomenon.

The various reports show that numerous legal principles are not respected. Guarantees to equality, access to counsel, rights to interpreters and trial by one's peers are violated in critical circumstances. Access to probation, parole, halfway houses, fine option programs, alternative measures programs, Aboriginal court workers, lawyers, superior courts, police, emergency shelters and interpreters all vary considerably across the country. The idea that criminal justice in Canada is uniform has no basis in reality.

The most important things to know about the criminal justice system is that it permits subjective discretion to determine outcomes at every stage, and it allows penalties to be imposed with almost no guidance for the decision-maker. "Abuse of power and the distorted exercise of discretion are identified time and again as principal defects of the system."¹⁸⁰ The Canadian Sentencing Commission quoted the Law Reform Commission of Canada's brief to it:

Excessive discretion is conferred on a wide range of police, prosecutors, judges and prison/parole officials. Equality, clarity and truth in sentencing are sacrificed ... Disparity becomes more pronounced in the absence of authoritative statements of purpose and principle. Prison overcrowding intensifies ... The current scheme creates disparity, and therefore fails to promote equality in a variety of ways.¹⁸¹

Ericson and Baranek argue that the extremely high value placed on discretion by our criminal justice system, combined with the value of individualization of particular cases, means that "control agents can hardly go wrong. Differential selection of citizens according to citizen characteristics and other individual circumstances of the case is not regarded as 'extra-legal' at all and certainly does not constitute discrimination."¹⁸²

This discretion has very important consequences for Aboriginal persons.

180 *Ibid.*, p. 5; Lilles, note 4, *supra*, at p. 335: "in every instance where discretion exists, the intrusion of bias is probable." McCorquodale, note 15, *supra*, notes at p. 43: "If legislation itself discriminated massively and specifically against Aboriginals, it would be surprising indeed were judicial officers to do otherwise."

181 Canadian Sentencing Commission, note 99, *supra*, p. 58. Also, see Hamilton and Sinclair, note 2, *supra*, p. 101.

182 Ericson and Baranek, note 24, *supra*, p. 234.

[T]he exclusion of Aboriginal people from decision-making positions within the justice system virtually guarantees that none of the discretionary decisions made by system personnel will be culturally appropriate to Aboriginal people.¹⁸³

Even where the law sets out guarantees, practice is often more important than the words of the law.¹⁸⁴

183 Hamilton and Sinclair, note 2, *supra*, p. 107.

184 Canadian Sentencing Commission, note 99, *supra*, p. 38. See also Moyer, Kopelman, LaPrairie, Billingsley, note 57, *supra*, p. 3.12: "It does appear that legislative intent (as in Ontario) and statutory provisions may have little relationship to the day-to-day operation of the legislation." (discussing Ontario legislation designed to reduce incarceration for minor offenses that has not achieved the desired effect)

See Hogarth, note 100, *supra*, p. 177: "The data presented in this chapter lead to the conclusion that the law expressed in legislation and reported cases offers little guidance to magistrates. ... The general conclusion that can be made is that the socializing and educative influences of legal experience are far more important in controlling judicial behaviour than the formal rules laid down by parliament and the appeal courts." See Havemann, note 6, *supra*, p. 121, citing Mohr: "The proud principle of a government of laws and not of men turned largely into a legal fiction when it came to sentencing."

F. Gale and J. Wundersitz, "Aboriginal Youth and the Criminal Justice System in South Australia," in Hazelhurst, note 15, *supra*, p. 127: "[L]egislation exerts no direct influence or control over police behaviour."

See Feely, note 33, *supra*, p. 288: "The police officer's decision as to whether or not to arrest has its analogues in decisions made by other officials in the criminal process. Plea bargaining, nolleing [withdrawing charges], casual continuances of cases, and wide latitude in sentencing - all decisions pursued without benefit of explicit principles - raise these same basic questions about the 'rule of law versus discretion' or more bluntly, about 'lawfulness' and 'lawlessness.' See Note, "Developments in the Law - Race and the Criminal Process," note 7, *supra*, pp. 1520, 1522.

See Ericson, note 26, *supra*, p. 214: "The principle of legality is supposed to function to provide effective limits on the power of State agents to judge and punish. However, as we have seen, many laws are written and used in a manner which enable detectives to do what they want to obtain what they want. Detective practices are facilitated further by low visibility conditions of their work, which allow them to be *the* definers of reality about a case, and to construct 'facts' about the case which are treated as

The simple fact is that the rule of law in criminal justice takes a back seat to individual discretion and Aboriginal people suffer for it. To now say to Aboriginal people that an idealized philosophy of the rule of law prevents them from taking control of how their communities define and deal with harms cannot be received as a reasonable argument.

legitimate because they take into account the rules which are supposed to govern the process." [emphasis in original] P. 219: "Our analysis reveals that the law does not rule; rather, detectives use law and other rules to control the process. ... If detectives, and other agents of the system on whose behalf they operate, want to disadvantage someone or some group, procedural rules are not likely to stand in the way. ... [I]n almost all cases detectives are able to use them to their advantage, or get around them legally, without problems."

CHAPTER 9 - CONCLUSION

This thesis has examined the Manitoba Inmate Survey undertaken by the Manitoba Aboriginal Justice Inquiry in the summer of 1989. By way of introduction, the thesis showed that Aboriginal over-representation in jails is a very serious problem for Canadian society. In Manitoba, although the Aboriginal population is approximately 12% of the provincial population, Aboriginal persons make up over half of persons admitted to jail. Aboriginal communities and individuals are suffering in many different ways at the hands of an ineffective justice system that does not protect victims, employ Aboriginal persons, contribute to community development or promote healing and restoration of offenders with their communities. It is a system that separates children and parents and it is one that incarcerates too frequently, without sufficient regard for culture or even for seriousness of offence.

The survey investigated the experiences of the Inmates and sought out their views about the criminal justice system. Aboriginal youth are more likely to become involved in the justice system (and are even more over-represented than Aboriginal adults) and become involved at earlier ages. Aboriginal offenders experience greater family instability and have more family members who have been in jail than non-Aboriginal offenders. Aboriginal inmates have less education and less employment. Aboriginal inmates generally do not want to be in prison and do not commit crimes in order to leave their home communities, despite beliefs to the contrary by some Aboriginal and non-Aboriginal inmates. Various studies reveal that Aboriginal offenses are more related to offenses against provincial

statutes, offenses against the person and are generally less sophisticated, premeditated or designed for profit than non-Aboriginal offenses.

The survey revealed that Aboriginal inmates receive more negative treatment at virtually every stage of the justice system. Aboriginal offenders are more likely to be taken directly to jail, wait longer to see a judge, and wait longer for a bail hearing. Research of the Manitoba Provincial Court Study (among other studies) shows that Aboriginal offenders are more likely to be detained in custody and to stay longer in pre-trial detention. The inmate survey revealed that Aboriginal offenders spend less time with their lawyers, are more likely to be represented by Legal Aid, are more likely to feel pressure to plead guilty and do plead guilty more often than non-Aboriginal offenders. Despite these results, an equal percentage of Aboriginal and non-Aboriginal offenders (less than a third) have not been incarcerated before. Among those offenders who do have previous incarcerations, Aboriginal offenders had more previous incarcerations.

Two-thirds of non-Aboriginal and more than three-quarters of Aboriginal offenders said Aboriginal inmates are treated very differently or with some difference at sentencing. Approximately 60% of both Aboriginal and non-Aboriginal inmates said Aboriginal inmates were treated differently by jail staff. More than half of non-Aboriginal and more than three-quarters of Aboriginal inmates said the parole board treated Aboriginal inmates differently. Fully 81% of Aboriginal inmates reported that Aboriginal culture was not respected in jail.

Aboriginal inmates have significantly different cultures. The majority of Aboriginal inmates reported speaking an Aboriginal language at home. Aboriginal inmates reported less understanding of the justice system processes and

approximately 40% had non-Christian religious beliefs. Aboriginal inmates are significantly more likely to have rural origins and rural community ties. Aboriginal women comprise a group whose needs are particularly distinct from other groups of inmates. The large majority of Aboriginal inmates are status Indians, with special rights that create another important difference that the justice system should recognize and respect. Most jails provide few if any Aboriginal specific religious ceremonies, let alone Aboriginal specific training and treatment programs.

This thesis has revealed that Aboriginal inmates experience the justice system in significantly different ways than non-Aboriginal inmates and have personal differences that the justice system does little to accommodate, if it recognizes those differences at all.

Part Two of the thesis asked the question, what do we do with this new information? It was shown that the information of this survey is only one of a very large number of studies into Aboriginal justice issues. A principal objective of the literature review was to examine whether there was support for the inmate survey's findings of differential treatment.

It was seen that there is a large body of official study into Aboriginal justice research. Various public inquiries, task forces and special committees have examined Aboriginal justice issues for the past 25 years and have consistently found discrimination and problems with the delivery of justice system services that contribute to Aboriginal over-representation in jails.

Some of the more recent official studies have explored different concepts of discrimination and equality to explain that discrimination can occur in many different ways and that there are different views of equality and how to ensure it.

The recent official studies have explored a broader range of issues than just present-day criminal justice problems. Some of the important contexts of discrimination investigated and discussed are cultural differences between Aboriginal and non-Aboriginal persons; the importance of understanding how the justice system treats Aboriginal rights in order to understand Aboriginal perceptions of the justice system; and relationships between present problems and the historical treatment of Aboriginal people. By expanding the analysis of Aboriginal justice issues in this way, official studies are moving away from simplistic attempts to deflect scrutiny of the justice system by claims that socio-economic problems are the real problem. Moreover, the Manitoba Aboriginal Justice Inquiry found that the justice system itself has contributed to those serious socioeconomic problems.

