JUSTICE AND THE POOR

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INTRODUCTION

The rich get richer . . . and the poor get prison.

J. Reiman[1]

The National Council of Welfare has long been concerned about the treatment of poor Canadians under our justice system. This led us to engage actively in debates over the provision of legal aid for the poor through the publication of a 1971 report, The Legal Services Controversy and a 1995 report, Legal Aid and the Poor. The conclusion of the 1995 report was that "Legal aid plans do a very poor job of meeting the legal needs of low-income people."[2]

Another troubling finding of the 1995 report was that thousands of low-income Canadians are imprisoned routinely because they are unable to pay fines. Also disturbing were indications that many poor young people who cannot get legal representation for minor offences end up with criminal records that bar them from jobs and thus condemn them to a lifetime of poverty. When we examined these issues further, we found that the different stages of the criminal justice process are so closely interconnected that their effects cannot be separated. We therefore extended our analysis to three main stages: relations with the police, bail decisions and sentencing.

The National Council of Welfare is not alone in worrying about the way the criminal justice system treats low-income Canadians. In every survey of Canadian attitudes on criminal justice carried out in the past 30 years, two-thirds of the respondents said they found our justice system unfair because it gave preferential treatment to the wealthy and was too harsh toward the poor.[3] These biases are perceived to exist throughout the criminal justice process. The groups most sceptical of fairness in the system are the young, the poor, and those who have had most personal experience with the system.

Research findings confirm this widespread impression of bias. The evidence points to a staggering degree of discrimination against the poor at all levels of the criminal justice system. The reality, in Canada as in the United States and probably all other countries of the world, is that:

> For the same criminal behaviour, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes. In other words, the image of the criminal population one sees in our nation's jails and prisons

> is an image distorted by the shape of the criminal justice system itself. It is the face of evil reflected in a carnival mirror, but it is no laughing matter.[4]

Very few of these negative effects are produced by evil people doing evil things. Yes, there are bigoted police officers, bigoted judges and bigoted parole officers, but they are a small minority and the harm they cause is almost insignificant compared to the tremendous damage inflicted by law enforcement policies that appear to be impartial and fair, but have a disproportionately harsh impact on the poor, especially on poor young men.

The practices that have most impact in criminalizing the poor concern police deployment and the exercise of police discretion. People from all levels of society commit crimes, but crime enforcement resources are heavily concentrated on the close surveillance of young men in low-income neighbourhoods. Not surprisingly, the resulting crop of suspects picked up and charged by the police do not reflect the distribution of crime so much as the distribution of poverty in our society.

Once poor people have been brought into the criminal justice system, the strikes against them continue to accumulate. Low-income suspects are less likely to be freed on bail, so a greater proportion is sent to jail until trial. Being imprisoned often bars poor people from alternative measures, through which other suspects who commit minor offences are diverted out of the formal criminal justice system. A large proportion of poor defendants, perhaps as many as half, appear before the courts without legal representation. By the sentencing stage, almost all those who remain before the courts are from low-income backgrounds.

Many Canadians believe that our criminal justice system is too soft on criminals, and that indulgent treatment has been a main cause of increasing crime rates, especially for crimes of violence. In fact:

- Canada has a lower rate of violent crime than most other industrialized nations.[5]

- Canada is extremely harsh toward criminals and has one of the highest rates of imprisonment of young people in the world, twice that of the United States.[6]

- The much-maligned Young Offenders Act did not make judges softer on youth crime as often thought, but on the contrary led to a steep increase in the proportion of young people sent to correctional institutions.[7]

The conclusion of those who have studied our criminal justice system is that it discriminates against the poor and harms as many people as it helps. Instead of developing effective ways of dealing with conflicts within our families, our schools and our communities, we dump all our disadvantaged social misfits into the criminal justice system, where they are repeatedly warehoused and then thrown back into the street. Instead of dealing wisely with the near-universal tendency of adolescents (especially boys) to commit minor criminal offences, we arrest thousands of low-income young men and lock them up with experienced criminals who give them advanced lessons in crime.

The Canadian criminal justice system is not only unjust but also an abysmal failure that pushes young people into crime instead of helping them to stay out of it.

I. THE POLICE AND THE POOR

Crime and delinquency are "found" among the poor because that is where they are sought.

W.K. Greenaway[1]

Police services are the most important element of the criminal justice system. In financial terms, they account for 60 percent of all government spending on justice, while expenses on correctional services account for 25 percent, followed by courts at 9 percent, and legal aid at 6 percent.[2] The police are the most crucial component of the system because they are the gatekeepers, the ones whose decisions to arrest and to lay charges draw people into the criminal justice process. When police decisions are biassed in ways that bring too many low-income people before the courts, it is inevitable that those who are tried and convicted and sentenced are also disproportionately poor.

Police actions are also the most vulnerable to bias. This is because police decisions are made most quickly and are least public, and because police officers have enormous discretion in determining who gets stopped, who gets arrested, who gets detained and who gets charged. Consider the range of choices of a police officer who catches some 18-year-olds driving around in a car they broke into. The officer can charge the youths with any of the following: theft over $5,000, possession of stolen property over $5,000, mischief to property over $5,000, taking a motor vehicle without consent, or conspiring to commit any of these. The maximum penalties for these offences range from six months to ten years in prison. The officer can also decide to lay none of these charges, but instead to deliver a stern lecture, escort the young people back to their homes and inform their parents.[3] As this shows, whether a person becomes involved in the criminal justice process often hinges on a police officer's attitude.

Is there something wrong with police officers exercising such enormous discretion? Most of us would say no and would agree that police officers should use discretion and common sense in their duties. Our justice system would probably collapse if tickets were issued to everyone who drove a few kilometres above the speed limit and if charges were laid against all teenagers who were caught trying to shoplift in stores. The problem is not police discretion in itself, but the use of discretion in a manner which discriminates against some groups, particularly the poor. To determine whether law

enforcement discriminates against low-income people, Canadian criminologist Thomas Gabor suggests we start by asking who breaks the law.[4]

Who Commits Crimes?

Until the 1960s, it was widely assumed that poverty bred crime and that most crimes were committed by young men with lower-class backgrounds. This assumption was based on statistics showing that the majority of those who were arrested, convicted, and imprisoned were then, as they are now, males under the age of 25 from families in which the parents had little education and low incomes and held inferior jobs or no jobs at all.[5] To account for this, criminologists developed many explanations. One was the social disorganization theory, which said that specific neighbourhood conditions, such as poverty, high mobility and multi-ethnicity, caused a breakdown of traditional values which led to crime. Another was the opportunity theory, according to which lower-class people were more likely to engage in crime because they were blocked from achieving financial success by legal means.[6]

Everyone was therefore surprised in the 1960s when U.S. researchers discovered that criminal behaviour was not linked exclusively to lower-status people and poor neighbourhoods. Using self-report studies, which asked (mostly young) participants to reveal, in total confidence and without fear of punishment, what illegal actions they had committed, researchers made two shocking discoveries.

First of all, the vast majority of all male adolescent participants reported having committed illegal acts that could have landed them before youth courts. Girls were much less likely to engage in illegal behaviour.[7] When Canadian criminologist Marc LeBlanc questioned 3,000 young Montrealers, he found that more than 90 percent had committed delinquent acts in the previous year, and that more than 80 percent had contravened the Criminal Code. The most common offences were shoplifting, vandalism, driving a car under the influence of alcohol or taking mild drugs, especially marijuana. Nine percent had committed more serious crimes such as robbery.[8]

The second surprise was that the children of parents with professional jobs were as likely to report having committed illegal acts as the children of poorer parents with low-status jobs. Contrary to the strong link between crime and social class of origin that had been taken for granted until then, it seemed that they were not related at all. This finding caused huge controversies in criminology

circles that continue to this day. It also inspired dozens of other self-report studies, which produced contradictory and inconsistent results and therefore failed to establish that young people from low-status or poverty backgrounds were more likely to get involved in crime or to commit more serious crimes.[9] In Canada, a study of 57 young people in New Brunswick found that boys whose fathers had professional occupations were less likely to commit delinquent acts than the sons of blue-collar workers.[10] But other studies, including the large LeBlanc survey in Montreal, found no relationship between delinquency and the parents' education or occupation.[11]

Most experts now agree that the social status and income of the parents have little or no direct effect on the likelihood that children will turn to delinquency, although they may in some cases have indirect effects by amplifying life problems that can lead to crime. For example, children with learning difficulties whose parents have little education and whose inner-city schools offer inadequate remedial programs may get less help with their problems than similar children with better-educated parents in more affluent neighbourhoods with better schools. This can result in more children from poor backgrounds doing badly at school, and it has been established that there is a strong association between school failure and the likelihood of becoming a repeat offender, to the point where school performance in adolescence is one of the best predictors of both juvenile delinquency and adult criminality.[12]

Research has found that the children most at risk of becoming delinquents and criminals face the following circumstances:

> (1) they receive little love, affection, or warmth, and are physically or emotionally rejected and/or abandoned by their parents; (2) they are inadequately supervised by parents who fail to teach them right and wrong, who do not monitor their whereabouts, friends, or activities, and who discipline them erratically and harshly; and (3) they grow up in homes with considerable conflict, marital discord, and perhaps even violence . . . Families at greatest risk of delinquency are those suffering from limited coping resources, social isolation, and (among parents) poor parenting skills.[13]

Given the lack of resources and greater vulnerability of young people from disadvantaged backgrounds, it is a tribute to their parents that the differences in criminal behaviour between youths from low-income and more affluent families are not evident. Two Ontario studies which looked at the family characteristics of incarcerated adolescents found that money worries played a minor role.

Most prominent were physical abuse between the parents and toward the children, family breakdown with estranged fathers, and excessive drinking by the parents and the children.[14]

Following the inconclusive findings of self-report studies on the relationship between crime and socioeconomic background, academic interest in this subject greatly diminished. By the early 1990s, criminologists were concentrating instead on other theories, such as the psychological or biological factors that are or may be associated with criminal personalities, the bad influence of delinquent friends, or the effects of policing methods on criminal behaviour.[15]

While this research has been useful, criminologist John Hagan of the University of Toronto thinks it would be a serious mistake to assume that socioeconomic status makes no difference and to give up the search for the link between social characteristics and crime. Hagan points out that although the relationship between the social status of the parents and crime is very weak, it has been demonstrated that the personal status of older youths and adults, particularly their own job situation, is clearly related to criminal behaviour. Unemployed men, whatever their family backgrounds, are more likely to be involved in crimes against property, such as theft and breaking and entering.[16] What has not been established is whether unemployment leads to crime or the other way around.

Most likely, crime and unemployment form a vicious circle. A Quebec survey of employers found that having a criminal record can drastically reduce one's chances of finding a job: 58 percent would not hire someone who had just been released from a penitentiary, even if the applicant had all the qualifications for the position. Larger employers were even less likely than small ones to want to hire people with criminal records. Most important, the consequences of past dealings with the criminal justice system are much more severe for people from lower-class backgrounds than for those whose families are better off. This is because lower-class ex-offenders are more stigmatized and are less likely to have family connections to find them jobs that enable them to forget the past and start a new life. [17]

"Kin-based job networks" were identified as a crucial factor that distinguished young delinquents who later reformed from those who continued to commit crimes into adulthood.[18] Those who had good family connections were able to find jobs and to build new legitimate careers that soon made them forget their youthful errors. Some ex-offenders who cannot find legitimate means of earning a living may feel they have no choice but to pursue criminal careers. This may be difficult to

resist if the only connections they have are fellow delinquents or criminals who invite them to join their illegal activities.

Hagan and others also said that while self-report studies are valid as far as they go, the picture of crime they present is incomplete. Because self-report research has focussed on young people still at school, it ignored the dropouts who were at greatest risk of becoming delinquents. When Hagan and Bill McCarthy studied homeless street youths in Toronto, who are estimated to number between 10,000 and 20,000, they found that although young street people were not all criminals, they reported having committed many more crimes on average than their peers who were still in school, especially more serious crimes. Hunger was a major motivation for thefts by street youths. Hunger and lack of shelter were linked to prostitution, especially for girls.[19] When Stephen Baron studied street youth in Edmonton, the young people he questioned reported an average of 1,673 offences in the past year, for a total of 334,636 offences by 200 youths.[20]

Do these studies of street youth confirm the old theory that poverty breeds crimes? Yes, in the sense that immediate and extreme poverty leads people to do anything to meet their basic needs. On the other hand, the Toronto studies found no evidence that most young street criminals come from low-income families. There was some overrepresentation of street youths from families with unemployed heads: seven percent of the homeless kids, compared to two percent of school kids, had at least one unemployed parent. But the other 93 percent of street youths had parents whose occupations were similar to those of the parents of children still at school.[21]

In the Prairie provinces, the studies showed that many Aboriginal people live in conditions of extreme poverty. They make up a large majority of adult skid row residents (including many released ex-offenders) and a majority of the runaways and street youth.[22] However, Aboriginal street youths were arrested mostly for small thefts and for trivial or technical offences, such as failure to report to their probation officers. This is consistent with reports that in spite of their extremely high arrest rates, Aboriginal people show little criminal intent and commit mostly petty offences while under the influence of alcohol or to obtain alcohol.[23] (Note: "Aboriginal" includes registered Indians on and off reserve, accounting for 69 percent, Métis who make up 26 percent, and Inuit 5 percent.[24])

In Edmonton, Baron reported that the small number of street youths who were from higher-status family backgrounds - and therefore probably not Aboriginal - were "most likely to commit violent crimes, sell more drugs, and generally be more involved in criminal activity than their peers

who came from more humble origins."[25] Similarly, Bernard Schissel's study of street youth in Saskatoon found that for the more serious and aggressive crimes such as assault and break and enter, street youths from higher-income families were arrested more often than youths with moderate and lower family incomes.[26]

These findings are not completely unexpected, because several U.S. studies concluded that young people from middle-class families who fail school are more likely to engage in delinquent behaviour than lower-class youths who fail school. According to Australian criminologist John Braithwaite, the problem is not so much failure itself as the discrepancy between aspirations and expectations. Also, middle-class youths who fail school are under greater pressure to succeed and have further to fall through downward occupational mobility.[27]

As street life and street culture are themselves conducive to committing crimes,[28] it is important to ask why young people end up on the streets. According to the Canadian studies, most street youths come from broken families and have histories of abuse by their parents or foster parents. In the Saskatoon study, 46 percent of the male street youths and 67 percent of the female youths reported having suffered multiple abuse, defined as more than one of physical or mental or sexual abuse.[29] In Toronto, "physical abuse has a strong positive effect on homelessness; homelessness has a strong positive effect on delinquent behavior; and both homelessness and delinquent behavior have strong positive effects on police sanctions."[30] Overall, Hagan concludes, many children abused and neglected by their families are forced out on the streets where they are then abused by our legal system.

Far away from life on the street, there has been an increasing awareness in the last few decades that official crime statistics immensely underestimate white-collar and corporate crimes. These include a huge range of offences, including tax fraud and bank embezzlement at the simpler end, and enormously complex corporate stock and securities fraud and antitrust violations at the other end, as well as numerous types of criminal negligence causing occupational injury or death. In her book about corporate crime in Canada, Laureen Snider writes that:

> Although corporate crime receives much less publicity than the assaults, thefts, and rapes most people think of when they hear the word "crime," it actually does more harm, costs more money, and ruins more lives than any of these. Corporate crime is a major killer, causing more deaths in a month than all the mass murderers combined do in a decade. Canadians are killed on the job by unsafe (and illegal) working

> conditions; injured by dangerous products offered for sale before their safety is demonstrated; incapacitated by industrial wastes released into the air or dumped into lakes and rivers; and robbed by illegal conspiracies that raise prices and eliminate consumer choice . . . Canadians are twenty-eight times more likely to be injured at work than by assault . . . People are 10 times more likely to be killed by conditions at their workplace than to be victims of homicide . . .
>
> Corporate crime . . . also causes staggering losses in financial terms . . . While the average robber in the United States nets $338, the average federally convicted white-collar criminal takes $300,000 . . . In a reverse Robin Hood process, antitrust offences and tax evasion transfer billions of dollars from the poor to the rich . . . All the street crime in a given year in the United States costs an estimated $4 billion, less than 5 percent of the average yield of corporate criminals.[31]

Who commits these crimes? Certainly not the poor, or extremely few of them. The most common motive is not need, but greed. The more complex the crime, the more powerful and socially prominent the perpetrators tend to be. As they say, "The best way to rob a bank is to own one."[32] A national review of fraud suggested that the profile of a typical white-collar offender "was a male aged 26-40, with some managerial responsibility, and earning $50,000 per annum or less - that is, middle-class persons with position and ambition."[33] U.S. studies of tax fraud find that while many ordinary people cheat on their tax returns, it is corporate taxpayers who are responsible for the overwhelming majority of underpaid tax.[34] Only a small proportion of white-collar crimes are committed by people with relatively low status, such as bank tellers, and the only white-collar crime in which women are represented almost as much as men is low-level bank embezzlement.[35] Snider writes that corporate offenders:

> . . . are well-educated people with good jobs, strong ties to community institutions, and memberships in all the organizations that symbolize conformity, such as churches, service clubs, and political parties. Unlike traditional offenders, white-collar criminals tend to be married, with stable histories of employment, and years of involvement in the community. Their incomes are above average, and their belief systems are traditional and conservative. They most certainly do not think of themselves or their peers as criminals.[36]

What are we to conclude from all this about the people who commit crimes in Canada? The answer appears to be that almost all Canadians break the law at some point in their lives, but that most of these illegal acts are not serious and are usually committed in adolescence. Among older youths and adults, those who commit most criminal offences are men who are at the extremes of the

social spectrum. At one end are criminals who were not necessarily from poor families, but who are now without legitimate employment and sometimes destitute. They are most feared by the public and are responsible for a large share of common or street crimes. At the other end are higher-class, white-collar criminals, who are responsible for more deaths and steal much more money than the poor, but are seldom called criminals and are seldom condemned by a society in which many people believe that "greed is good."[37]

Who Do the Police Arrest and Charge for Crimes?

If it is so doubtful that most juvenile delinquents come from low-income families, why is it that studies throughout the world find that young people from poor families are massively overrepresented among those who are arrested, convicted or imprisoned for breaking criminal laws?[38] And if higher-class criminals do considerably more harm to our society than poor criminals, why is it that prisons are so full of poor people that they could be called - to borrow an appropriate expression from a U.S. critic - our national poorhouses?[39]

Part of the answer is that the illegal acts of more affluent youths and adults are much less likely to come to the attention of the authorities. In the relatively rare instances when well-off people are caught and charged, they are dealt with less harshly than poorer people who commit similar acts. These problems are aggravated by public attitudes and law enforcement policies and practices that directly or indirectly discriminate against the poor.

According to criminologist Maurice Cusson, the main reason delinquent boys from well-off families are much less likely to be arrested and found guilty of criminal acts is that affluent families can draw on many more resources than their poor counterparts. Cusson cites the example of Jean-Sébastien, the son of a rich businessman, who showed serious behaviour problems from birth. Sent to an exclusive school where he did badly, he stole money from classmates and was expelled with no charges laid. Back home, he stole large sums from both parents. In another private school for difficult children, he set fire to the building, which was totally destroyed. His parents reimbursed the school for the damages and no charges were laid, and they paid again when he stole the cashbox at his next school. And so on for many years until, as a last resort, Jean-Sébastien was finally sent to work on a cattle ranch owned by his uncle in South America, where he settled down and did all right.[40]

The most striking aspect of this abbreviated story is that in spite of having committed dozens of illegal acts, including a very serious one - arson - Jean-Sébastien did not once appear before a judge. His family was always able to solve the problems by paying the victims and dissuading them from laying charges and by finding other private solutions for their son. If Jean-Sébastien had been born to poor parents in a poor neighbourhood, there is little doubt that he would have faced many judges and seen the inside of many detention houses. Jean-Sébastien's story stands in sharp contrast to the experiences criminologist Anthony Doob witnessed in the youth bureau of a southern Ontario town, where several helpless parents who could not handle their children reported their illegal activities to the police. According to Doob, the fact that it was the parents who complained increased the likelihood that the youths would be charged.[41]

Low-income people, especially in neighbourhoods with a high proportion of single-parent mothers, are also heavy users of police services for situations not connected to crime. The poor are more likely to call the police for assistance with neighbourhood and family problems, medical emergencies and other types of crises, leading an expert to say, "Poor, uneducated people appear to use the police in the way that middle-class people use family doctors and clergymen - that is, as the first port of call in time of trouble."[42] According to the semi-autonomous Quebec Amerindian Police, about a third of all calls to the police on reserves were requests for services, and 45 percent of all service calls ended up with police making referrals to other agencies, such as social and health services, probation officers or psychiatric specialists.[43]

When surveys of satisfaction with police services are done in poor neighbourhoods, they often find that residents feel both underpoliced and overpoliced. Complaints of **too little policing** are made by fearful citizens and victims of crime who feel that the police do not do enough, or react quickly enough to protect them from criminal acts. Witnesses who appeared before the Canadian Panel on Violence Against Women felt that calls for help about domestic violence which originate in public housing complexes are answered much more slowly than those originating from middle-class neighbourhoods.[44] Women, and especially low-income older women, are most fearful about the possibility of becoming victims of crime and therefore most likely to want greater protection by the police.[45]

One result of the greater dependence of poor people on the police is that low-income neighbourhoods produce a much greater volume of calls to the police than more affluent areas. Because of this, and because low-income neighbourhoods also produce higher arrest rates and higher

official crime rates, it was assumed until quite recently that most crime victims were poor and that most crimes take place in urban, low-income, densely populated areas with transient populations and many single-parent families.[46] Police authorities use these figures to make decisions about the deployment of police officers and resources to different parts of towns and cities, with the result that a disproportionate number of police patrols are assigned to poor areas.[47]

Starting in the 1980s, these long-standing assumptions about poor neighbourhoods and crime were challenged by research findings demonstrating that calls to the police and official crime rates show only a tip of the crime iceberg. Victimization surveys done by Statistics Canada in 1982, 1988 and 1993 revealed that 24 percent of all Canadians over the age of 15 had been victims of at least one crime in the year before the surveys. The 1993 survey found that "90 percent of sexual assaults, 68 percent of assaults, 53 percent of robberies, 54 percent of vandalism, 48 percent of motor vehicle theft or attempted theft, and 32 percent of break-and-enters were not reported to the police."[48] For wife assaults, it was estimated that less than seven percent were ever brought to the attention of the justice system. These rates of reporting crimes to the police are similar to those found in international surveys that included several European countries along with Canada and the United States.[49]

Surveys of victims showed that the link between poverty and victimization is far from clear. They found that the victims of crime, like the offenders, tend to be young. Young single men aged 15 to 24 - especially students with active social lives - and young separated or divorced women who live alone have the highest rates of violent victimization. In the case of the women, violence by former partners is believed to be the most common explanation. The risk for property crimes goes up as income increases. Least at risk are people over age 65, with rates too low to be reliably calculated in 1993, though other studies found that elder abuse and neglect by family members is often unreported.[50]

When victims were asked why they had not reported these crimes, the main reason they mentioned (cited by 34 percent) was that they had dealt with the matter in another way. Other reasons included that the incidents were too minor or personal matters (most victims knew their assailants), that they feared revenge if they complained, or that they felt the police could not do anything.[51] Students were least likely to report crimes, while homemakers and seniors were most likely to call the police. Not surprisingly, other studies revealed that so-called "victimless" crimes, such as prostitution, drug offences and gambling, are almost never reported to the authorities unless they are committed in public in ways that offend third parties such as local residents.[52]

All these findings about the pervasiveness of crime make it clear that figures such as the number of calls to the police and official crime rates are extremely imperfect measures of the reality of crime in our society. They are nevertheless crucial for policing practices, because they are the main reasons for the greater police presence in low-income neighbourhoods. High police presence leads to complaints of **too much policing**, or police harassment, from poor young men who feel they are too often stopped, questioned, frisked and arrested on the street for trivial offences or nothing at all.[53] Contrary to what most people would expect, many studies carried out in the U.S. and Canada found that while a greater police presence sometimes makes local residents feel less fearful, it does not reduce crime significantly:

> . . . the presence of more patrol officers didn't lower the crime rates. This led to the *mayonnaise theory of police patrol*, which states that the quantity of police patrols is similar to the amount of mayonnaise required to make a sandwich. Just as a small amount of mayonnaise goes a long way . . . so too does a little police patrol go a long way. If an area has no patrol, starting one there will reduce the crime rate, but adding more patrols to an area that already has some appears to have little, if any, impact on crime . . .
>
> First, patrol officers are so spread out across a beat that the visibility of a patrol vehicle may be a chance encounter rather than a daily occurrence. Second, many crimes are not deterrable by police patrols. Crimes that occur in residences . . . are not going to stop because more police are patrolling the streets. And third, some people are not deterred by increasing numbers of police. Robbers, for example, will change their approach to committing an offence rather than stop their criminal behaviour altogether.[54]

According to Daniel Koenig, a sociologist at the University of Victoria, increasing the number of police officers can have the perverse effect of increasing the official crime rate.[55] He points out that in Canada between 1962 and 1988, the rates of reported offences in many categories rose much faster than the increases in real offences as reported by victims, and that these increases in reported crimes followed increases in per-capita police strength. This suggests that increases in official crime rates mostly reflect changes in police activity, with additional police officers doing more investigations and generating more arrests for less serious offences.