The thesis then examined problems surrounding statistical studies of Aboriginal justice issues. It was seen that criminal justice data is extremely limited and analysis of the data is fraught with complications. Many different kinds of discrimination are simply not capable of being counted. The justice system fails to collect data at many important decision points and fails to collect numerous variables which are taken into account in decision-making. Most importantly, the examination of single decision points, especially near the end of the criminal justice system process (such as sentencing), fails to reveal discrimination at other points, fails to reveal the cumulative effect of small degrees of discrimination at many decision points, and in fact, can result in a statistical image of little or no

discrimination when such a conclusion is not warranted given the other data limitations.

One of the most important limitations is that data do not readily permit comparisons of all persons charged with particular offenses (instead, comparisons are usually restricted to only those who were convicted or those sentenced to jail). The data do not permit comparison of similar facts that result in different charges and they do not give information about which incidents police decide to investigate or give priority to, and why. The various decisions that result in the selection of who will be brought into the system and on what charges remain well insulated from scrutiny and comparison. Some studies observed that differences in types of crimes (eg., premeditated white collar vs. spontaneous violence) affect the ability of the police to identify suspects, and result in different priorities for police and different plea bargaining positions for the offenders.

The evidence revealed that Aboriginal crimes (generally: spontaneous, unconcealed and unpremeditated, with a high level of offenses against persons) were more likely to be among those offenses attracting greater police attention with suspects more easily identified and less likely to have strong bargaining positions. It is this kind of systemic discrimination, which is not motivated by considerations of race, which may be a particularly important source of discrimination against Aboriginal people.

Most importantly, the data limitations show that statistical studies have only a limited ability to shed light on what is happening within the justice system generally, let alone explain what is happening with Aboriginal accused persons.

To fully understand the systemic discrimination that occurs in the justice system, it is essential to examine studies that discuss the operation of the justice system generally, combined with an examination of Aboriginal specific studies and data. Ignoring studies that explain how the justice system operates simply because those studies may not have an Aboriginal specific aspect to them ignores a major source of information. A full understanding of systemic discrimination requires a full understanding of how each component of the justice system operates. As was shown in chapter 8, unfair practices and unchecked discretion occur at every decision point in the justice system, but especially outside of the court room.

Studies such as *Reproducing Order: A Study of Police Patrol Work*,¹ *Making Crime: A Study of Detective Work*,² *Let's Make a Deal: Negotiating Justice*,³ "A Plea is No Bargain: The Impact of Case Disposition on Sentencing,"⁴ "The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts,"⁵ *Sentencing as a Human Process*,⁶ *The Process is the Punishment*,⁷ and *Justice Behind the Walls*⁸ are important studies for understanding what is

1 R. Ericson, (Toronto: University of Toronto Press, 1982).

2 R. Ericson, (Toronto: Butterworths, 1981).

3 J. Klein, (Toronto: Lexington Books, 1976).

4 M. Uhlman and N. D. Walker, *Social Science Quarterly*, Sept. 1979, vol. 60, no. 2, 21.

5 J. Hagan, I. Nagel and C. Albonetti, *American Sociological Review*, Oct. 1980, vol. 45, p. 802.

6 J. Hogarth, (Toronto: University of Toronto Press, 1971).

7 M. Feely, (New York: Russell Sage Foundation, 1979).

8 Canadian Bar Association Committee on Imprisonment and Release, Ottawa: 1988.

happening to Aboriginal persons in the justice system, even though they are not Aboriginal or even race specific studies.

Chapter 8 examined a wide range of studies in an attempt to locate discrimination in the justice system. It was found that at every point in the justice system Aboriginal persons are exposed to discrimination, which at times is the result of racially based considerations, but more often, is the result of Aboriginal persons being over-represented in groups of persons exposed to unfair practices and unchecked exercises of discretion (including over-representation in the group of persons brought into the system overall).

Ultimately, the thesis showed that empirical studies do reveal consistent findings of discrimination, despite the very considerable data limitations whose effect is most likely to hide discrimination. The various studies support the conclusions of the Manitoba Inmate Survey that Aboriginal persons are discriminated against by the justice system.

The next question is what is the appropriate response to these findings? The survey only asked inmates about changes to jail and parole. The inmates want more and better training and education programming. Among their various suggestions included calls for more Aboriginal staff (including those who can speak Aboriginal languages), more respect given to Aboriginal culture, more Aboriginal specific programming (including absences to attend pow-wows and traditional ceremonies outside of jail), better food, more pay for inmate prison jobs, more fresh air, guards without uniforms, more recreational access, assistance to be provided to enable family visits, fewer restrictions on movement and better complaint procedures in jail.

Inmates suggested more Aboriginal persons on parole boards, including Aboriginal women and elders, more Aboriginal parole officers, more parole services on reserves, including halfway houses and a community committee (on reserve) to make parole decisions.

Inmates took advantage of an opportunity to express other views in addition to those included in the interview. There were suggestions for greater consistency between cases, sentencing guidelines, less delay, a permanent justice inquiry to investigate abuses, greater access to appeal mechanisms, more public legal education in Aboriginal communities, parole officers on reserves, screening for racist attitudes and less police harassment and brutality.

The one question that expressly went beyond the jail and parole was what the inmates thought of the concept of Aboriginal justice systems. Ninety-six per cent of Aboriginal and 88% of non-Aboriginal inmates said they favoured such an innovation.

The idea of Aboriginal justice systems has been mentioned by many of the official reports and has been recommended frequently in the more recent reports. However, the reports give considerably different levels of detail on their thoughts about Aboriginal justice systems. The most detailed consideration is given by the Manitoba Aboriginal Justice Inquiry. From my point of view, the most important ideas about Aboriginal justice systems found in the official reports is that they can be justified *either* on the basis of Aboriginal rights *or* on the demonstrated failure of the existing justice system, and one justification can stand entirely independently of the other. As well, no full consideration of Aboriginal justice systems should avoid considering the questions of what law-making powers should extend to those

systems and what principles should govern non-Aboriginal governments when they are negotiating what those law-making powers should be.

The Aboriginal Justice Inquiry described the attributes of a fully developed Aboriginal justice system, complete with full law-making authority, Aboriginal police, Aboriginal courts including appellate courts, Aboriginal jails and Aboriginal parole services. It also suggested that communities would likely want to make a transition to Aboriginal justice systems at their own pace, taking on progressively greater responsibilities over time. No outside group would judge when the community was ready to take on greater control. Other official reports that have recommended the concept of Aboriginal justice systems have tended to simply recommend negotiations take place. I believe this is too timid and leaves an impression, to me at least, that there are few or no principles that should guide the negotiations, and particularly leaves the impression that non-Aboriginal governments should have full discretion to agree to (or *permit*) only what they can be convinced is a good idea. Whatever the realities of power and negotiation may be, official (non-Aboriginal) reports should make recommendations on the principles that should guide non-Aboriginal governments.

Recommendations

The review of the criminal justice system's problems reveals that the scope of the problems are extreme. While literally hundreds of different recommendations can be made and be seen to have merit, the past 25 years have shown that the justice system is strongly resistant to change. Incremental changes have not improved the situation for Aboriginal offenders - the Aboriginal proportion of the jail population continues to rise. This happens despite better legal representation,

a *Charter of Rights and Freedoms*, court communicator programs, public legal education programs, cross-cultural training, increased hiring of Aboriginal persons, fine option programs, decriminalization of liquor offenses and so on.

These improvements have not changed the fundamental aspects of the criminal justice system - the overwhelming and mostly unchecked discretion of control agents, the alienation of accused, victims and communities from the system, the disparity in resources between the state and the accused, the emphasis on fact-finding rather than restoration of harmony, the universal availability of jails compared to checkerboard access to non-carceral sanctions, and a *Criminal Code* that has not been changed for one hundred years.⁹ Indeed, it may be asked whether it is simply coincidence that among the areas of Canadian policy and law that have been most resistant to change over our history, two of the most prominent are criminal law and Aboriginal policy. One author wrote in 1955, about Canadian policy concerning Aboriginal peoples, "[p]robably in no other sphere has such continuity of clarity of policy prevailed; probably in no other area has there been such a marked failure to realize ultimate objectives."¹⁰ If there is another area, it is likely criminal law.

In my view, more band-aid changes will be ineffective. They will be changes on the periphery which will show some movement while protecting the central

9 R. Ericson, *Making Crime: A Study of Detective Work*, (Toronto: Butterworths, 1981), p. 218: "Canadian procedural and substantive law has not been subject to substantial changes since Confederation, and the codification."

10 J. E. Hodgetts, *Pioneer Public Service*, quoted in Kahn-Tineta Miller and G. Lerchs, *The Historical Development of the Indian Act*, (Ottawa: Treaties and Historical Research Branch, Department of Indian Affairs, 1978), p. 191.

elements from change. Reforms should recognize that the justice system is based on strong internal contradictions and inherent problems.