Similarly, it was argued that the higher per-capita number of police officers in the North and in Saskatchewan is one of the causes of the disproportionate incarceration of Aboriginal people. This was demonstrated when some Aboriginal people who felt underpoliced requested that police detachments be established in their communities. The result was an almost instant "crime wave," with

the police making arrests and laying charges for problems that were until then dealt with in other ways.[56] This experience led analysts to conclude that the original problem was not so much underpolicing as under-servicing, and that what these communities really needed were alcohol and family violence workers, traditional healers, mental health workers, sexual abuse counsellors and the like instead of more police and more residents being sent to jail.

The equivalent happened to adolescents in the cities when police forces, reacting to public fears about youth crime, established youth gang units to concentrate even more on young people's activities:

> It does not stretch the imagination too far to deduce that the creation of special gang units will increase the amount of youth crime detected, and hence recorded, in the official statistics. Similarly, in a climate of concern about youth crime, the police will be more inclined to arrest than discharge the juveniles that they encounter on the street.[57]

Overpolicing is exacerbated by the fact that poor people, and particularly young men, are much more likely to be unemployed and therefore to have a lot of leisure time. As their homes are often too small or uncomfortable, and as they cannot afford much in the way of entertainment, they often "hang out" on street corners or in other public places and frequently come into contact with the police. In his studies of policing in Ontario, Richard Ericson found that patrol officers spend a substantial portion of their time "patrolling parks, fast-food establishments, and shopping malls in the hope of discovering youths violating liquor and drug laws."[58]

In addition, studies in Canada and elsewhere found that police officers on patrol often feel the need to act aggressively and to do frequent so-called "proactive" stops (which are initiated by the police, contrary to "reactive" stops, which occur after a complaint) and computerized checks of people from targeted groups "to demonstrate to themselves, to people they stop, and to local residents and business people that the police control public spaces."[59] According to Ericson, "Constant proactive stops are a not-so-subtle way of reminding marginal people of the 'order of things.'"[60]

The most frequent targets of these "stop and frisk" operations are people who are considered menacing by local merchants and residents. This includes young people who look different or low-class (for example, with shaved heads or Mohawk hairdos, tatoos, torn jeans, eyebrow rings, leather

and chains) or who visibly belong to groups that are perceived to be poor and to have higher official crime rates, such as Blacks and Aboriginal people. Given such intense police scrutiny, it is inevitable that the risk of being caught with a "joint" is considerably greater for an unemployed young "punk" from a low-income neighbourhood or for a Black or Aboriginal youth than for a white middle-class student who uses the same drug in the basement or backyard of his suburban home. Police officers admit that they harass young people who hang out without doing anything wrong because "We get calls to go break it up."[61]

The problem was well illustrated in a large study which looked at the probability that marijuana users aged 18 and older would be arrested in three metropolitan areas of the United States. When participants were asked if they used the drug, students were far and away the most likely to say yes, followed by white-collar workers and then, very far behind, by blue-collar workers. Comparing this against arrest records in which possession of marijuana was the only charge, the researchers found that blue-collar users had by far the highest arrest rates, followed by student users and, far behind, by white-collar users. In addition, within each of the three categories, young users, Black users of all ages, and users with a prior arrest record were greatly overrepresented.[62]

The circumstances of these arrests indicated that most were spontaneous and involved patrol officers doing "proactive" searches that found less than one ounce of marijuana. Most liable to arrest were "those groups with least access to privacy and whose arrests most frequently involved discovery in a public context."[63] Those most often arrested - blue-collar young males, often Black, known to the police - were more often stopped and searched because they were perceived to be "suspect." Students were least likely to have been the targets of planned investigations and were more often caught in routine police contacts such as car stops. An Edmonton study confirmed that high-school dropouts are much more likely to come into contact with the police than their counterparts who are still at school.[64]

Street people such as bums, beggars, chronic drunks, squeegee kids, street prostitutes and the homeless are under the greatest scrutiny of all. Life on the street is a "glass bubble," and street people are prime targets for the police because of their higher crime rate.[65] As more people get forced out on the street by government policies such as decreased welfare rates and fewer supports for ex-offenders and the mentally ill, the public has become increasingly intolerant of even mildly antisocial behaviour. Business people say that street people are "bad for business" and clamour for city bylaws to "round up" the poor who sleep on park benches and who beg on main shopping streets.

Local residents also call for strict enforcement and prosecution of laws and bylaws against panhandling, soliciting for purposes of prostitution, loitering, trespassing, public drinking and disturbing the peace.[66] Criminologist Thomas O'Reilly-Fleming wrote that:

> Many city dwellers find the homeless frightening, particularly those who are dishevelled. "They're a nuisance" said one young woman I interviewed on the street in Vancouver. "They stink and they get on your nerves, always asking for money." The homeless remind us of the potential for failure in our own lives . . .
>
> There is a sense in which people feel that the homeless will somehow drag them literally away from their lives, that perhaps it will, as one homeless woman expressed it, "rub off."[67]

O'Reilly-Fleming found that homeless women seem to engender even more wrath than homeless men in the public, perhaps because they are seen as bearing a double stigma, as general life failures and failures in their traditional female roles.[68] Many residents want street people out of sight and out of mind and pressure the police to take them away. Most often arrested are the mentally ill. A Calgary study of individuals held in detention while awaiting trial found that 62 percent had a mental illness in the month before their arrest.[69] In the United States, it was reported that between one-third and one-half of all psychiatric patients had been arrested at some point, primarily for minor offences.[70]

Do more frequent routine stops and checks of people in certain low-income groups by the police constitute unfair police harassment, or are they justified by the fact that these groups have higher official crime rates? This issue was addressed by the Supreme Court of the United States in the case of Edward Lawson, a law-abiding Black man who wore his hair in dreadlocks and who liked to stroll through White neighbourhoods. He was arrested or detained 15 times under a California statute requiring "suspicious" persons to identify themselves to the satisfaction of police officers.

The U.S. Supreme Court struck down the statute because it gave powers to the police that were so broad and so vague that they practically invited the use of discriminatory discretion against more vulnerable groups. To stop and frisk a person, the Court ruled, the police had to have reasonable grounds to believe that a crime had been or would be committed.[71] The main reasoning of the Court was that people should only be stopped or arrested or charged by the police for something they had done, not for what they were. In the United Kingdom, the Code of Practice governing the police also specifies, "Reasonable suspicion cannot be supported on the basis simply

of a higher than average chance that the person has committed or is committing an offence, for example, because he belongs to a group within which offenders of a certain kind are relatively common."[72]

The Supreme Court of Canada has not yet ruled on this specific point, but Canadian legal experts say that in this country there are

> . . . few remedies for the innocent driver or pedestrian who faced the intimidating and degrading experience of being stopped and hassled by the police for no reason except perhaps the colour of his or her skin [or any other personal characteristic]. Such a person might bring a civil action, but this was costly and, even if successful, might only result in something like $500 in damages. Another option was to make a complaint against the police, but in most cases such complaints were investigated by the police themselves.[73]

On the question of whether a Canadian resident can resist an unlawful arrest ("being arrested" meaning being taken into custody or detention), experts answer:

> In theory, yes. In practice, however, it's not a good idea. Police officers may arrest a person if the officers have reasonable grounds to believe that the person has committed, or is about to commit, an offence, even if the person is innocent.[74]

Related issues have arisen here in connection with city bylaws adopted in Winnipeg, Vancouver, Calgary, Ottawa, Quebec City, Charlottetown and elsewhere that limit the activities of panhandlers by prescribing where, how and when they can ask for money. A legal action against the Winnipeg bylaw, undertaken by the Public Interest Law Centre on behalf of the National Anti-Poverty Organization on the basis of the Canadian Charter of Rights and Freedoms, is slated to be heard in court in September 2000.[75] According to the Centre's Director, Arne Peltz, the basis of its challenge is that "people have the right to be on the street and express themselves, as long as they don't obstruct or interfere with other people."[76] The B.C. Civil Liberties Association condemned the Vancouver bylaw because it is so broad that the police could choose to enforce it against any downtown panhandler, on any grounds: "For example, the police could charge those whose appearance or clothing offends them, those who make use of signs which seem particularly pathetic or discomforting, or those whose race or sexual orientation they personally dislike."[77]

An Ottawa bylaw that contained a blanket prohibition on begging in public places was recently repealed. One of the reasons the authorities gave for the repeal was that the bylaw was no longer needed since the recent coming into force of the provincial Safe Streets Act of Ontario. As well as prohibiting panhandling in many public places, the new Act prohibits squeegeeing by making it illegal to offer merchandise or services to people in motor vehicles (except for towing and other emergency services). The law also empowers the police to arrest without a warrant squeegee people who continue their activities after being warned, and people suspected by the police who will not or cannot provide proof of their identities. A first conviction is punishable by a fine of a maximum of $500; subsequent convictions carry sentences of a maximum of $1,000 or imprisonment for a maximum of six months or both. Many lawyers have said that the law violates the Charter of Rights and some have offered to provide free legal services to anyone charged under the Act.[78]

Social class and race can also make a difference in the treatment of female suspects by the police. Studies revealed that some police officers gave women the "chivalrous treatment," meaning that they were more lenient with women than men in similar circumstances. The main problem is that this benefited some female suspects more than others, in particular those who were middle- or upper-class, White, well groomed and apparently submissive, and who reacted by "crying, pleading for release for the sake of their children, claiming men have led them astray."[79] Women who did not fit this stereotype, who were not White, or who were drunk, unkempt, hostile or selling sex, were treated as harshly as men.

Attitude also affects police decisions on whether to arrest male suspects and charge them. Numerous studies in the U.S. and Canada found that in situations involving similar illegal acts and similar criminal records, disrespectful suspects were more likely to be arrested and charged than suspects with good social skills who showed deference toward police officers and contrition for their actions.[80] When the police assess suspects' attitudes and manners, they are assessing them in a way that is prejudicial toward lower-class, immigrant and minority groups.[81] The result is that White middle-class suspects, who are better educated and better informed, who are more likely to hire a lawyer and to initiate false arrest cases and libel suits against the police, are treated with greater care and tolerance and are almost never subjected to police violence. It was no coincidence that 52 of the 85 people who were bitten by unleashed police patrol dogs in Regina in 1981-82 turned out to be Aboriginal.[82]

Police officers are notoriously intolerant of insolence and lack of respect, especially by young people. For them, disrespect means:

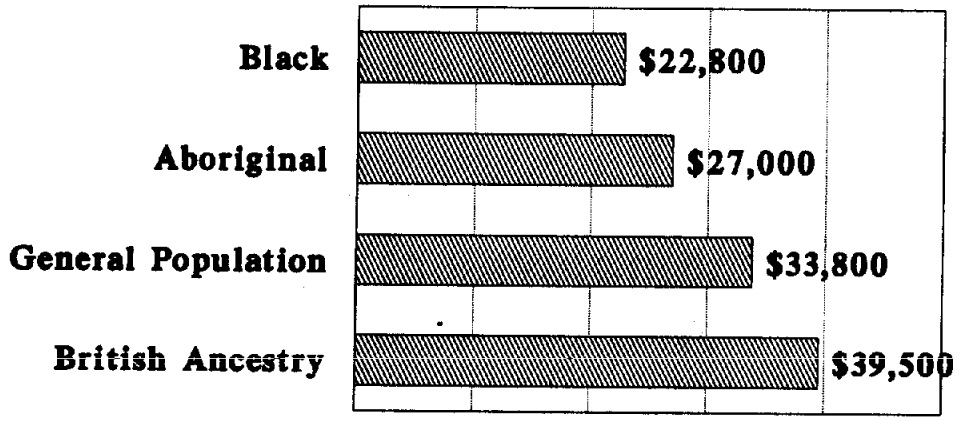
> . . . not only physical aggression and other overtly *hostile* acts that threaten officers' safety, but also *resistance* in the form of actions or statements that merely challenge officers' authority or legitimacy (e.g., denying an officer's accusation or questioning an officer's judgment) and even *passive* acts of *noncompliance* (e.g., failing to respond to an officer's questions or requests) that imply that officers are "not taken seriously."[83]

In a 1997 national survey, Canadian police officers deplored what they felt was an overall decline in the respect young people have for authority. As an example, they mentioned their frustration that "many of the young people they had come into contact with were aware of their rights and willing to flaunt this fact in the face of the police."[84] Police experts write that some working-class people also have learned hostile or suspicious attitudes toward the police, which can lead to violent encounters when the police label them and treat them as "troublemakers" or "assholes" or "scum."[85] In such situations, the underlying factor seems to be an expectation of trouble on both sides that turns into a self-fulfilling prophecy.