Legality requires equality; the law discriminates against the homeless and jobless. Legality requires that officials be governed by law; the law is based on *post hoc* decisions. Legality requires each case be judged on its own facts; the law makes previous convictions grounds for defining behaviour as an offence. Legality requires incriminating evidence as the basis for arrest and search; the law allows arrest and search in order to establish it. Legality embodies individual civil rights against public or state interests; the law makes state and the public interest a justification for ignoring civil rights ... Deviation from legality is institutionalized in the law itself. The law does not need to change in order to remove hamstrings on the police; they exist only in unrealized rhetoric.¹¹

Reform based on notions of due process and a more adversarial approach "misses the point that [accuseds] never had many, if any, in practice."¹²

At each stage of the process the accused not only fails to take what externally appear as his formal decisions, but he also does not take advantage of his formal rights because the costs of doing so are structured so that they usually exceed the benefits ... The accused typically complies with police searches whether or not they have the authority of a warrant, usually does not remain silent in the face of police questioning, infrequently seeks or obtains access to a third party while in police custody, often does not obtain a lawyer, rarely demands a trial, often does not speak out in court when he has the urge to do so, and very rarely entertains an appeal of the outcome, let alone actually seeks one.¹³

11 Ericson, *Making Crime*, note 9, *supra*, pp. 15-16, quoting D. McBarnet, "Arrest: The Legal Context of Policing," in *The British Police*, S. Holdaway, ed., (London: Edward Arnold, 1979), p. 39.

12 R. Ericson and P. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents In the Criminal Process*, (Toronto: University of Toronto Press, 1982), p. 241.

13 *Ibid.*, p. 218.

[T]he cost of *invoking* one's rights is frequently greater than the loss of the rights themselves. ... This situation is true for defendants who consider themselves innocent as well as for those who readily acknowledge their guilt. This situation poses serious questions about the efficacy of the adversary process and the value of elaborate procedures as institutions for protecting individual rights and assuring justice in lower criminal courts. ... Expanding due process might give the illusion of improvement even if there were none.¹⁴ [emphasis in original]

The result is "the idea of the criminal process as an adversarial system based on due process is a myth"¹⁵ and "[i]n practice at every stage the adjudicative ideal is warped beyond recognition."¹⁶

One of the problems with the justice system is that it has moved increasingly away from its roots, where ordinary citizens were involved in debates of common sense and community good.

14 M. Feely, *The Process is the Punishment*, (New York: Russell Sage Foundation, 1979), p. 289.

15 Ericson and Baranek, note 12, *supra*, p. 222.

16 Feely, note 14, *supra*, p. 281.

The past 100 years, and particularly the past 50 years, have seen a dramatic shift in the staffing of the criminal courts, full-time specialists have replaced part-time personnel as policemen, prosecutors, defense attorneys, and judges. In the criminal justice field the demise of part-time nonspecialists was probably hastened by such technological developments as ballistic tests, fingerprints, blood tests, and by increasingly complicated rules of evidence and procedure. Problems that might once have engaged skilled amateurs in thoughtful deliberation and debate are now the objects of 'expert' inquiry by trained specialists who rely not only on common sense and conjecture, but also upon professional competence. This has reduced the need for adversarial deliberations before a jury. Public deliberation, debate, and judgement have been replaced by technical determination. ... [T]he reduction in trials may ... be a by-product of increased professionalism, impersonal judgement, and rapid agreement according to established criteria.

Professionalism breeds impatience with naivete, intolerance with ignorance, a desire for efficiency, and reliance on its own technical language, all of which alienate the professional from his client.¹⁷

Perhaps related to the professionalization of the system has been a trend towards a detailed, compartmentalized conception of law, away from general concepts of harm. The Law Reform Commission of Canada has counted approximately 40,000 offenses outside the *Criminal Code* to which Canadians are subject, and in general

¹⁷ *Ibid.*, pp. 275-276.

for every offence taken off the books, three other appear. ... [D]ecriminalization has to be pursued if we are to remain a free society in any sense of the word. ... [I]f there is to be a truly new direction in sentencing, it must arise from a different conception of its purpose and function in relation to behaviour and the situations we now call criminal. ... [W]e have to realize that there are limits to what the law can reasonably do.¹⁸

Mohr notes that fundamentally, criminal law is concerned with harm, which is also the basis of civil suits, particularly torts, which means injury, harm or wrong. Mohr explores the etymological origins of other terms, such as punishment, which comes from the Greek *poine*, which means exchange of money for harm done, and guilt, whose origins are less clear, but may derive from the Anglo-Saxon *geldan*, meaning to pay. Of course, retribution also means to pay back. Mohr further notes that in different areas of the law the concept of fault is being removed from judicial consideration, such as in marital disputes.

Many, if not most human interactions, cannot be resolved or even understood by assigning guilt to one party. This is, however, what the criminal law demands. ... What we call criminal law and the jurisprudence supporting it may well be an historical phenomenon whose time has run out. The jurisprudence of sentencing has never been convincing in the first place and certainly is not now. In fact, it is most impressive by its absence.¹⁹

The point is that the way we have organized our laws and the way we conceive of criminal law are not the only ways to address harms within a community. Increasingly they seem not to be the best ways, even for non-Aboriginal society. The Aboriginal Justice Inquiry, in its chapter 2, discusses Aboriginal concepts of

18 J. Mohr, "New Directions in Sentencing," in *New Directions in Sentencing*, B. Grosman, ed., (Toronto: Butterworths, 1980), pp. 25-27.

19 *Ibid.*, pp. 27-28.

justice and shows that they are not as obsessed with highly specialized distinctions between different harms or with finding guilt as our present system is.

Another problem with the justice system is that the juxtaposition of great discretion with detailed rules and procedures can lead to a confusion of roles and inconsistency in the exercise of justice. This, in and of itself, reduces the legitimacy of the entire process. Feely discusses the problem of moving from a mediation orientation to an arbitration orientation by the same actors on different occasions.

[T]he central problem of the court ... is entrenched in the officials' aspirations to do good, in the impulse for flexibility and substantive justice which gives rise to competing conceptions of justice. The freedom to pick and choose among these conceptions undercuts the morality of all of them, and ironically the impulse to provide justice seems to foster a sense of injustice. This tension between formal and substantive justice is perhaps inherent in all systems of law.²⁰

²⁰ Feely, note 14, *supra*, p. 286.

Slipping from one role to another and then back again ... destroys the integrity of the adjudication process. ... A judge who applies formal, precise rules can turn around and cajole the complainant and defendant into reconciling their differences, or give paternalistic advice to a defendant. A defense attorney who may appear to be a lawyer's lawyer in one case many whisper in huddled conference with the prosecutor in the corridors on the next. A prosecutor who in one case claims that he has no discretion, that he *must* seek a conviction because the law was violated, will at other times nolle a case because 'a conviction will serve no useful purpose.' In short, each official has several conceptions of justice, each requiring different rules and different set of relevant considerations. By shifting roles within the same forum, no role can maintain legitimacy, and the morality of the entire process is undermined. Ironically, the impulse to do justice contributes to the feeling that justice is not being done. Such tensions are inevitable in any complex system of law, but they are particularly prominent in the lower criminal courts where the stakes are usually low and the desire for swift justice is high.²¹ [emphasis in original]

There are other problems in the justice system that are especially relevant to Aboriginal people.

[B]ecause 'we' are outsiders, we are incapable of making the accused feel truly ashamed. [Aboriginal accused] could really care less about what we think of their behaviour. ... [They] *escape* being held accountable to the community.²² [emphasis in original]

It is critical in small communities that dispute resolution be effective, because "the parties will not fade into anonymity or cease future interaction."²³

21 *Ibid.*, pp. 289-290.

22 R. Ross, "Cultural Blindness and the Justice System in Remote Native Communities," paper prepared for the 'Sharing Common Ground' Conference on Aboriginal Policing Services, Edmonton, May, 1990, pp. 13-14.

23 *Ibid.*, pp. 13-14.

Aboriginal people generally would choose to respond to harms differently than the non-Aboriginal system does. This is part of the cultural differences discussed in chapter 6. The Aboriginal emphasis on restoration and harmony is fundamentally different than the adversarial process (which is barely recognizable in practice, but fails to provide restoration or harmony or other discernable benefits in its place). More generally, the justice system can never be Aboriginal, can never fully accommodate Aboriginal languages or beliefs and can never apply Aboriginal thinking and values in all the discretionary decisions made for every accused and convicted person.

More important than whether the accused feels shame, or even whether the courts effectively restore the offender to the community, is the effect the criminal justice system has on community decision-making and development.

The very presence of our courts has taken away a critical *forum* in which wisdom can be demonstrated and respect earned. There can be no doubt that it was respect for Elders which was the social glue holding people together in relatively peaceful obedience to commonly accepted rules. ... The arrival of the court took away the critical arena of dispute-resolution from the Elders. With a grossly diminished opportunity to demonstrate wisdom, there was a corresponding diminishment of heart-felt respect. The same dynamic took place as we introduced our education, our health care, our bureaucratic Band Council structure, our policing etc. ... [emphasis in original]

[T]he very fact of our presence itself undermines social peace. The guidance of, and respect for, wise members of the community is essential to all aspects of community life; take away the central forum of dispute-resolution and you significantly diminish the likelihood that wisdom will develop and respect regenerate. The impact extends itself into all other facets of community life, and a full-scale unravelling beings.²⁴

24 *Ibid.*, pp. 13-14.

There is much about the justice system that no piecemeal reform can hope to address, especially problems in the treatment of Aboriginal people and communities. If Aboriginal people want a justice system where the community, victims and accused all feel truly part of the process, where respected members of the community are seen as possessing the necessary qualities to make decisions about justice, where specialized and somewhat arbitrary distinctions between harms do not exist, where the objective is harmony and restoration in preference to rigid fact-finding and adversarialism, where offenders may have fewer rights in theory but more in practice, then they will be suffocated by the existing system and any attempt at incremental reform will be futile. This conception of justice is fundamentally at odds with the system of justice that has evolved in Canada. What is more, there is no reason to believe that such desires are wrong in policy or law.