When such intolerant police attitudes are combined with racial or other stereotyping or anti-immigrant feelings - which are as common among police officers as among the working-class and lower-middle-class population from which most of them are drawn[86] - the results can be explosive. This problem is most severe for Blacks and Aboriginal people, who combine being members of visible minorities, being among Canada's poorest groups, and having suffered centuries of injustice by authorities that have left them with feelings of fear, suspicion and hostility toward the police. ("Black" refers to Canadians of African ancestry, 42 percent of whom were born in Canada.)[87]

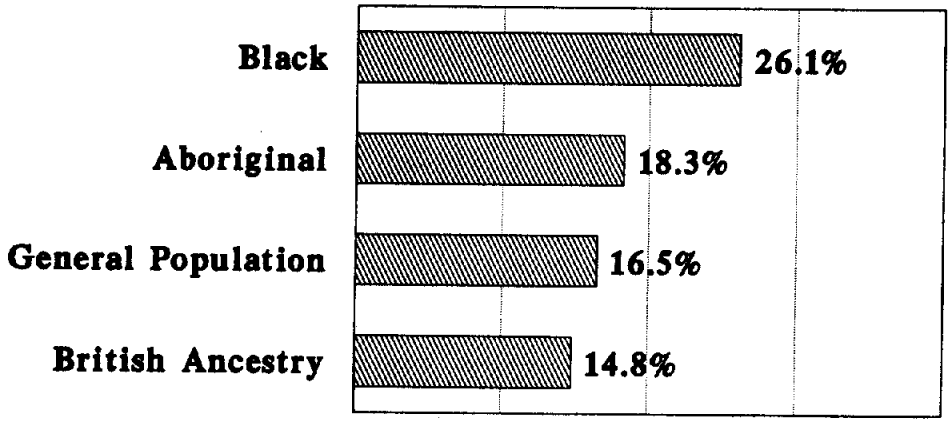
The plight of Blacks and Aboriginal people is evident in Graphs A and B on the next page, which compare their income and employment situation to the general population and to people of British ancestry in Toronto in 1991. According to Graph A on the next page, adult male Torontonians of British ancestry had average personal incomes of $39,500, and the average income for all adult men was $33,800. Far behind were the incomes of Aboriginal and Black men, at $27,000 and $22,800 respectively. The employment situation for young males (aged 15 to 24) revealed by Graph B shows a similar pattern, with unemployment rates of 14.8 percent for young men of British ancestry, 16.5 percent for the whole young male population of Toronto, and then 18.3 percent for young Aboriginal people and a whopping 26.1 percent for young Black men.[88]

Average Personal Income of Selected Males 15 and Older In Metro Toronto, 1991



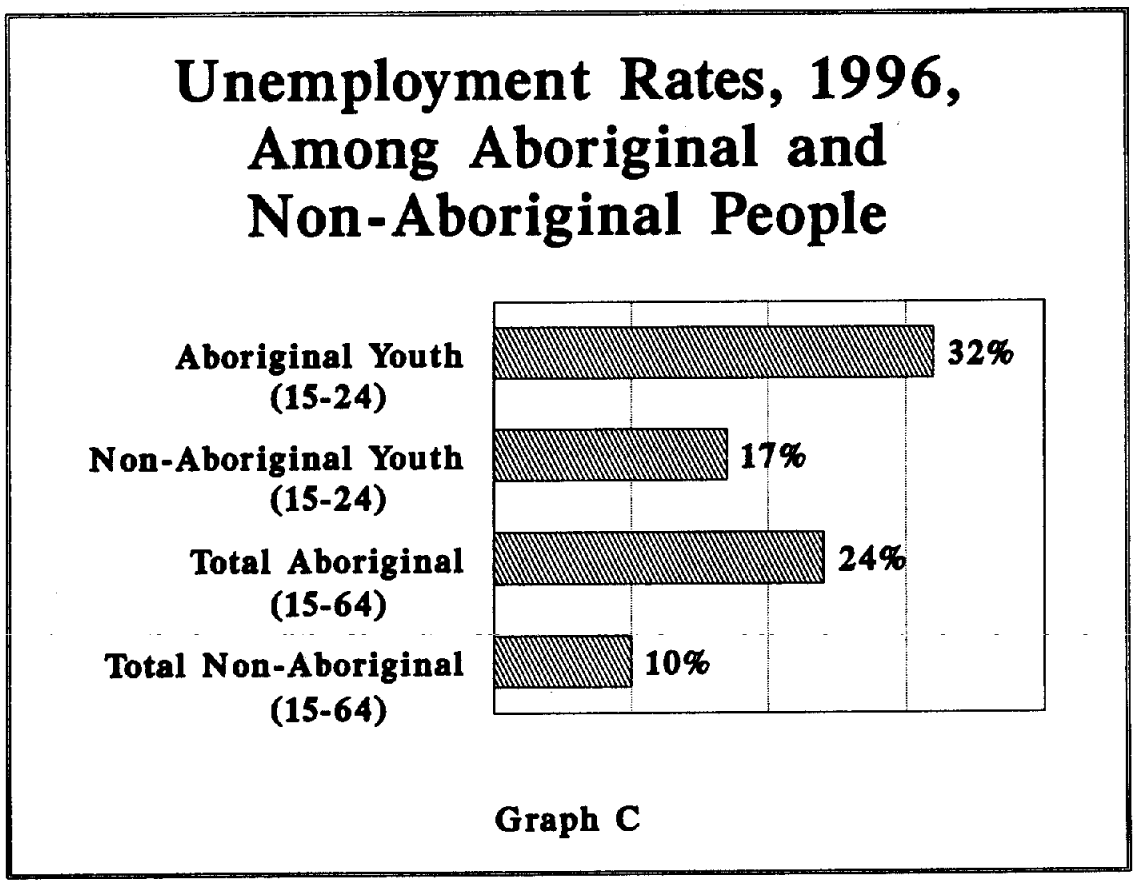
Graph A

Unemployment Rate of Selected Males 15 to 24 In Metro Toronto, 1991



Graph B

These figures are probably representative of the situation of Canadian Blacks, close to half of whom live in Toronto, but they greatly underestimate the poverty of Aboriginal people because very few of them live in cities in Eastern Canada.[89] Aboriginal people are much younger on average than other Canadians. In 1996, about 40 percent of them were under the age of 18, compared with 24 percent of non-Aboriginals. Almost one-third of all Aboriginal children under 15 live in single-parent families, twice the rate for the general population. In western cities like Winnipeg, Regina and Saskatoon, half of all Aboriginal children live with only one parent.[90]



Graph C

As shown in Graph C, Aboriginal people have very high unemployment rates. In 1996, 32 percent of Aboriginal youths aged 15 to 24 were unemployed, almost twice the already-high rate of 17 percent for their non-Aboriginal counterparts. The figures for Aboriginal people aged 15 to 64 were not much better, indicating an unemployment rate of 24 percent, compared to 10 percent for

non-Aboriginals. The Aboriginal population is also very disadvantaged in terms of education: 54 percent of those aged 15 and older do not have a high school diploma, compared to 35 percent of the non-Aboriginal population. Only 4.5 percent of the Aboriginal population have university degrees, compared to 16 percent of non-Aboriginals. The Canadian Human Rights Commission wrote that "In fact, an Indian youngster in Canada has a better chance of being sent to prison than of completing university."[91]

The location of an illegal act also makes a difference in the police decision to charge, with a greater likelihood of charges being laid for the same offences when they are committed in low-income urban areas and, probably, on Aboriginal reserves. A study done in St. John's, Newfoundland, found that police officers had specific mental images of different sections of the city which influenced the way in which they carried out their tasks. They perceived as "trouble areas" parts of the city which had high rates of service calls and known or suspected criminals. When police officers went into "trouble areas," they were more suspicious and more concerned about their safety because they expected to meet people who presented problems for the police.[92]

Police expectations can provoke problems, according to Ottawa sociologist Dennis Forcese. "For example, in subsidized housing communities, with their concentration of . . . working-class tenants, the police generally expect trouble to occur, and often precipitate difficulties in a self-fulfilling way by a heavy-handed presence."[93] Police attitudes can lead to very different exercises of police discretion. Depending on a police officer's expectations, a group of young people shouting in the street in the middle of the night can appear to be either normal kids on a night out who should indulgently be told to hush up, or dangerous members of an adolescent gang who should be taken to the station and charged with disturbing the peace.

One of the most crucial factors in the police decision on whether to charge suspects is whether they have police or court records. In research on juveniles in Ontario, this factor was even more important than the seriousness of the illegal acts committed, so that young people with a record who had committed a trivial offence were more likely to be charged than youths without a record who had committed a more serious act.[94] As youths from low-income neighbourhoods are much more likely to come into contact with the police to start with, and are more likely to be charged with an offence than middle-class youths caught for the same behaviour, this additional damning effect of having a record is the last straw, ensuring that most official recidivists will be from low-income backgrounds. And as recidivists are often unemployable and are under the greatest possible police surveillance, it

is not surprising that many destitute ex-offenders become permanently caught in the criminal justice system in what has been called the "revolving door of despair."[95]

Finally, in addition to these police practices, there are at least two questionable government policies that increase the criminalization of the poor. The first is in the area of domestic abuse and concerns "mandatory charge" rules requiring police officers to make an arrest when there is some physical evidence that an assault has taken place, even if the victim does not want them to do so. These rules were adopted following research findings which suggested that arrest was the most effective way of deterring violence in these situations. Much discussion has taken place on many aspects of this policy, including criticisms that mandatory charges reduce women's options and increase their danger by driving family abuse underground because wives no longer dare to call the police.[96] One wife expressed her ambivalence as follows:

> I've thought so many times about calling the police. If truth be known, I've thought about it for years - to teach him a lesson, to make him see what he's doing. But I always figured it would do more harm than good. . . I call the police, and bang, he's out of a job, and jobs aren't so easy to come by here. Then where are we at? Things'll just get worse. We'll have no money. He'll start drinking more. He'll be even more angry at me and he'll hit me more. So where's the sense calling the police?[97]

The most recent research on the subject supports the view that for poor women at least, mandatory charging rules may do more harm than good. When all the studies are put together, the consensus among researchers is now as follows:

> 1. Arrest reduces domestic violence in some cities, but increases it in others;
>
> 2. Arrest reduces domestic violence among employed people, but increases it among the unemployed;
>
> 3. Arrest reduces domestic violence in the short run, but can increase it in the longer run.[98]

Lawrence Sherman, the author of the original research that inspired mandatory charge rules, now recommends that these rules be repealed, and that police officers be allowed discretion in domestic disputes while being guided by carefully framed policies. He also encourages

experimentation with other options for handling domestic assaults, with careful evaluation of the results.[99]

The other government policy that contributes in a major way to the criminalization of the poor is the U.S-inspired "war on drugs," in which intensive street-level police operations and vigorous prosecutions aim at imprisoning offenders no matter how small the amount of drugs involved. These campaigns have been condemned as "cynical fear-mongering" orchestrated by governments in order to gain public support with promises of restoring law and order, and to distract people from economic problems by scapegoating unpopular groups. The fears this produces in the population are further exploited by police forces seeking bigger budgets and by mass media that thrive on sensational stories about drugs and crime.[100]