I am persuaded by the arguments of the various official reports, especially the Aboriginal Justice Inquiry, that Aboriginal people have a right to their own justice systems. No discrimination or evidence of major problems in the justice system is required. On the other hand, it is equally true that the overwhelming and persistent nature of the problems justifies bold changes such as Aboriginal justice systems, without any need to justify it on a basis of rights.

In my view, whether justified on the basis of existing problems or on the basis of the present problems, non-Aboriginal governments should approach negotiations with Aboriginal communities by following the principle that Aboriginal communities should choose how justice operates in their communities, including law-making. While for Aboriginal peoples such a development would be a matter of rights and needs, for the larger system there would be the substantial benefit of watching and learning from a variety of different approaches to justice, with a

hope for reduced victimization, increased community development and perhaps in the long run, decreased financial costs of the administration of justice.

This is not to suggest that Aboriginal justice systems would be spectacular and immediate successes. Such an expectation would be unfair.

Police, lawyers, judges, correctional authorities, policy advisors and politicians must finally accept the fact that for Native people the present system is an abject failure. This is a basic prerequisite for change. It is not sufficient to become defensive and to plead: 'We realize that the current system is not perfect but we are trying our best.' Goodwill is not the issue. Nor is it enough to humbly mutter '*mea culpa*' and engage in periodic, symbolic self-flagellation followed by 'business as usual' ... From this acceptance of reality must flow a willingness to gamble on Native people themselves. ... Power will have to be shared. 'Risk capital' will be required for the development of innovative, Native designed and operated programs. ... [T]here will be failures; there will be waste; there will be breakdowns in communication; there will be differing standards of accountability; preliminary costs-benefits analysis will not always be promising. With time and patience, however, there will be a positive response from native people and a return on the investment ... [T]here is no 'quick fix' ... Wildly throwing dollars at the problems will not make them go away.²⁵

For every mistake made by an Aboriginal system, the very considerable problems with the existing system should always be borne in mind.

I believe it is unlikely there will be Aboriginal justice systems with complete jurisdiction (to the exclusion of the mainstream justice system, dealing with most or all offenses) in most places. As argued by the Aboriginal Justice Inquiry, Aboriginal justice systems should occur where there can be jurisdictional neatness,

25 S. Jolly, "Native People in Conflict with the Criminal Justice System: The Impact of the Ontario Native Council on Justice," paper presented to the American Society of Criminology 34th Annual Meeting. Toronto, Nov. 4, 1982.

specifically, where there is a geographical territory (primarily but not necessarily exclusively reserves) that can be subject to the exclusive jurisdiction of the Aboriginal system in that area. Even if some form of shared jurisdiction (or alternative dispute resolution or community programming run by Aboriginal persons) can be devised for some urban areas, I believe Aboriginal people will continue to come under the jurisdiction of the non-Aboriginal justice system in the vast majority of places. Therefore, Aboriginal justice systems can only be part of any solution to the reform of the justice system.

In the non-Aboriginal system, there are 20 years of Law Reform Commission of Canada reports on the criminal justice system, especially advocating substantial reforms to the *Criminal Code* that have gone unimplemented. The report of the Aboriginal Justice Inquiry makes hundreds of recommendations for reforming virtually all aspects of the justice system.

Given the failures of past approaches, I am inclined toward blunt reforms. For example, I support the Aboriginal Justice Inquiry's call for reducing jail capacity, reducing high security jail capacity, abolishing imprisonment for fine default (only for refusal to pay after civil collection methods have been attempted), quota hiring and cluster hiring (designating a specified percentage of Aboriginal persons for particular entry processes, such as police recruitment classes, law schools, Crown articling students, and so on). I would further require written decisions from police for every person put into pre-trial custody and from judges for every person denied bail or sentenced to jail.

I would also recommend that a system of fixed budget *proportions* be adopted. For example requiring correctional services to provide equal amounts for carceral

and non-carceral sanctions, specifying minimum proportions from the corrections budget for parole supervision (including half-way houses) and jail programming, minimum proportions of police budgets for emergency shelters for family abuse and other victims services (under the principle of preventive policing) and minimum proportions of the prosecution budget for Legal Aid, public legal education and victims compensation.

The justice system can also play a role in assisting the development of Aboriginal communities. It can help restore the importance of elders, victims and community members in the resolution of community problems. To do so the justice system will have to play a supporting role rather than a controlling role. This will represent an important change in approach.

This thesis has identified two separate areas where the justice system might concentrate its efforts. First, the reports cited in chapter 5 make it clear that violence against women and children is one of if not the most important crime problem facing Aboriginal communities. (The same may also be said of the broader community.) The justice system could fund Aboriginal controlled emergency shelters and counselling programs out of its budgets, rather than or as a supplement to social service funding. Second, the figures in chapter 5 show that young Aboriginal males making a transition to the urban environment from rural areas and reserves are the most likely group to be convicted and incarcerated. The justice system could fund Aboriginal controlled support programs and places for Aboriginal persons migrating to urban areas.

Another reform that could have important benefits would be the development of grade school materials that accurately reflect Aboriginal contributions to

Canadian society, to enable Aboriginal students to feel pride in their heritage and to see their realities reflected in course content. The materials would also teach non-Aboriginal Canadians about who Aboriginal people are and about Aboriginal cultures and rights. In the same way as French immersion education has taken a generation to educate Canadians, a similarly dedicated and patient effort will be required to achieve effective cross-cultural education so often recommended. (Educational materials falls outside the jurisdiction of the justice system and its connection to justice may be too indirect for the justice system to play much if any role role in its funding.)

It is fairly simple to list any number of changes that could bring improvements to the justice system. The problem is not in finding ideas, it is for government to demonstrate political will. The proportion of our jail population that is made up of Aboriginal people is a national disgrace. The failure to act in the face of this problem raises the possibility that this failure is related to racism. Some of the inmates said that the lives of Aboriginal persons are not valued as much as those of non-Aboriginal persons by the justice system. As each year passes with no significant action taken to reform the justice system, this perception of the inmates must be taken ever more seriously.

BIBLIOGRAPHY

Journal Articles

Archibald, B. "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System." *Dalhousie Law Journal*, 12, 2, (Nov, 1989): 383.

Arcuri, A. "Lawyers, Judges and Plea Bargaining: Some New Data on Inmates' Views." *International Journal of Criminology and Penology*, 4, (1976): 177.

Bienvenue R. and A. H. Latif. "Arrests, Dispositions and Recidivism: A Comparison of Indians and Whites." *Canadian Journal of Criminology*, 16, (1974): 105.

Boldt, E., L. Hursh, S. Johnson and K. Taylor. "Pre-Sentence Reports and the Incarceration of Natives." *Canadian Journal of Criminology*, 25, (1983): 269.

Bonta, J. "Native Inmates: Institutional Response, Risk and Needs," *Canadian Journal of Criminology*, 31, 1, (1989): 50.

Brant, C. "Native Ethics and Rules of Behaviour." *Canadian Journal of Psychiatry*, 35, (August 1990): 534.

Bridges, G., et al. "Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment." *Social Forces*, 34, 4, (1987): 335.

Clements, M. "Sex and Sentencing." *Southwestern Law Journal*, 26, (1972): 894.

Duckworth A., C. Foley-Jones, P. Lowe and M. Laller. "Imprisonment of Aborigines in North Western Australia." *The Australian and New Zealand Journal of Criminology*, 15, 1, (March 1982): 26.

Figuera-McDonough, J. "Gender Differences in Informal Processing: A look at charge bargaining and sentence reduction in Washington, D.C." *Journal of Research in Crime and Delinquency*, 22, 2, (May 1985): 106.

Fisher, F. M. "Multiple Regression in Legal Proceedings." *Columbia Law Review*, 80, (1980): 702.

Frazier, C., E. Bock and J. Henretta. "The Role of Probation Officers in Determining Gender Differences in Sentencing Severity." *Sociological Quarterly*, 24, (Spring 1983): 305.

Griffiths, C. T. and J. C. Yerbury. "Natives and Criminal Justice Policy: The Case of Native Policing." *Canadian Journal of Criminology*, 26, (1984): 148.

Hagan, J. "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint." *Law and Society*, (Spring 1974): 357.

Hagan J. "Parameters of Criminal Prosecution: An Application of Path Analysis to a Problem of Criminal Justice." *Journal of Criminal Law and Criminology*, 65, 4, (1975): 536.

Hagan, J. "Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice." *Social Forces*, 55, 3, (March 1977): 597.

Hagan J. and C. Albonetti. "Race, Class, and the Perception of Criminal Injustice in America." *American Journal of Sociology*, 88, 2, (Sept. 1982): 329.

Hagan, J., I. Nagel, and C. Albonetti. "The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts." *American Sociological Review*, 45, (Oct. 1980): 802.

Hathway, J. "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Court Worker Program." *Sask. L. Rev.* 49, (1985): 201.

Kennedy, R. "*McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court." *Harvard Law Review*, 101, 7, (May 1988): 1399.

LaFree, G. "The Effect of Sexual Stratification by Race on Official Reactions to Rape." *American Sociological Review*, 45, (Oct. 1980): 842.

LaPrairie, C. "The Role of Sentencing in the over-representation of aboriginal people in correctional institutions." *Canadian Journal of Criminology*, (July 1990): 429.

Lilles, H. "Some Problems in the Administration of Justice in Remote and isolated Communities." *Queen's Law Journal* 15, 2, (Fall 1990): 327.