Since the mid-1980s, Canada has imitated the United States in making law enforcement its main strategy to control drug use. Experts agree that this "war on drugs" is futile in controlling drug use, as shown by the fact that the price of cocaine, the war's signature drug, which should have risen if dealing was becoming riskier and drugs less available, has instead continued to drop.[101] In Canada, because marijuana is no longer imported but is now grown locally, its price has not changed in 20 years, leading some to note that a cannabis "high" now costs half the price of its equivalent in beer or wine.[102] The only real impact of the drug war has been to imprison large numbers of low-income small suppliers and users, a disproportionate number of whom are Black. The biggest increase in imprisonment was at the Vanier Centre for Women in Ontario, which in 1992-93 admitted 5,200 percent more Black women convicted of trafficking or importing drugs than in 1986-87.[103]

The strangest aspect of the North American war on drugs is that drug use declined steeply in the 1980s and the early 1990s. The decline had nothing to do with law enforcement, but reflected a broadly-based long-term change in North American attitudes toward all drugs, including legal ones such as tobacco and alcohol.[104] The clearest indication that our drug laws are not working was a recent recommendation by the Canadian Association of Chiefs of Police that the possession of small amounts of marijuana and other cannabis products be decriminalized (not legalized), so that this act would henceforth be dealt with by issuing a ticket.[105] Addiction experts believe that "If the resources currently devoted to criminal law responses were redirected into prevention, primary care and rehabilitation, a better return on investment in health and public safety would likely be an immediate benefit."[106]

Compared to all the law enforcement policies and practices for common crimes we have just seen, the law enforcement efforts directed toward uncovering and punishing white-collar and corporate offences are minuscule. Laureen Snider reports that in the 1980s, when government regulation was seen as an onerous burden which crippled free enterprise, agencies entrusted with controlling businesses were savaged in the United Kingdom, the United States and Canada.[107] The result was a virtually risk-free atmosphere in which white-collar criminals thrived and business ethics plummeted. In Canada, the discrepancy in enforcement between common and white-collar crimes has become so obvious that even police officers have complained of it to police expert Dennis Forcese.[108]

The other enforcement difference is that white-collar and corporate offences are much less likely to be reported to the authorities than common crimes such as thefts, burglaries and assaults. Common crimes are usually reported to the police by victims, witnesses, neighbours and businesses, while others are discovered in routine police patrols. Many, if not most white-collar crimes never come to light at all because many of their victims, including the general public, consumers and the corporation's employees, often do not know they were victimized, do not have the resources to unravel complex conspiracies, or blame themselves for having been taken in by clever scams.[109]

When corporate crimes are uncovered, they are most likely to be hushed up and handled internally. Employers are often reluctant to lay charges against employees who embezzled their funds or defrauded them. They are afraid it will make them look bad, or think it is not worth the time and expense involved in testifying and participating in criminal investigations.[110] For obvious reasons, corporate crimes that benefit companies are seldom reported. On the contrary, in the last few decades an increasing number of managers "complained of superiors' pressure to support incorrect viewpoints, sign false documents, overlook superiors' wrongdoing, and do business with superiors' friends."[111] While increasing the pressure from the top, company executives also learn to look the other way so that when a long-standing consumer fraud is uncovered or an unsafe mine finally collapses and kills workers, they can avoid criminal responsibility by truthfully saying they did not know what was going on.

In the very small proportion of cases where white-collar crimes are detected, authorities often have the choice of proceeding under the Criminal Code or through "quasi-criminal" administrative procedures under statutes such as provincial securities legislation, occupational safety regulations, the Income Tax Act, or laws that prohibit the sale of dangerous products or the dumping of

poisonous residues into the water or air. The choice is almost always to proceed administratively, which has the effect of whitewashing the behaviours involved so that they are not clearly and officially defined as crimes.[112] Most, if not all administrative enforcement agencies also have policies favouring informal settlements in which offenders are let off in exchange for paying a fine and promising to mend their ways. For example, federal tax authorities have a long-standing policy of not prosecuting tax evaders if they pay up when they are caught. (Note: tax avoidance is legal, tax evasion is not.) As a result, "only impecunious or recalcitrant tax evaders show up in the statistics."[113]

This gentle treatment is totally different from the treatment common criminals receive at the hands of the justice system. No policy exists to say that pickpockets will not be charged if they hand over the wallets they stole and promise to reform. And although executives who foster life-threatening working conditions are not so different from bank robbers who panic and kill someone, and rich men who cheat on their income tax are just as dishonest (or more) as poor mothers who cheat the welfare department, we all know which ones are going to be exposed as criminals in the front pages of indignant tabloids.

The enormous class biases of our laws and law enforcement methods were best summed up by Roland Penner, former Attorney General of Manitoba:

> Let's suppose I became philosopher-king and I could make any changes I wanted. Suppose I decided that minor social control offences and crimes without victims were to be eliminated from the Criminal Code. Also suppose that minor property offenders were to be dealt with in the community rather than in jails. At the same time suppose that I made tax evasion, knowingly polluting the environment, false advertising, fraudulent bankruptcy, and price-fixing crimes which carried automatic jail terms. Now, let's introduce the proverbial "man from Mars" who always gets into stories like this one. He arrives and I take him on a tour of (the provincial jail near Winnipeg). What would he say? "You sure have a problem with your middle-class White people, don't you?"[114]

II. BAIL OR JAIL

My first arrest happened when I was 16. It was for possession - a gram of hashish oil . . . About 10 days later . . . I was with a friend. She sold to an undercover cop and he handed me the money. I claimed the drugs because I was 16 and had never had a trafficking charge before. I spent four months in jail. It was my first time. I learned more crimes in there than I did on the streets . . . Sure you hate jail, but then it is sort of like a vacation.

Mariah, 20-year-old inmate of a Toronto halfway house[1]

What is bail, and how does it work? Bail comes into play after someone has been arrested and charged with a criminal offence. After people have been arrested and brought to the police station and the formalities are completed, sometimes including fingerprinting, they must immediately be released unless there is a good reason to keep them in jail until their trial. Release at this stage is called "police bail," and it is denied when the offence is very serious, when the accused are considered dangerous or likely to commit more offences before their trial, or when there is reason to believe they will not show up for trial.

People who are kept in jail by the police must be brought before a judge within 24 hours, or as soon as a judge becomes available on weekends or in special circumstances. At this first hearing, the accused plead guilty or not guilty and can ask the judge to grant them bail, which is also called "judicial interim release," until the time of the trial (for those who plead not guilty) or until sentencing if the sentence is not handed down on the spot (for those who plead guilty). If bail is refused, the untried accused, many of whom are later found innocent of all charges, are kept in prison until trial for periods ranging from a few days to six months or more.[2] For an overview of all the stages of typical criminal cases, see the Appendix at the end of this report (before the footnotes).

What, if anything, is wrong with the bail process, and how does this affect the poor? Most critics agree that the laws that regulate bail are reasonable, but so general and subject to so little monitoring in practice that they give enormous uncontrolled discretionary powers to the police and judges. One result is that the system imprisons many more people than it should, making a mockery of the principle that "detention [should] be used as a last resort."[3] One example, given in a 1996 report by federal, provincial and territorial Ministers responsible for youth justice, is that many youths are kept in jail before trial for reasons such as homelessness and dysfunctional families, which have

nothing to do with the legal grounds for detention.[4] As in the case of neighbourhood policing, discretion in bail decisions almost always works to the detriment of the poor.

The fact that too many untried accused are imprisoned is obvious in the correctional statistics. In 1997-98, among the adults (over 18) admitted to provincial and territorial prisons during the year, there were more people "on remand" (105,705), as prisoners waiting for their bail hearing or denied bail are called, than prisoners who had been convicted and sentenced (98,646). (Admissions figures can count the same people more than once if they were admitted to prison more than once during the year.) This represented a huge increase since 1990-91 in the proportion of all inmates who are admitted on remand. In that year, admissions were 92,102 prisoners on remand and 114,869 prisoners who had been sentenced.[5]

A similar picture emerges from the number of adults actually in provincial and territorial prisons on a given day in 1997. This measure, which is roughly similar to a census figure, produces a much smaller proportion of prisoners on remand, mostly because they are imprisoned for shorter periods than sentenced prisoners. Prisoners on remand accounted for 32 percent of adults actually in provincial-territorial prisons on a given day in 1997, up from 26 percent in 1991.[6] This is particularly noteworthy since new police bail rules were adopted in 1995 to reduce the number of remand prisoners in jail.

Most striking in demonstrating the arbitrariness of bail decisions is the enormous disparity from province to province. Among young people under age 18 actually in provincial custody in 1997, prisoners on remand made up 9 to 15 percent of inmates in eastern provinces (Newfoundland to Quebec), while they accounted for 25 to 31 percent of inmates in Manitoba, Alberta and British Columbia.[7] This is consistent with a survey of police opinions which found that officers from the Prairies and B.C. are much more inclined to jail young people than their Quebec counterparts. Overall, 13 percent of the Canadian police officers surveyed thought that jail was an appropriate option for first-time serious property offences - such as car thefts - by juveniles.[8]

Another indication of the lack of thoughtful deliberation in bail decisions is found in a 1996 one-day snapshot of adults in all provincial and territorial prisons. It showed that the proportion of all female inmates who were on remand after being refused bail (24 percent of all female prisoners) was almost the same as the proportion of all male inmates who were on remand (25 percent).[9] When criminologist Pierre Landreville noticed the same thing in Quebec prisons, he pointed out that

something must be wrong with a system that produces such results, since the offences women are charged with are less serious than men's and less likely to involve violence, so a much smaller proportion of women than of men should be jailed until their trials in order to prevent danger to society.[10]

The Effects of Pretrial Detention

Being sent to jail until trial can have extremely harmful consequences. The most disturbing is that it can affect the outcome of the trial. Many studies in Canada, the United Kingdom and the United States showed that compared to accused people who are left free, people who are detained until trial are more likely to be found guilty and more likely to get a sentence of imprisonment.[11] This is true even when other factors which might influence these decisions, such as the type of offence, previous criminal record and race are taken into account.

One likely explanation is that the status of "pretrial detainee" puts a negative label on an accused person, because people who have not been tried are only supposed to be detained as a last resort. This is the opposite of the "halo" effect described by psychologists, which predisposes us favourably toward someone who has been described in positive terms. According to this theory, judges and others involved in the criminal justice process unconsciously assume that people who were denied bail must be "bad" people, otherwise they would have been released. This creates an atmosphere that can tip the balance toward a guilty verdict.[12]

Another explanation may be that accused people who are detained in jail are prevented in many ways from helping their own cause. They have more difficulty finding lawyers and communicating with them and are hampered in their search for evidence and witnesses who could give them alibis or vouch for their good character. They are also unable to take many steps that would give a good impression to the court, such as finding a job, or reimbursing the money they stole or engaging in volunteer activities. In a manual written for lawyers who handle bail hearings, an expert suggests asking for a postponement of bail hearings to allow unemployed accused people to find themselves a job - any job - because judges are reluctant to interrupt employment.[13] This is the kind of situation where having good family connections, such as an uncle with his own business who comes forward to offer the accused person a regular position, can make a tremendous difference.

Detention can also negatively affect the outcome of a case because an accused who is held in jail until trial is under much greater pressure to plead guilty. Faced with the possibility of spending weeks or months in jail until their trials, people accused of minor first offences that normally bring a lenient sentence without imprisonment might decide to plead guilty even if they are innocent. Those who have jobs might do it in order to avoid losing income or getting fired while they are in jail.

Others accused of more serious offences against which they have a valid defence, upon learning that time spent in pretrial detention is usually (depending on the judge) taken into account in the eventual sentence, might calculate after a month or two of pretrial detention that they would get out of jail faster if they pleaded guilty. A study of legal aid found that young Aboriginal Canadians in particular sometimes pleaded guilty when they had a defence "to get it over with."[14] They probably did not realize that the resulting criminal record could ruin their lives by preventing them from finding employment, making them perennial suspects for the police or ensuring more severe treatment before the courts in the future.