Maclean, B. D., and R. S. Ratner. "An Historical Analysis of Bills C-67 and C-68: Implications for the Native Offender." *Native Studies Review*, 3, 1, (1987): 52.

Morse, B. W. "Native People and Legal Services in Canada." *McGill L. J.* (1976): 504.

Note. "Developments in the Law - Race and the Criminal Process." *Harvard Law Review*, 101, 7, (May 1988): 1472.

Radelet, M. and G. Pierce, "Race and Prosecutorial Discretion in Homicide Cases." *Law and Society Review*, 19, (1985): 587.

Ross, R. "Leaving Our White Eyes Behind: The Sentencing of Native Accused" (1989), 1 C.N.L.R. 3.

Sinclair, C. M. "Dealing with the Aboriginal Offender - Indians and the Criminal Law." (Manitoba) *Provincial Judges Journal*, 14, (June 1990): 18.

Uhlman, T. M. and N. D. Walker. "A Plea is No Bargain: The Impact of Case Disposition on Sentencing." *Social Science Quarterly*, 60, 2, (Sept. 1979): 218.

Verdun-Jones, S., and G. K. Muirhead. "Natives in the Criminal Justice Systems: An Overview." *Crime and Justice*, 7/8, 1, (1979/80): 3.

White, R., R. Underwood and S. Omelczuk. "Victims of Violence: The view from Youth Services." *The Australian and New Zealand Journal of Criminology*, 24, 1, (March 1991): 25.

Wynne, D. and T. Hartnagel. "Race and Plea Negotiation: An Analysis of Some Canadian Data." *Canadian Journal of Sociology*, 1, 2, (1975): 147.

Zatz, M. "The Changing Forms of Racial/Ethnic Biases in Sentencing." *Journal of Research in Crime and Delinquency*, 24, (Feb. 1987): 69.

Books and Chapters in Books

Baldwin, J. and M. McConville. *Negotiated Justice: Pressures to Plead Guilty*. London, Eng.: Martin & Robertson & Co., 1977.

Bird, G. "Field Work in South Australia." In *Ivory Scales: Black Australia and the Law*. K. Hazelhurst ed. Kensington: New South Wales University Press, 1987.

Birnie, L. *A Rock and A Hard Place: Inside Canada's Parole Board*. Toronto: Macmillan, 1990.

Coldrey, J. "Aboriginals and the Criminal Courts." In *Ivory Scales: Black Australia and the Law*. K. Hazelhurst ed. Kensington: New South Wales University Press, 1987.

Cooper, S. "The Evolution of the Federal Women's Prison." In *Too Few to Count: Canadian Women in Conflict with the Law*. E. Adelberg and C. Currie, eds. Vancouver: Press Gang Publications, 1987.

Crawford, J., P. Hennessey and M. Fisher. "Aboriginal Customary Law: Proposals for Recognition." In *Ivory Scales: Black Australia and the Law*. K. Hazlehurst, ed. Kensington: New South Wales University Press, 1987.

Ericson, R. *Making Crime - A Study of Detective Work*. Toronto: Butterworths, 1981.

Ericson, R. *Reproducing Order: A Study of Police Patrol Work*. Toronto: University of Toronto Press, 1982.

Ericson, R. and P. Baranek. *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process*. Toronto: University of Toronto Press, 1982.

Feely, M. *The Process is the Punishment*. New York: Russell Sage Foundation, 1979.

Fitzgerald, O. *The Guilty Plea and Summary Justice*. Toronto: Carswell, 1990.

Gale, F. and J. Wundersitz. "Aboriginal Youth and the Criminal Justice System in South Australia." In *Ivory Scales: Black Australia and the Law*. K. Hazelhurst, ed. Kensington: New South Wales University Press, 1987.

Griffiths, C. and S. Verdun-Jones. *Canadian Criminal Justice*. Vancouver: Butterworths, 1989.

Hagan, J. and K. Bumiller. "Making Sense of Sentencing: A Review and Critique of Sentencing Research." In *Research on Sentencing: The Search for Reform* vol. 2. A. Blumstein, J. Cohen, S. Martin and M. Tonry, eds. Washington, D.C.: National Academy Press, 1983.

Havemann, P. et al. *Law and Order for Canada's Indigenous People*. Regina: School of Human Justice, 1985.

Hogarth, J. *Sentencing as a Human Process*. Toronto: University of Toronto Press, 1971.

Johnson, H. "Getting the Facts Straight: A Statistical Overview." In *Too Few to Count: Canadian Women in Conflict with the Law*. E. Adelberg and C. Currie, eds. Vancouver: Press Gang Publications, 1987.

Klein, J. *Let's Make a Deal: Negotiating Justice*. Toronto: Lexington Books, 1976.

LaPrairie, C. "Native Women and Crime in Canada: A Theoretical Model." In *Too Few to Count: Canadian Women in Conflict with the Law*. E. Adelberg and C. Currie, eds. Vancouver: Press Gang Publishers, 1987.

LaPrairie, C. "The Young Offenders Act and Aboriginal Youth." In *Justice and the Young Offender in Canada*. J. Hudson, J. Hornick, B. Burrows, eds. Toronto: Wall & Thompson, 1988.

McCorquodale, J. "Judicial Racism in Australia? Aboriginals in Civil and Criminal Cases." In *Ivory Scales: Black Australia and the Law*. K. Hazelhurst, ed. Kensington: New South Wales University Press, 1987.

Mohr, J. "New Directions in Sentencing." In *New Directions in Sentencing*. B. Grosman, ed. Toronto: Butterworths, 1980.

Parker, D. "The Administration of Justice and its Penal Consequences." In *Ivory Scales: Black Australia and the Law*. K. Hazelhurst, ed. Kensington: New South Wales University Press, 1987.

Reasons, C. "Crime and the American Indian." In *Native Americans Today: Sociological Perspectives*. H. M. Baker, B. A. Chadwick, R. C. Day, eds. New York: Harper and Row, 1972.

Ross, R. *Dancing with a Ghost: Leaving Our White Eyes Behind*. Toronto: Butterworths, 1992.

Salter, S. "Inherent Bias in Liberal Thought." In *Equality and Judicial Neutrality*. S. Martin and K. Mahoney, eds. Toronto: Carswell, 1987.

Walker, J. "Prison Cells With Revolving Doors: A Judicial or Societal Problem." In *Ivory Scales: Black Australia and the Law*. K. Hazelhurst, ed. Kensington: New South Wales University Press, 1987.

Wilkie, M. *Aboriginal Justice Programs in Western Australia*. Nedlands: Crime Research Centre, University of Western Australia, 1991.

Government

Alberta. Board of Review, Provincial Courts, Report No. 4. Kirby, W. *Native People in the Administration of Justice in the Provincial Courts of Alberta*. 1978.

Alberta. Policing in Relation to the Blood Tribe. Rolf, C. H. Commissioner. *Commissioner's Report*. 1991.

Alberta. Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta. Cawsey, R. A. Chairperson. *Justice on Trial* vol. III. Edmonton: 1991.

Canada. Canadian Sentencing Commission. Ekstedt, J. and M. Jackson. "Justice in Sentencing: Offender Perceptions." Ottawa: 1988.

Canada. Canadian Sentencing Commission. Landau, T. "Views of Sentencing: A Survey of Crown and Defence Counsel." Ottawa: 1988.

Canada. Canadian Sentencing Commission. Landreville, P., M. Hamelin and S. Gagnier. "Opinions of Quebec Inmates Regarding Questions Raised by the Mandate of the Canadian Sentencing Commission." Ottawa: 1988.

Canada. Canadian Sentencing Commission. Poirier, R. "The Handling of Criminal Cases by Defence Lawyers." Ottawa: 1988.

Canada. Canadian Sentencing Commission. *Sentencing Reform: A Canadian Approach*. Ottawa: Supply and Services Canada, 1987.

Canada. Correctional Services of Canada. Canfield, C. and L. Drinnan. "Comparative Statistics Native and Non-Native Federal Inmates - A Five Year History." Ottawa: 1981.

Canada. Correctional Services of Canada. McCaskill, D., "Patterns of Criminality and Correction among Native Offenders in Manitoba: A Longitudinal Analysis." Ottawa: 1985.

Canada. Correctional Services of Canada. Task Force on Aboriginal Peoples in Federal Corrections. *Final Report*. Ottawa: 1988.

Canada. Correctional Services of Canada. Task Force on Aboriginal Peoples in Federal Corrections. Year-End Implementation Report 1990-91. Ottawa: 1991.

Canada. Canadian Centre for Justice Statistics. "A One-Day Snapshot Profile of All Persons in Provincial Adult Correctional Institutions." Ottawa: 1986.

Canada. Health and Welfare. *Vital Statistics 1988 - Manitoba Indians*. Ottawa: 1988.

Canada. House of Commons. Special Committee on Indian Self-Government in Canada, Second Report to the House. Penner, K. Chairperson. Ottawa: 1983.

Canada. House of Commons. Special Committee on Visible Minorities in Canadian Society. Daudlin, B. Chairperson. *Equality Now!* Ottawa: 1984.

Canada. House of Commons Standing Committee on Aboriginal Affairs' 2nd report. "Unfinished Business: An Agenda For All Canadians in the 1990s." Ottawa: Queen's Printer, 1990.

Canada. House of Commons Standing Committee on Justice and Solicitor General. Daubney, D. Chairperson. *Taking Responsibility*. Report on its Review of Sentencing, Conditional Release and Related Aspects of Corrections. Ottawa: Queen's Printer, 1988.

Canada. House of Commons and Senate. Special Joint Committee of the House of Commons and Senate. Beaudoin, G. and D. Dobbie Co-Chairs. *Report of the Special Joint Committee on a Renewed Canada*. Ottawa: 1992.

Canada. Indian and Northern Affairs. Finkler, H. "North of 60 - Inuit and the Administration of Criminal Justice in Northwest Territories: The Case of Frobisher Bay." Ottawa: 1975.

Canada. Indian and Northern Affairs. Hull, J. "An Overview of Registered Indian Conditions in Manitoba." Ottawa: 1987.

Canada. Indian and Northern Affairs. Monture, G. Project Committee Chairperson, Canadian Corrections Association. *Indians and the Law, a survey prepared for the Hon. Arthur Laing*. Ottawa: 1967.

Canada. Indian and Northern Affairs. Task Force To Review Comprehensive Claims Policy, Coolican, M., Chairperson. *Living Treaties: Lasting Agreements*. Ottawa: 1985.

Canada. Justice. "Aboriginal People and Justice Administration - A Discussion Paper." Ottawa: 1991.

Canada. Justice. Clark, S. "Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders." Ottawa: 1989.

Canada. Justice. Morse, B. and L. Lock. "Native Offenders' Perceptions of the Criminal Justice System." Research paper prepared for the Canadian Sentencing Commission. Ottawa: 1988.

Canada. Justice. Sloan, R. "Legal Aid in Manitoba: An Evaluation Report." Winnipeg: 1987.

Canada. Royal Commission on Aboriginal Peoples. R. Dussault and G. Erasmus Co-Chairs. *The Right of Aboriginal Self-Government and the Constitution: A Commentary*. Ottawa: 1992.

Canada. Solicitor General. Harman, W. and R. Hann. "Release Risk Assessment: An Historical Descriptive Analysis." Ottawa: 1986.

Canada. Solicitor General. Hemingway, P. et al. "An Opinion Study Concerning Causes and Solutions of Problems Related to Canadian Indians using a Quasi-Clinical Approach." Ottawa: 1983.

Canada. Solicitor General. Jamieson, W. and C. LaPrairie. "Native Criminal Justice Research Issues and Data Sources." Ottawa: 1987.

Canada. Solicitor General. McCaskill, D. *Studies of Needs and Resources Related to Offenders of Native Origin in Manitoba*. Ottawa: 1971.

Canada. Solicitor General. Moyer, S. "Homicide victimization of Natives and non-Natives in Canada: 1962-1984." Ottawa: 1987.

Canada. Solicitor General. Moyer, S., F. Kopelman, C. LaPrairie and B. Billingsley. "Native and non-Native Admissions to Federal, Provincial, and Territorial Correctional Institutions." Ottawa: 1985.

Canada. Solicitor General. Shaw, M. et al. *Survey of Federally Sentenced Women*. Ottawa: 1990.

Canada. Solicitor General. Task Force on Federally Sentenced Women. *Creating Choices*. Ottawa: 1990.

Manitoba. Hay Management Consultants. *Report - Review of the Recruitment, Selection and Classification Processes within the Manitoba Civil Service*. Winnipeg: 1991.

Manitoba. Justice. Hendrickson, B. "A Study of the Operation of the Manitoba Provincial Court in Winnipeg and Selected Northern Communities with Reference to the Treatment of Aboriginal Offenders." Winnipeg: 1989.

Manitoba. Justice. Kueneman, R., R. Linden and R. Kosmick. "Study of Manitoba's Northern and Rural Juvenile Courts." Winnipeg: 1986.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Ahenakew, F., Cecil King and Catherine Littlejohn. "Indigenous Languages in the Delivery of Justice in Manitoba." Winnipeg: 1990.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Dansys Consultants. "Manitoba Aboriginal Justice Study." Ottawa: 1991.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Dansys Consultants. "Aboriginal People in Manitoba: Population Estimates for 1986 and 1991." Ottawa: 1990.

Manitoba. Public Inquiry into Administration of Justice and Aboriginal People. Hamilton, A. C. and C. M. Sinclair, Commissioners. vol. 1 - *The Justice System and Aboriginal People*, vol. 2 - *The Deaths of Helen Betty Osborne and John Joseph Harper*. Winnipeg: Queen's Printer, 1991.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Messer, L. "Manitoba Fine Option Program: A Survey of Fine Defaulters." Winnipeg: 1990.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Sawatzky, P. "Winnipeg Remand Study: A Re-Analysis, Comparing Aboriginal and Non-Aboriginal Inmates." Winnipeg: 1991.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Shewchuk, E. "Report on Courtworkers in Canada." Winnipeg: 1989.

Manitoba. Review Committee on Indian and Metis Adoptions and Placements. Kimmelman, E. Chairperson. *No Quiet Place*. Winnipeg: 1985.

Nova Scotia. Royal Commission on the Donald Marshall Jr. Prosecution. Hickman, T. A. Chairperson. Head, W. and D. Clairmont. "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System." Halifax: 1989.

Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution. Hickman, T. A. Chairperson. *Commissioners' Report*. Vol. 1. Halifax: 1989.

Ontario. Attorney General. Grant, A. Chairperson. Osnaburgh-Windigo Tribal Council Review Committee. *Report*. Toronto: 1990.

Ontario. Race Relations and Policing Task Force. Lewis, C. Chairperson. *The Report of the Race Relations and Policing Task Force*. Toronto: 1989.

Other

Apter, B. "A Report on Pre-Trial Release and Detention in Winnipeg." Submitted by the John Howard Society to the Hon. James McCrae, Attorney General, Fall 1988.

Assembly of First Nations. "First Nations Submission on Claims." Ottawa: 1990.

Barrett, T. "Court frees native convicted of murder." *Ottawa Citizen*, March 10, 1992.

Birkenmayer, A. C. and S. Jolly. "The Native Inmate in Ontario." Toronto: Ontario Native Council on Justice, 1981.

Canadian Bar Association, Committee on Native Justice. *Aboriginal Rights in Canada: An Agenda for Action*. Ottawa: 1988.

Canadian Bar Association, Committee on Imprisonment and Release. *Justice Behind the Walls*. Ottawa: 1988.

Canadian Bar Association, Committee on Imprisonment and Release. *Locking Up Indians in Canada*. Ottawa: Canadian Bar Association, 1988.

Conference on Northern Justice. *Report of the Conference on Northern Justice*. Sept. 30-Oct. 5, 1973: M.S. Lord Selkirk II, Manitoba.

Dubienski, I. and Stephen Skelly. "An Analysis of Arrests for the Year 1969 in the City of Winnipeg with particular reference to arrests of persons of Indian descent." Winnipeg, n.p., 1970.

Hylton, J. "Admissions to Saskatchewan Provincial Correctional Centres: Projections to 1993." Regina: University of Regina, 1980.

Indian Commission of Ontario. "Discussion Paper Regarding First Nation Land Claims." Toronto: 1990.

Indigenous Bar Association. "The Criminal Code and Aboriginal People." Ottawa: Law Reform Commission of Canada, 1991.

Jolly, S. "Native People in Conflict with the Criminal Justice System: The Impact of the Ontario Native Council on Justice." A paper for the American Society of Criminology, 34th Annual Meeting, Toronto, Nov. 4, 1982.

Jolly, S. and J. Seymour. "Anicinabe Debtors' Prison - A Survey of Fine Defaulters and Sentenced Offenders Incarcerated in the Kenora District Jail for Provincial Offences." Ontario Native Council on Justice, 1983.

Kaminski, L. "An Historical Survey of Aboriginal Juvenile Delinquency in Manitoba: Court Records of the Eastern Judicial District of Manitoba: 1930-59." Winnipeg: unpublished, 1991.

Kaiser, H. A. "The Criminal Code of Canada: A Review Based on the Minister's Reference." A paper prepared for the Law Reform Commission of Canada, 1992.

Koring, P. "Justice tarnished by tainted convictions." *Globe and Mail*, March 9, 1992.

LaPrairie, C. "Research on Native People as Victims of Crime, A Discussion Paper." n.p., 1982.

Law Reform Commission of Canada. *Aboriginal Peoples and Criminal Justice - Equality, Respect and the Search for Justice*. Ottawa: 1991.

Metis and Non-Status Indian Crime and Justice Commission. *Report*. Ottawa: Native Council of Canada, 1977.

Native Peoples and Justice. Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, both held in Edmonton, Feb. 3-5, 1975. Ottawa: Solicitor General of Canada, 1975.

Ouimet, R. Chair, Report of the Canadian Committee on Corrections. Ottawa: Canadian Committee on Corrections, 1969.

Ross, R. "Cultural Blindness and the Justice System in Remote Native Communities." A paper prepared for the 'Sharing common Ground' Conference on Aboriginal Policing Services, Edmonton, May, 1990.

Schmeiser, D., H. Hermann and J. Manning. "The Native Offender and the Law." Ottawa: Law Reform Commission of Canada, 1975.

Sugar, F. and Lana Fox. "Survey of Federally Sentenced Aboriginal Women in the Community." Ottawa: Native Women's Association of Canada, 1990.

Zimmerman, S. "The Revolving Door of Despair: Native Involvement in the Criminal Justice System." Ottawa: Law Reform Commission of Canada, 1991.

Cases

Andrews v. Law Society of British Columbia, [1989] 2 W.W.R. 289 (S.C.C.).