Pretrial detention can also have adverse personal consequences. Young men in their late teens and early twenties who were awaiting trial in an Ontario detention centre told a researcher about their parents who were distressed at their being in jail, the jobs and apartments they were afraid of losing, and their wives and children who had to go on welfare.[15] Some got into fights, and some were victimized by other inmates. Many had trouble sleeping and had to be given tranquilizers or sleeping pills. Again and again, they complained of being bored. Most of their time was spent watching television, playing cards or doing nothing. Because of this inactivity, pretrial detention is known in prison circles as "dead time."[16] It is considered the worst detention of all, because remand prisoners are usually kept in dismal, overcrowded short-term maximum security facilities without recreational or rehabilitation programs.

There are many other ways pretrial detention can disrupt people's lives. This is particularly true for young people, whose life courses are still largely undetermined. If detention takes them out of school for weeks or months, for example, there is a great likelihood they will never go back. The most extreme disruptions relate to young Aboriginal people from the North. The Manitoba Aboriginal Justice Inquiry described how the lack of detention facilities and judges in Aboriginal communities resulted in young suspects, most of whom had been charged with property offences, being removed from their communities and sent to jail in Winnipeg. In some cases, parents did not even know where their children were and there was no one around to discuss the cases with them.

The Inquiry found that more than 90 percent of the young women and half of the young men held on remand in Manitoba were Aboriginal. Many of these Aboriginal women were mothers whose removal from their communities forced them to abandon their children.[17]

Finally, one of the main problems with going to jail before trial is the other people who are behind bars. Many studies found that one of the most important predictors of whether young people are going to become criminals is the company they keep, and it is not for nothing that prisons have been called "schools of crime."[18] Putting people in prison - and let us always remember that some of the prisoners have never been found guilty of any offence and will later be acquitted of the charges against them - greatly increases the risk that they will become career criminals. The Canadian Committee on Corrections warned of the dangers of imprisoning untried first offenders except when absolutely necessary:

> The period following his first arrest is a crucial one for the first offender. If he is unwisely dealt with, he may come to see society as an enemy and to assume that his future lies with the criminal element. If he is released while awaiting trial, he may continue his positive family and social relationships; if he is held in jail, he will more readily identify himself with the criminal element.[19]

To minimize the problem, it has been recommended that greater care be taken to keep remand prisoners and sentenced prisoners apart, so that inexperienced offenders do not mix with hardened criminals.[20] This rule is often broken due to overcrowding in many correctional facilities. Correctional officers agreed that separating inexperienced and hardened prisoners was a worthy goal, but disagreed that separating remand and sentenced prisoners would be an effective way to achieve it. They pointed out that prisoners serving their sentences in short-term jails or detention centres are usually there on relatively minor charges, while the remand population is a very mixed bag that includes many first-timers but also some of the most serious criminals who were denied bail because they are dangerous to the community. As a result, the officers said, it is the sentenced prisoners who may be more at risk in contacts between the two groups.[21]

Bail in Practice

The best way to understand why and how low-income people are disadvantaged in the bail process would be to follow thousands of typical accused people from the moment of their arrest by

the police until the end of their trials, noting all the details of the proceedings. This has never been done in Canada, but the impressive study of the files of 1,653 adult men charged with criminal offences in Toronto in 1989-90 performed by the Commission on Systemic Racism in the Ontario Criminal Justice System comes close enough to provide a useful basis for analysing bail practices.[22]

This study was particularly useful for our purposes because the Commission was very aware of the ongoing U.S. debate in which one side argues that the main reason so many Black Americans are in jails and prisons is racial discrimination, while the other side maintains that Blacks are jailed in disproportionate numbers because they are poorer than Whites, and because poor people of all races are more likely to be charged and convicted for the same offences.[23] As a result, the Commission was careful to take poverty factors into account. It obtained information from the 1991 census confirming that Blacks are much poorer than Whites in Toronto, it recorded all the available information on the poverty status of its subjects, and it carefully distinguished in its analyses between the effects that could be attributed to racism and those which were due to being unemployed or homeless. (The files did not contain consistent information about income.)

As might be expected from the review of police policies and practices in Chapter I, the vast majority of all the adult men with criminal charges whose files were drawn by the Commission on Racism turned out to be poor or of very modest means. Among the Whites, 7 percent were professionals, 21 percent had skilled jobs, 21 percent had unskilled jobs, 44 percent were unemployed, and the rest were retired, students, etc. Seventeen percent did not have a fixed address and 5 percent were on welfare. Among the Blacks, 4 percent were professionals, 15 percent had skilled occupations, 21 percent had unskilled jobs and 54 percent were unemployed. Twenty percent did not have a fixed address and 3 percent were on welfare.[24] As a point of comparison, the unemployment rate in Toronto in 1990 was 8.7 percent for men aged 15 to 24 and 5.1 percent for those aged 25 to 44.[25]

The Commission's study concentrated on five types of atypical offences which all raise important bail issues. Three of them - sexual assaults, serious non-sexual assaults and robbery - are violent offences that automatically raise the question of whether the accused is dangerous to the community. The other two types of offences - drug charges and bail violations - are specifically singled out in bail laws as justifying stricter treatment. These five offences are relatively rare, together making up only about ten percent of all criminal charges. The most typical criminal charges

are for property offences, especially small thefts less than $1,000 and, for adults, impaired driving and other criminal driving offences.[26]

To simplify matters as much as possible, we will limit our analysis of the Commission's information to the cases in which the accused had no previous criminal convictions, for a total of 613 accused. The decisions made by the police and judges in these cases are shown in Table 1.

TABLE 1

DECISIONS TAKEN BY POLICE AND JUDGES,
ACCUSED WITH NO PREVIOUS CRIMINAL CONVICTIONS[27]

	Charged and Released by the Police Until Court Appearance	Charged and Jailed by the Police Until Bail Hearing before a Judge	Granted Bail by a Judge and Released Until Next Court Appearance	Denied Bail by a Judge and Jailed Until Next Court Appearance	Convicted of the Offence(s)
Total=100% (N* = 613)	34% (N = 208)	66% (N = 405)	54% (N = 331)	12% (N = 74)	44% (N = 271)
White Accused (N* = 288)	45% (N = 130)	55% (N = 158)	47% (N = 135)	8% (N = 23)	48% (N = 138)
Black Accused (N* = 325)	24% (N = 78)	76% (N = 247)	61% (N = 198)	15% (N = 49)	41% (N = 133)

*N = Number of accused. These numbers greatly overrepresent the actual proportion of Blacks, because the study deliberately included roughly equal numbers from both races, and a greater proportion of the Blacks had no previous criminal records.

The first two columns of the first row of the table show that out of the 613 men who were charged with criminal offences (100 percent), 34 percent were immediately set free while 66 percent were detained in jail overnight or over the weekend by the police. The next two columns of the same row indicate that in the subsequent bail hearings before judges for the 66 percent who had been kept in jail by the police, 54 percent were granted bail and were released while 12 percent were denied bail and were sent back to jail until their next court appearance. The last column of the first row shows that of the 613 original accused, only 44 percent were eventually convicted, meaning that they pleaded guilty or were found guilty after a trial. The accused who were convicted were not necessarily among those who were detained after being denied bail.

By far the most striking aspect of the figures in Table 1 is the enormous difference between the proportion of accused who were jailed by the police (66 percent of all accused) and the proportion who remained in jail after a bail hearing before a judge (12 percent of all accused). There is actually a logical reason for the difference, because police officers have no authority to release people charged with serious offences punishable by a maximum of more than five years of imprisonment, which is the case for several of the offences involved here. The Law Reform Commission of Canada criticized this restriction on police powers to release accused people, saying that it is unnecessary and the cause of many Aboriginal suspects having to be transported from the North to southern prisons.[28]

This restriction can only serve as a partial explanation, however, because it does not justify the large difference in the proportion of Blacks jailed by the police (76 percent) compared to the proportion of Whites who were jailed (55 percent). As the accused of both races were in similar circumstances with similar accusations and no previous convictions, it is clear that other factors were involved. One possible reason, which is compatible with the police practices we saw in Chapter I, is that suspects who are deemed to be uncooperative or hostile toward the police are more likely to be denied bail than other, more accommodating people arrested in similar circumstances.[29] Because of long-standing animosities, this probably happens more frequently when the suspects are Blacks or Aboriginal people.

Other disturbing practices came to light when it was found that at least some police officers engage in so-called "bail bargaining," in which threats of detention or of police opposing bail in forthcoming bail hearings were used to extract confessions or information from suspects.[30] Such

techniques, which completely violate the spirit of our criminal laws, are more likely to be used with vulnerable suspects from disadvantaged groups who have fewer means of defending their rights.

Whatever the reasons for the racial difference in police detentions, Table 1 makes it crystal clear that the police jail far too many accused people. A large proportion of the people they detained were eventually found not guilty at their trials: 66 percent of the accused were jailed until a bail hearing, while only 44 percent were eventually convicted. Even more inexcusably, the gap between the proportion of people jailed and people eventually convicted is much larger for Blacks than for Whites. Although proportionately more Blacks were jailed by the police, a larger proportion of the Whites were eventually found guilty or pleaded guilty of the offences with which they were charged: 48 percent of the Whites were convicted, compared with 41 percent of the Blacks. This suggests that Black people are charged and jailed on the basis of flimsier evidence.

To find out the reasons for the differences in police and judicial bail decisions, the Commission on Racism performed statistical analyses taking into account race, any past criminal and imprisonment history, type of offence, employment status and type of job, having or not having a fixed address, and marital and welfare status. The results indicated that for all five offences taken together, and for four of the offences looked at separately, the main reason Blacks were denied bail in disproportionate numbers was that more Blacks were unemployed or homeless than their White counterparts. Racial discrimination was also a factor, but a minor one compared to the others. The only exception was drug cases, where the negative effect of racism was even stronger than the negative effect due to being homeless or unemployed.[31] All these effects were found to be strongest at the level of the decisions made by the police.

In answer to criticism that they were keeping too many people in custody, the police used to say that they did it to ensure that the courts would impose enforceable conditions on the accused.[32] Police officers could impose financial guarantees (with no cash deposits required except for non-residents) that the accused would appear in court, but they could not impose conduct restrictions such as requiring the accused to stay away from their alleged victims. Because these arguments seemed reasonable, the law was changed as of April 1, 1995, to empower the police at their discretion to release accused persons who undertook to respect specific conditions. These releases will be examined later in this chapter along with conditional releases granted by judges at bail hearings.

No evaluation was done of these new police powers in Canada, but in the United Kingdom, where the police were given almost identical powers, also in April 1995 and with the same rationale, the Home Office commissioned a study of their effects six months after implementation. The study showed a very small and perhaps temporary reduction in police detentions, along with a huge decrease in unconditional releases. In other words, the police did not use their new powers to release more people, but to exercise new controls over people who were not thought to need them before. In criminology, this is called a "net widening" effect.[33]

It is difficult to overestimate the role of the police in determining who is sent to prison on remand. Without an initial police charge, followed by a police decision to jail overnight or over the weekend, there is no need to make a bail application to a judge to get released. Because of policing methods, most of the people who are brought to that stage are low-income people. The police are also responsible for preparing the reports which brief Crown prosecutors for bail hearings. In theory, these reports are supposed to be factual summaries about the offences, the accused's previous contacts with the criminal justice system and the accused's family background. They also include the police's own recommendations on each case. In practice, these reports often contain irrelevant damaging comments such as that the accused was uncooperative and had a "bad attitude," and stereotypical judgments about "irresponsible" single-parent mothers and transient "losers."[34]

Legal Representation at Bail Hearings

Bail hearings are often the most important court appearances accused people who are being detained must face. As we saw earlier, suspects who are denied bail and kept in jail until trial are more likely to be found guilty and to receive a prison sentence. Bail rules are very complex. To give only one example, it is up to the Crown prosecutor to demonstrate why an accused person should not be released, but the rule is reversed for very serious offences such as murder, for offences committed while on bail and for some charges of trafficking and importing drugs, including marijuana. Bail is much more difficult to obtain in these "reverse onus" cases, because it is the accused who must present convincing arguments why he or she should not be denied bail. It is easy to imagine that a street kid accused of selling a "joint" to an undercover police officer would not know what such arguments might be, let alone have the capacity to present them coherently to a judge in an intimidating court environment.[35]

First appearances in court are also crucial because that is when accused people enter their pleas of guilty or not guilty. This is a fundamental decision requiring considerable legal expertise to establish whether the accused has a valid legal defence, and the wrong choice can have grave consequences. Pleading guilty when you do have a defence produces an unnecessary criminal record that can ruin a person's life. Guilty pleas often bring immediate sentencing, where the accused or their representatives are given an opportunity to describe extenuating circumstances and ask the court for leniency. Victims can also address the court at this time if they want.