R. v. Daniels, [1990] 4 C.N.L.R. 51 (Sask. Q.B.).

R. v. Fireman, [1970] 3 O.R. 380 (C.A.).

R. v. Flett, [1991] 1 C.N.L.R. 140 (C.A.), [1989] 4 C.N.L.R. 128 (Q.B.), [1987] 5 W.W.R. 115 (Prov. Ct.).

Guerin v. R., [1984] 2 S.C.R. 335.

R. v. Koonungnak (1963), 45 W.W.R. (N.S.) 282 (N.W.T. Terr. Ct.).

R. v. Naquitarvik (1986), 26 C.C.C. (3d) 193 (N.W.T.C.A.).

St. Catherine's Milling & Lumber Co. v. R. (1888), 14 A.C. 46 (P.C.).

R. v. Sikyea, [1964] S.C.R. 642.

R. v. Sparrow, [1990] 1 S.C.R. 1075.

R. v. Turpin et al. (1989), 69 C.R. (3d) 97, (S.C.C.).

APPENDIX: DETAILED METHODOLOGY

[Reproduced from the Manitoba Inmate Survey, research paper for the Aboriginal Justice Inquiry, Winnipeg, 1991.]

The Commissioners wanted to learn as much as possible about what Aboriginal people thought of the justice system. They held hearings in 43 communities and five correctional institutions, and visited five other correctional institutions. They heard from more than 1,000 persons. However, due to time constraints at the hearings, concern for privacy of many inmates, a desire to obtain more detailed background information and to have an Aboriginal/non-Aboriginal comparison, the Commissioners believed it would be appropriate and informative for the Inquiry to conduct a survey of the inmates in Manitoba. This survey was conducted after the hearings and visits were held in these institutions by the Commissioners.

Doris Young, Senior Researcher on the Inquiry staff, Harry Daniels and Eric Robinson staff researchers, and Brad Morse, Professor of Law at the University of Ottawa and supervisor and co-author of the Canadian Sentencing Commission study "Native Offenders' Perceptions of the Criminal Justice System," devised the survey instrument. The survey was inspired by surveys by the Sentencing Commission, the Native Council of Canada, and the McCaskill studies. Contributions and suggestions were sought from the Native Brotherhood Organization at Stony Mountain Penitentiary and wardens at Headingley, Brandon, Dauphin and Portage la Prairie provincial institutions. The Native Brotherhood Organization at Stony Mountain Penitentiary carefully reviewed the draft survey.

The purpose of the survey was to examine the awareness of Aboriginal and non-Aboriginal inmates of their rights and of the criminal justice system, the perception of inmates concerning legal services available to them, their experience with the legal process and prison programming and to learn biographical information about the inmates. The survey contained 78 questions in all ... Each interview lasted approximately one hour. The questionnaire was pre-tested with five inmates from Headingley and five from the Portage la Prairie Jail for Women. The interviews were conducted between May and July, 1989.

The primary interviewers were Eric Robinson, of the Inquiry staff and Jennifer Yarnell, suggested by the Native Clan Organization Inc. (an agency providing services to offenders) and the Native Brotherhood Organization (the Aboriginal inmates' organization) at Headingley Jail. Doris Young and Jeannie Daniels, both of the Inquiry staff, conducted the interviews at the Portage la Prairie Jail for Women. Each of the interviewers were briefed in advance by Prairie Research Associates on standard interview procedures. Doris Young, Jeannie Daniels, Eric Robinson and Harry Daniels are Aboriginal persons. It is important to note that while Aboriginal peoples have been the subject of many studies, it is rare indeed that the persons conducting the study are themselves Aboriginal.

Before interviewing began at any of the institutions, a meeting was held with the inmates to provide them with information about the survey, and to allow them to ask questions. The wardens and superintendents were approached to seek their cooperation with the survey and they ensured that no inmate who participated in the interview would lose pay-time or be penalized in any way. ...

Selecting the respondents

In planning the interview schedule for our survey, it was intended that the respondents would be selected in a random fashion, with approximately the same number of Aboriginal and non-Aboriginal inmates. This did not occur. In particular, the number of non-Aboriginal men interviewed is considerably less than was desired (we had initially hoped to interview 248 Aboriginal and 187 non-Aboriginal inmates, with equal numbers from the federal institutions and Headingley and Brandon jails where stable numbers of non-Aboriginal inmates are incarcerated). Also, the selection of respondents was not purely random, which is discussed later in this section.

There are a number of reasons to explain the relatively few non-Aboriginal male respondents (47 of a possible 662 inmates). First, the interviewers for this survey reported a strong impression that the numbers of Aboriginal inmates seemed significantly greater than the numbers reported by the institutions. This is a very important observation and a number of explanations can be suggested.

The Task Force on Aboriginal Peoples in Federal Corrections, 1988 reports at p. 32: "Available data currently underestimates the proportion of federal Aboriginal offenders." One of the reasons identified for this is that federal statistics rely on self-identification of ethnicity and it is believed that some Aboriginal offenders may be reluctant to acknowledge their ethnicity on admission to an institution. This may be because they are afraid of harsher treatment in the correctional system by identifying their ethnicity, because they do not want to cast shame on their ethnic group, or because there is no perceived benefit to declaring ethnicity, among other possible reasons. The response to one of the questions we

asked the inmates indicates the inmates believe Aboriginal inmates are treated more harshly by prison staff and the parole system. ...

It was also the impression of the interviewers that non-Aboriginal inmates were more likely to benefit from parole, temporary absences, intermittent sentences, programs external to the institution and lower security facilities, which would help explain the apparent low numbers of non-Aboriginal inmates. For specific examples, Rockwood Institution, a minimum security, very open facility situated immediately adjacent to Stony Mountain, has a considerably higher proportion of non-Aboriginal Inmates than does Stony Mountain ... For another example, Headingley Jail has a number of buildings, some called "annexes," in addition to the main building. It was the observation of the interviewers that non-Aboriginal inmates were much more likely to be housed in the annexes and Aboriginal inmates much more likely to be housed in the main building (with higher security, less outdoor access, more confined space, and more rules of conduct).

These impressions are confirmed by the Task Force Report in its chapter 4. It reports that Aboriginal inmates are less likely to be placed in lower security institutions, less likely to be granted parole, more likely to have served more of their sentence before being granted parole and more likely to have their parole revoked than are non-Aboriginal inmates. There is no reason to think these findings are different for provincial jails.

A second reason why there were fewer non-Aboriginal male respondents than desired is that for interviewing purposes it is easier to have access to inmates in the main buildings, because inmates have fewer options that may conflict with being available for interviews, because that is where the majority of inmates are

located, especially Aboriginal inmates, and because it is easier for jail staff to coordinate interviews by keeping them within one building. Therefore, the proportion of Aboriginal inmates is further increased. No interviews were conducted at the Headingley annexes. One result of this kind of respondent selection is that there will tend to be less variation between the inmates and it may be that inmates with less serious offences will be excluded from the sample.

Another factor in the low number of non-Aboriginal respondents and lack of random selection was that the interview process involved asking the jail staff to request randomly selected inmates to attend at the interview room. It was agreed that if any inmate chose not to participate, that wish would be respected. The interviewers had the impression that there may have been some misunderstandings, in that non-Aboriginal inmates may have believed that the request for their participation was in error or unnecessary, given that the request was coming from the Aboriginal Justice Inquiry. Participation in the survey had no direct relevance to them or their interests and so they might be expected to be less motivated than Aboriginal inmates to participate in the survey.

While the above reasons affected the participation of non-Aboriginal males, it should also be pointed out that the selection of respondents was not purely random, for many of the same reasons - interviews from only a part of the jail, voluntary participation and interviews of inmates present (excluding others on temporary absences, or involved in other programs). Further, the request to participate in the interview was passed on to the inmates by jail staff who may not have fully understood the purpose of the survey, may not have been able to convey its confidentiality or may not have been as persuasive as the interviewers could have

been. In addition, some inmates observed that they had been the subjects of many different surveys and did not perceive value in participating in more surveys.

Another factor affecting random selection, and possibly affecting the low non-Aboriginal response, was that the Commissioners had held hearings in the various institutions in the preceding four months, and, in the cases of Headingley and Stony Mountain-Rockwood (a combined hearing was held at Stony Mountain), quite close to the time of the interviews. Thus, many inmates, including non-Aboriginal inmates through a presentation of the Inmate Welfare Committee, had an opportunity to express themselves at the hearings. Although not relevant to non-Aboriginal inmates, there were a number of Native Brotherhood Organization meetings attended by Inquiry staff where Aboriginal inmates could also express their views.

Finally, the interviewing process, through travel, dealing with jail administration, file reviews and inmates' schedules with various programs, took more time than had been originally estimated and required scaling back of the original plan.

In contrast to the low response by non-Aboriginal men, the number of non-Aboriginal women surveyed is large (13), and is a sharp contrast to the number of non-Aboriginal women reported by the warden as part of the population. This can be explained by the passage of time during the interview process (between two to three months), as new inmates entered the institution. There is a very high turnover of population at the Portage la Prairie Jail for Women. Further, the Manitoba Department of Justice statistics (based on 1989 data) are significantly different from the figures conveyed to our interviewers. The 1989 data show 67%

of that jail population to be made up of Aboriginal inmates, compared to the 95 % reported to our interviewers by the warden in the summer of 1989.

Also, female inmates are less likely to be surveyed on a regular basis and may be more receptive. Portage is a small institution with a large number of Aboriginal women and they may have encouraged the non-Aboriginal women to come forward. It is also important to note that our interviewers found non-Aboriginal women to be more willing to be interviewed than non-Aboriginal men. This may be due to the fact that the Portage jail is much smaller and has virtually no programs, making it more convenient, interesting and less interruptive to participate in surveys.

The plan for a purely random and voluntary survey, with a high number of non-Aboriginal inmates was not realized. While the interviewers did obtain inmate lists from the jail staff, these lists did not prove overly helpful because of a high non-response rate to staff requests to attend to the interview room. Thus, the sample was not an entirely randomly selected survey and did have an important element of voluntarism, in some cases subsequent to general requests for volunteers by inmate committees. In addition, while the interviewers had targets for numbers of Aboriginal and non-Aboriginal inmates to interview, both in total and per institution, the number of non-Aboriginal respondents is significantly less than the number of Aboriginal respondents, and the proportions of Aboriginal and non-Aboriginal inmates interviewed is not consistent among institutions. ...

The fact that different proportions of the Aboriginal and non-Aboriginal sample in this survey come from different institutions makes comparisons very difficult, especially general comparisons between Aboriginal and non-Aboriginal inmates.

For this reason, Aboriginal and non-Aboriginal comparisons presented here were compared to results within federal and provincial institutions. Where there is a significant difference between Aboriginal and non-Aboriginal responses *overall* on the one hand and Aboriginal and non-Aboriginal responses in *specific institutions only* (federal, provincial, male/female) on the other hand, these differences are noted. [In the thesis, these differences are consolidated in chapter 5.] Unless there is such a note, the difference in the institutional make-up of the Aboriginal and non-Aboriginal samples did not account for the answers given.

The reader is cautioned to bear in mind the above mentioned methodological limitations. We do not know what bias may have been introduced by using general requests for respondents from inmate committees, or what bias may have been introduced by having differing proportions of Aboriginal and non-Aboriginal inmates from different institutions (and from the more secure custody areas of Headingley jail) and different proportions of male and female Aboriginal and non-Aboriginal inmates. We do see that our sample has a high number of Status Indians, Indians from rural areas and Indians who speak an Aboriginal language at home. If our sample selection has a bias due to reliance on the Native Brotherhood Organization at Stony Mountain and Headingley, it might be expected to be in these areas, because it might be hypothesized that the NBO attracts inmates who have retained a fairly strong Aboriginal identity.

Further, there is a possibility that the small number of non-Aboriginal inmates limits the extent to which they are representative of the non-Aboriginal inmate experience and limits the extent to which their responses can be compared to Aboriginal responses.

Despite the above cautions, it is believed that this survey does present important indications of the views and experiences of inmates, particularly Aboriginal inmates, and that in certain cases where there are significant differences in the answers provided by non-Aboriginal inmates, this information is worthy of attention.

One method of checking the accuracy of the information given was to conduct a file review and compare file data with responses given during the interviews. By making these comparisons we can see that the quality of responses from the inmates appears to be quite good. The two questions we used for these "reality checks" were length of sentence and most serious offence.

For length of sentence, the files revealed 60 inmates were sentenced to less than a year (inmate responses were 59), 67 between 1 and 2 years (inmate responses were 63), 49 between 2 and 4 years (inmate responses were 52) and 67 inmates with sentences of more than 4 years (inmate responses were 76). There were 15 files missing this information, and 8 interviews did not provide answers to this question. Note that the files indicated 125 inmates with federal time (15 cases missing) and the inmates indicated 128. Overall, the comparison of length of sentence between file data and inmate responses shows the inmates responses were very similar to the file information.

For the most serious offence question, the offences were grouped by degree of seriousness, with the least serious offences having the lowest number and the most serious offences having the largest code number. [The coding is explained in ch. of this thesis and in more detail at the end of this Appendix.] The file data revealed eighteen 100 or 200 level offences (inmate responses were 19), sixty 300

or 400 level offences (inmate responses were 60), seventy-four 500 or 600 level offences (inmate responses were 65) and one hundred and three 700, 800, and 900 level offences (inmate responses were 100). The files were' missing data for 3 inmates and the interviews did not provide data for 8 inmates. Again, the inmates' responses about seriousness of offences coincided very closely with the file information. Because of the close correlation between file data and inmate response on these two questions, we believe the accuracy of answers of the inmates is quite good.

A note on the presentation of the results of the questions. Percentages are reported in whole integers and rounded (0.5 has been rounded to 1.0). In all cases the N values are presented so a more exact calculation can be quickly made by the interested reader. The result, of course, is that many columns do not add to exactly 100% because of rounding. Also, for almost every question, some inmates did not provide a response. These non-responses were not included in the base figure of respondents, with the result that percentages reported are based on the total number of inmates who did give a response to the question. The lower the number of responses, the less reliable the percentages will be.

MOST SERIOUS OFFENCE CODE LIST

(used to analyze seriousness of offences,
reproduced from the Manitoba Inmate Survey)

Attempts/conspiracies are to be coded as if they were completed crimes (except murder) i.e. attempt theft over \$1,000 is code 314 or 315.

101 Cause Disturbance (s. 171)

102 Common Assaults, Summary (s. 245(b), 246(2)(b), 246.1(b))

103 Federal Statutes (other than NCA, FDA)

104 Indecent Act (exposure) (s. 169)

105 Provincial Statutes (e.g., Highway Traffic Act)

106 Soliciting - Prostitution - Communicating for the purpose (s. 195.1)

107 Take Auto w/o Consent (s. 295)

108 Trespass by Night (s. 173)

109 Unlawful Assembly (s. 67)

110 Willful Damage (under \$1,000 (s. 387))

201 Breach of Probation (s. 666) & parole violation/breach of bail

202 Cause Investigation with False Information (s. 122(1))

203 Drive Suspended (s. 238, 242(1))

204 Escape Custody, No Force (s. 133(1))

205 Fail to Appear (s. 133)

206 False Pretences under \$1,000 (s. 320(2)(b))

207 Fraud under \$1,000 (s. 338)

208 Obstruct Justice (s. 127)

209 Obstruct Peace Officer (s. 118)

210 Possess Goods Obtained by Crime (under \$1,000)(s. 312)
211 Review for Failure to Comply (s. 33(6)(1)(a) YOA)
212 Simple Possession (NCA, FDA)
213 Theft of Telecommunications (s. 287)
214 Theft under \$1,000 - Shoplifting (s. 294(b))
215 Theft under \$1,000 Other than Shoplifting (s. 294(b))
216 Utter threats to property or animals (s. 331(1)(b)(c), 243(5))
217 Point Firearm (s. 84(1))
218 Careless use of Firearm (s. 84(2))

301 Corrupt Public Morals (s. 159 to 164)
302 Dangerous Driving (s. 233(2))
303 False Pretences over \$1,000 (s. 320 (2)(1)(a))
304 Forgery (s. 324)
305 Fraud over \$1,000 (s. 338(a))
306 Impaired Drive/Driver over .08 (s. 237 (a)(b))
307 Keep Common Bawdy House (s. 193)
308 Perjury (s. 120)
309 Possess Goods Obtained by Crime over \$1,000 (s. 312)
310 Possess Housebreaking Instruments (s. 309)
311 Possess Restricted/Concealed/Prohibited Weapon (s. 88, 89)
312 Refuse Breathalyser (s. 235)
313 Set Fire to Substance (s. 392)
314 Theft over \$1,000 - Shoplifting (s. 294(a))
315 Theft over \$1,000 - Other than Shoplifting (s. 294(a))
316 Uttering (s. 326)
317 Willful Damage over \$1,000, Mischief (s. 387)

318 Utter threats to Kill/Maim Person (s. 33(1)(a), 243(4))

319 Car Theft

401 Assault Peace Officer, Indictable (s. 246(2) (a))

402 Assault, No Weapon/Harm Indictable (s. 195)

404 Robbery, No Use of Force, Weapon, or Violence (s. 302(a))

405 Unlawfully in Dwelling House (s. 307)

406 Criminal Negligence in Operating of Motor Vehicle (s. 233(1))

501 Bestiality or Buggery (s. 155)

502 Gross Indecency (s. 157)

504 Possess Weapon Dangerous to Public Peace (s. 85)

506 Sexual Intercourse with Female 14-16 (s. 146(2))

601 Arson (s. 389)

602 Assault with Weapon, or Causing Bodily Harm (s. 245.1(1))

603 Assault, Sexual, No Weapon (s. 246. 1(1)(a))

604 Break and Enter, Other than Dwelling House (s. 306(1)(e))

605 Cause Bodily harm by Criminal Negligence (s. 204)

607 Extortion, No Force Used (s. 305)

608 Sexual Intercourse with Female under 14 (s. 146.1)

609 Dangerous Driving Causing Bodily Harm (s. 233(3))

701 Aggravated Assault (s. 245.2)

702 Break and Enter Dwelling House (s. 306(1)(d))

704 Escape Custody with Force (s. 132)

705 Incest (s. 150)

706 Trafficking and Possession for Purpose of (FDA, NCA)

707 Wounding with Intent (s. 228)

708 Unlawful/Forcible Confinement

800 Aggravated Sexual Assault (s. 246.3)

801 Assault with Explosive or Corrosive (s. 79(1)(b))

802 Extortion with Force (s. 305)

803 Kidnapping (s. 247)

805 Robbery with Force, Weapon, Violence (s. 302(1)(b)(c)(d))

901 Accessory after the Fact to Murder (s. 215)

902 Cause Death by Criminal Negligence (s. 203)

903 Manslaughter (s. 215)

904 Dangerous Driving Causing Death (s. 233(4))

951 Attempt Murder (s. 213)

952 Murder, 1st Degree (s. 212)

953 Murder, 2nd Degree (s. 212)

999 Unknown/Offence not provided for in code list.