Pleading not guilty when you do not have a valid defence can also be disastrous. It can lead to more severe sentences by antagonizing judges who resent unnecessary trials or by exposing the accused at trial in the worst possible light, with witnesses testifying to what bad people they are. It prevents the accused from expressing regret and remorse. A wrong decision to plead not guilty can result in being convicted of a more serious offence because it precludes plea bargaining, in which lawyers typically arrange for their clients who are charged with more than one offence to plead guilty to minor ones on condition that more serious ones be dropped.

In Canada, legal representation for most bail hearings is handled by so-called "duty counsel" who work in criminal courts. Duty counsel are lawyers who are paid by legal aid plans, but who represent free of charge all accused people who make a first appearance in court without their own lawyers. In Toronto's provincial courts, for example, duty counsel act for the accused in about 90 percent of bail hearings and also handle a large proportion of guilty pleas.[36] Depending on the policies of each provincial or territorial legal aid plan, some duty counsel are employees of the legal aid plan while others are private-sector lawyers hired by legal aid on a part-time basis for a specified, usually per diem fee.

Although no comprehensive study of duty counsel services has been done in Canada, many observers have expressed grave concerns.[37] The main problem is that most people have no opportunity to prepare their bail applications until they see duty counsel for a short time in bail court on the morning of their hearings. In the United Kingdom and the United States, the criminal justice systems include extensive networks of paralegal personnel ("bail verification officers") who visit suspects soon after their arrival in the detention centre to gather the information needed for their bail applications.[38] The officers also seek independent confirmation of residence and employment and contact people who might be willing to act as sureties. (Sureties guarantee to pay a specific sum if the accused do not appear for trial.)

In Canada, private organizations such as local branches of the John Howard Society offer this type of assistance, but these services are rare and often disappear because of lack of funding. As a result, most accused who are detained by the police arrive in court the next morning to a scene of panic and chaos:

> Duty counsel have no control over the rate at which prisoners are transported to courts. If large numbers of unprepared prisoners arrive at the same time, duty counsel may be unable even to interview them properly, still less to provide full advice or verify information about sureties, employment or residence. One consequence may be postponement of the bail hearing to obtain further information. Another is that bail conditions may be imposed that are beyond the financial means of the accused. In either event, the accused must be held in custody until a subsequent court appearance. In this way accused persons continue to be deprived of their liberty, and both the courts and prison systems incur unnecessary costs.[39]

Another concern about legal representation at bail hearings has to do with the poor qualifications of many part-time duty counsel. The Commission on Racism described the problem in its report:

> Even before the recent crisis in legal aid funding, legal aid fees for bail hearings were low and declining. That meant much of this work has been done by young and inexperienced lawyers, either in the traditional role of privately retained defence counsel or more likely as duty counsel hired per diem. Unlike the salaried duty counsel, . . . who quickly acquire the necessary skills and confidence for competent representation, per diem duty counsel receive no systematic training and may work without any assistance or supervision from senior counsel. Though bail court may well be a good venue for qualified lawyers to learn their trade, hone their skills, and develop confidence, over-reliance on such lawyers is unfair to them and unjust for accused persons.[40]

In the worst-case scenario, accused people can find themselves represented at their bail hearings by young and inexperienced lawyers who know and care little about criminal law, but who take criminal legal aid cases simply because they do not have enough clients in their own fields of interest and need additional work to make a living. A criminal lawyer from British Columbia commented that he cringed when he heard lawyers say they had general practices which included a little bit of criminal law, because it was akin to doctors who were general practitioners saying they do a little bit of neurosurgery. Another problem with part-time duty counsel in some jurisdictions is legal aid tariffs that pay more to private lawyers for appearing twice, leading them to request

unnecessary adjournments of bail hearings that keep accused people in jail for three days or more instead of one.[41]

As mentioned above, salaried duty counsel are generally very competent, but even their expertise can be undermined by legal aid plan administrators who do not take bail hearings seriously. In January 1999, for example, the Ontario Legal Aid Plan decided not to renew the contracts of the 12 duty counsel working in Toronto courthouses who had more than four years of experience. The idea was to save a modest amount of money for the plan by keeping only the more junior duty counsel who had slightly lower salaries. This was denounced by a judge, who said that many of her fellow judges are up in arms over the disappearance of the very lawyers they feel are best equipped to work the levers of the often-Byzantine justice system. She added:

> My concern, as a judge, is that everybody be treated as fairly as possible. Duty counsel represent the homeless, the jobless and those with mental health problems. These people perform an invaluable service . . . The purpose of our system is not just to process bodies and criminalize them . . . The responsibilities of duty counsel have expanded incredibly. It isn't just a job anybody can do. To have the blind leading the blind doesn't seem to me to be very responsible.[42]

Role of Crown Prosecutors at Bail Hearings

Crown attorneys play the most important role in bail hearings. They are the ones who present arguments to judges as to why accused people who were detained by the police should not be set free, or should be set free only under certain specific conditions. No recent Canadian research has been done on the impact of these representations, but studies of British courts, which work in very similar ways, concluded that judges go along with the Crown's recommendations in the vast majority of cases.[43]

The role of Crown attorneys is often misunderstood, and with good reason. Contrary to the impression given in movies and television shows, the duties of the Crown consist not only of presenting the case against the accused, but also of presenting all the relevant facts that can assist judges in making their decisions, whether these facts are damning or favourable to the accused. Historically, Crown attorneys were intended to act as a check on the power of the police, as protectors of rights as well as prosecutors.[44]

The problem with applying the principles of objectivity and fair-mindedness in bail hearings is that the only facts Crown prosecutors possess about the accused, which they hurriedly acquire minutes before the hearings start, are those contained in the police reports. The usual result, according to critics, is that instead of acting as a control on the power of the police, prosecutors are simply an extension of the police apparatus.[45]

Faced with Crown prosecutors who recite damning facts about the accused from police reports, and unprepared duty counsel who have little to say in response, judges understandably almost always side with the Crown. Bail hearings are typically disposed of in a few minutes - so fast that most accused people cannot follow what is going on. When the Commission on Racism surveyed criminal justice staff to ask whether racism might be a factor in their work decisions, several Crown prosecutors commented that "sometimes it is so busy in court that we hardly notice the accused."[46] This echoes observers who described the court process as "less of a search for justice than a battle against the clock."[47]

Criteria Used in Judicial Decision-Making on Bail

Because accused people are presumed innocent until they are found guilty, our criminal law provides that they must be set free until their trial unless there is a serious reason not to do so. These serious reasons come under two main headings: when imprisonment is necessary to ensure that the accused will show up for trial, and when imprisonment is necessary to protect the public from further crimes or to prevent the accused from interfering with the administration of justice - for example, by harming witnesses who would testify against them. Unlike the police, judges can grant pretrial release whatever the nature of the offence. It is not unusual for people who are accused of murder to be released until trial, especially in situations involving so-called "crimes of passion."[48]

The second reason, which usually involves predicting whether a particular accused person is likely to commit other offences while on bail, has generated a great deal of heated public and professional debates that have shed little light on the criteria that could be used to identify future offenders.[49] Most of the controversies have been about the fear of violent behaviour, with sensational media coverage urging judges to deny bail at the slightest doubt. Judges are very sensitive to these issues, and their most common way of assessing future violent behaviour is by examining the accused's criminal record.[50]

Looking at the analyses of the Ontario Commission on Racism, however, we find that records of previous violent convictions were not generally very useful in making bail decisions for the simple reason that close to three-quarters of the accused did not have any.[51] Also, many of the accused in the study, and probably the majority of the accused who appear before Canadian bail courts, were not charged with violent offences. The bail issue in these cases is therefore not the risk of future violent offenses, but the risk that the accused would commit less serious criminal acts while out on bail.

On the question of what acts are considered "serious," legal experts say that detention is not appropriate when the alleged offence is trivial.[52] The Manitoba Inquiry on Aboriginal Justice found that the majority of Aboriginal youths in remand centres in the province had been charged with property offences.[53] One may wonder how much sense it makes to keep tens of thousands of untried accused people locked up for weeks and months, at an estimated cost to taxpayers of around $275 a day for juveniles and $130 a day for adults - which is around $100,000 a year for juveniles and $50,000 for adults - in order to prevent them from possibly committing another minor theft.[54]

In cases where there is no past conviction for violent acts or no previous charge for a violent act, how do judges decide whether the accused are likely to commit other crimes if released on bail? According to U.S. experts who examined bail decisions in youth courts, judges' predictions often resemble "hunches" or "guesses."

> Because judges must focus on the short-term danger posed by the defendant, they must rely on information about unproven prior acts and anticipated future conduct, as well as on subjective information of the personal restraints and social controls that will regulate the defendant's behavior if released. For this reason, juvenile court judges in *Schall* commonly considered such factors as the presence of family members at the detention hearing as an indication of the availability of familial controls during the pretrial period.[55]

Judges' professional opinions were also based on elements that reflected a general consensus among criminal justice decision-makers. These included "judgments about the defendants' demeanor, dress, and perceptions of the quality of supervision from parents or caretakers."[56] These are all highly subjective criteria reflecting cultural norms that vary by social class and race. The risk of applying negative stereotypes to non-white, non-middle-class accused is further increased by the fact that the judgments are made in a matter of minutes and frequently on the basis of unverified or inadequate information.

Criminal histories are also taken into account in assessing whether suspects are likely to show up for trial. This is obviously relevant in some situations, for example if an accused failed to show up for trial in the past. In addition, judges have developed over the years a concept called "ties to the community." The assumption is that the more ties to the community accused people have, and the stronger the ties, the less likely they are to disappear before their trials. The specifics of these "ties to the community" generally consist of having a fixed residence, a job, a spouse, close friends and relatives nearby, and acquaintances who can appear as character witnesses. Some of these criteria, especially employment and residence (owning one's home is considered most desirable), clearly discriminate against poor people.

As mentioned earlier, the effect of these criteria was apparent in the analyses of the Ontario Commission on Racism. When factors such as race, criminal record, previous bail skipping and others were held equal, having a job was the single most important characteristic that distinguished the accused who were freed on bail from those who were jailed.[57] The next most important consideration was whether the accused had been on bail for another charge when he was arrested. Other influential factors, in order of importance, were having a fixed address, whether the accused's job was high status or low status, race, previous prison term and marital status. Overall, the accused most likely to be detained until trial were spouseless Blacks who were either unemployed or working in unskilled jobs, who did not have a fixed address, who had already been to prison, and who had been charged with committing an offence while out on bail.

The profile does not suggest that people whose bail applications were rejected were dangerous or violent people. On the contrary, when all other factors were controlled, the fact of having a previous record for violent offences, or any previous record other than for drug offences, did not make a significant difference to the bail decisions.[58] This leads us to conclude that in most cases the reason accused Canadians are kept in prison for weeks and months before their trial is not because they are dangerous and poor, but mostly because they are poor.

Considering the enormous negative impact of the decision to deny bail, one would think that the practice of using employment or a fixed address as criteria is based on solid research demonstrating conclusively that unemployed people or people without a fixed address are unlikely to show up for trial. It is therefore amazing to find that no such studies have ever been done in Canada.

> A substantial body of research in the United States questions the value of basing bail decisions on personal information about an accused. These studies suggest that residential stability, employment and nearby family contacts are generally unreliable indicators of whether an accused person will appear for trial.[59]

Also disturbing are court records indicating that the employment criterion may be used in deciding whether an accused person is likely to commit another offense while on bail.[60] In some cases, Crown prosecutors who did not tell the judges that there was a danger that the accused would not appear at trial still mention unemployment as a relevant fact in support of their argument that the accused should be detained in order to protect the public from further crimes. It would appear that in borderline situations where prosecutors and judges are uncertain about people's likelihood of committing another offense, they tend to give the benefit of the doubt to the accused who have jobs and release them and to detain the ones who do not have jobs.

There are ways of avoiding this type of discrimination. In the United Kingdom, for example, the lack of a fixed address is seldom an issue since there are "probation hostels" where homeless accused people - and people on probation, of course - can stay until they find other residences.[61] Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and Yukon had bail supervision programs in the early 1990s to monitor untried accused persons on a regular basis, to suggest other services that could meet their needs, and to make sure they knew when and where to show up in court.[62] Failure to appear is one of the most common criminal charges laid against young Aboriginal people in Canada.[63]

Like the bail verification services we saw above, most bail supervision programs are run by private non-profit organizations. One example is the bail supervision program of the Ma Mawi Chi Itata Centre for Aboriginal youths in Winnipeg, which was praised in the 1991 report of the Manitoba Aboriginal Justice Inquiry for its excellent work.[64] The Inquiry recommended that these services be expanded and better financed and that similar initiatives be established throughout the province. Instead, the bail supervision program of the Ma Mawi Chi Itata Centre was terminated due to lack of funds.[65]

Ontario, which accounts for more than 40 percent of all youth court cases in Canada,[66] abruptly terminated the funding of its 12 bail supervision programs in 1997 for budgetary reasons. The decision made no sense, since it was estimated that saving $1 million on the budget of the bail programs would cost Ontario $25 million in new jail expenses. A defence lawyer speculated that "this

was a way of extorting guilty pleas from people who would otherwise have to spend weeks or months in jail awaiting a chance to argue their innocence."[67] Following intense pressure, the government reinstated some of the programs and ordered a review by an independent consultant.

Conditional Releases

When accused people are released at bail hearings, judges can specify different types of releases:

1. with an unconditional promise to appear at trial (This is what is usually meant by being "released on your own recognizance.");

2. with a promise to appear at trial and to obey whatever conditions the judge orders;

3. with an agreement to appear at trial and to pay a specific amount in case of failure to appear, with no deposit or surety being required;

4. with an agreement to appear at trial and to pay a specific amount in case of failure to appear, with provision of a surety. (A surety is another person who guarantees the accused's appearance and who may have to pay if the accused does not show up.);

5. with an agreement to appear at trial and to pay a specific amount in case of failure to appear, with a deposit of cash or other valuable security; or

6. with any combination of the above.

It is interesting to note that the law considers the order of these release methods as a "ladder of severity," with option one being the least severe and option five the most onerous. In presenting their arguments, Crown prosecutors who recommend a supposedly more severe option have to demonstrate why they did not recommend a less severe one. The reality is that for people with plenty of money, none of the financial conditions impose much or any hardship at all. But for someone who has no money, the imposition of a cash or security deposit, even of a modest amount, or the

requirement of providing a surety they could not reimburse, can cause immense difficulties and act as a barrier to freedom.

Keeping people in jail before trial because they cannot provide financial guarantees is against the law. The Canadian Charter of Rights provides that "Any person charged with an offence has the right . . . (e) not to be denied reasonable bail without just cause." Judges can only release detained accused persons with financial guarantees after they have determined that there is no just cause to keep them in detention. Experts agree that "to impose a condition which is known to be impossible to comply with from the outset would amount to a wrongful refusal of bail."[68] The Law Reform Commission of Canada agreed. It recommended that cash deposits be abolished or greatly restricted, and that when people must stay in jail because they cannot find sureties, a quick reassessment be done to prevent their being detained just because they are poor.[69]

When the staff of the Ontario Commission on Racism visited prisons in the mid-1990s, they found that many prisoners, especially youths who were members of minority groups, had been granted bail but were waiting for sureties to be confirmed or other bail guarantees to be met. Employees of many detention centres, as well as defence lawyers, duty counsel and organizations involved with prisoners and ex-prisoners, confirmed that many accused who are granted bail "spend days, weeks or even months, in prison because they cannot meet the bail court's conditions for release."[70] A 1992 study by the Ontario Ministry of Correctional Services found that "35 percent of the 212 adults and youths aged 16 and 17 who had been granted bail by the first day of the study were still in prison seven days later."[71] And a 1994 survey of prisoners who had been granted bail but were still in jail found that two-thirds were still there because they were unable to meet cash bail or to provide the required sureties.[72]

Conditional Releases With Non-Financial Conditions

There are two main types of conditional releases with non-financial conditions. The first, provided for in the Young Offenders Act, applies only to youths and allows conditional releases after it has been determined under the criteria we saw above that a youth should be detained. The conditions are that the young person is released in the care of a "responsible person" who is judged to be able to take care of the youth and to exercise control over him or her. The youth must agree to the proposed arrangement. The determination of who constitutes a "responsible person" is bound

to favour young people with well-heeled fathers and to work to the disadvantage of youths from poor single-parent families. Aboriginal youths with parents thousands of miles away on the reserve don't stand a chance.

The second type of conditional releases with non-financial conditions applies to accused adults and youths after the judges decide they should not be detained. We saw earlier that the police were given the right in 1995 to release accused people who promise to obey specific conditions. These conditions include remaining within a specified area, notifying the police of changes of address and employment, not communicating with named people or not going to specified addresses, leaving a passport with the police, reporting to the police at specified times, staying away from firearms, and abstaining from alcohol or non-prescription drugs. Judges who release accused people at bail hearings can impose any or all of these conditions, as well as any other conditions they consider reasonable.

Many of these non-financial conditions seem very reasonable, such as keeping the authorities informed of one's whereabouts and employment, surrendering one's passport, and staying away from people who have allegedly been victimized by the accused. The condition about firearms makes sense in most cases, but the Law Reform Commission pointed out that it was routinely imposed without a careful examination of each situation on Aboriginal people whose normal way of life included trapping and hunting.[73]

The problem with many of the other conditions listed, and with those often imposed by judges at the prompting of the police, is that they can be very intrusive and criminalize behaviour that is legal for anyone else. One result, anticipated by those who evaluated similar conditions in the United Kingdom, is that these controls can draw some people further into the criminal justice system by making them liable to further trouble if they are caught in breach of the conditions, since any breach constitutes a criminal offence.[74] According to the Law Reform Commission, criminal charges for breaching bail conditions are a double punishment, because violators are also punished by having their bail revoked.[75]

One example of intrusive conditions is orders to abstain from alcohol or illicit drugs. While it might make sense to the police and to judges to issue an order to abstain from alcohol to accused people who allegedly committed offences while under its influence, making it a criminal offence for

an alcoholic to drink is a perfect recipe for failure. The same is true for the use of drugs, but orders to abstain from drugs make less difference because possessing drugs is already against the law.

The worst aspect of orders to abstain from alcohol is that they have a disproportionate effect on one extremely disadvantaged group known to have a high rate of alcoholism: Aboriginal people. Because of poverty and the lack of decent accommodation, Aboriginal drinkers are much more likely to be caught drinking in public than their middle-class counterparts, who can indulge comfortably at home undisturbed by the police. The result of such orders is to make some Aboriginal people fair game for the police, who can pick them up and charge them any time they want. It puts an even faster spin on the "revolving door of despair" too many Aboriginal people already experience.

The Law Reform Commission was also thinking of Aboriginal people when it criticized conditions to stay away from certain persons and certain parts of town. The Commission on Racism found similar problems among Black youths in Toronto.[76] The main problem with ordering suspects to stay away from other accused people or anyone who has a criminal record is that it amounts to social banishment when the co-accused are your best friends or members of your family or when the communities involved have such high rates of arrests and convictions that practically everyone has a history of trouble with the law. Both Black and Aboriginal youths reported having been ordered to stay away from the parts of town where most Blacks or most Aboriginal people live. It is hard to imagine that any judge could believe that keeping someone away from their own people and families could make them better citizens.

Other common conditions involve geographical restrictions. Accused people are forbidden to leave certain areas, or forbidden to leave their homes (house arrest) or, in the case of young people, must obey dusk-to-dawn curfews or orders to attend school. As can easily be imagined, house arrest orders are hard not only on the accused, but on all members of their families, especially if they are poor and live in overcrowded houses or apartments. Geographical restrictions are enforced by various means, including telephone spot checks and electronic surveillance (with a device on a wrist or ankle). Accused people who are caught violating these conditions are arrested and held in custody until their trials for both their original offences (for which they got bail) and for breach of their bail conditions.

Police officers said they often recommend curfews in bail or probation conditions as a strategy to deal with what they perceive to be youth gangs. Young ex-offenders said they "hated" curfews

because they prevented them from "hanging out" with their friends in the evening.[77] Some of the judges and lawyers surveyed by the Ontario Commission on Racism believed that accused youths from minority groups - not only Blacks - were more likely than Whites to be subjected to curfews and other restrictions on their movements.[78]

A 1997 survey of police perceptions of youth crime gave a fascinating glimpse of police views and disagreements. At one extreme were police officers from Quebec, which has the lowest rate of youth incarceration in Canada, who believed that warnings were sufficient for first-time minor property crimes and seldom sent youths to court even for repeat minor property offences. At the opposite extreme were police officers from the Prairies, where incarceration rates are highest (outside the territories), who favoured more incarceration for all types of offences and more intensive police interventions in young offenders' lives "to get at the root causes of their behaviours."[79]

A substantial proportion of the officers from the Prairies, but none of the officers from Quebec, thought the Young Offenders Act should be extended to youths under age 12. The vast majority of the Quebec officers thought that the responsibility for extremely young offenders should be left to parents. Almost all Prairie officers thought that at least some children under 12 would benefit from being brought into the criminal justice system.[80] From their comments, it is obvious that the officers from the Prairies were well intended. They had no understanding that for most troubled young people, contacts with the police and the criminal justice system are not a solution, but a major cause of their problems.

One person who understands this is Judge Heino Lilles of the Yukon. He proposes "a sober recognition that criminal justice processing often increases the likelihood of kids reoffending rather than reducing it."[81] It is also the view of Judge Hugh Atwood of Brampton, Ontario, who believes that "Although there are very good people working in the system, the system as a whole is very wrong headed . . . For every child who was substantially helped, another child was harmed."[82]

Criminologists who are familiar with the effects of taking young offenders to court also agree. On the basis of research done in the United Kingdom, the United States and Canada, they concluded that "the data appear to be reasonably consistent on the effects of criminal justice processing for young people who have not had much contact with the youth justice system: contact with the system often *increases* the likelihood of subsequent offending."[83]

An Australian study took a closer look at the effects of pre-trial detention. It started with a group of young first offenders, some of whom were remanded in custody for a short time prior to trial, while the others were released until their court appearances. Both subgroups (remanded and released) were the same in terms of their age as well as the type and number of their charges. At trial, all the offenders from both groups were found guilty and received sentences of probation. The researchers monitored their records for the next two years and obtained these results:

> The data were clear: recidivism rates were dramatically higher for those who had received the "shock" of being remanded in custody (64 percent) than they were for those who had been sent home (37 percent).[84]

III. SENTENCING THE POOR

Imprisonment for non-payment, when the convicted person has not the means or ability to pay, is, in fact, imprisonment for poverty . . . Your Commissioners are of the opinion that many recidivist criminals receive their first education in crime upon being committed to prison for non-payment of fines.

Archambault Commission, 1938[1]

The persistence of jailing in default of a fine as a Canadian problem is astounding.

Haveman et al., 1984[2]

A sentence is the punishment a judge imposes on someone who has been convicted of a criminal offence. Very few convictions are the result of a trial, because only a tiny proportion of criminal cases, about three percent, go to trial.[3] The main reason trials are unnecessary is that most accused people plead guilty. Another reason is that a substantial proportion of criminal charges are suspended or withdrawn before they get to trial. All aspects of this process, including the criteria used to suspend or withdraw charges, the manner in which guilty pleas are arranged, the way trials are run, and the sentencing rules themselves, work in ways that disadvantage the poor.

Crown Decisions About Criminal Charges

In their role as representatives of the State, Crown prosecutors have the power and the responsibility to stop or suspend criminal proceedings in appropriate circumstances. This can be done any time between the moment a complaint is laid and a judgment has been rendered. Judges have no say in these decisions.

One crucial use of this Crown power is to filter out cases in which there is insufficient legally obtained evidence to obtain a conviction. Without this check on police power, there is always a danger that corrupt police elements might launch criminal procedures that would keep blameless people in jail for months and ruin their lives before a trial finally established their innocence. Crown

filtering also discourages police misconduct and human rights violations by rejecting cases in which evidence was obtained through illegal methods - for example, confessions extracted by violent means.

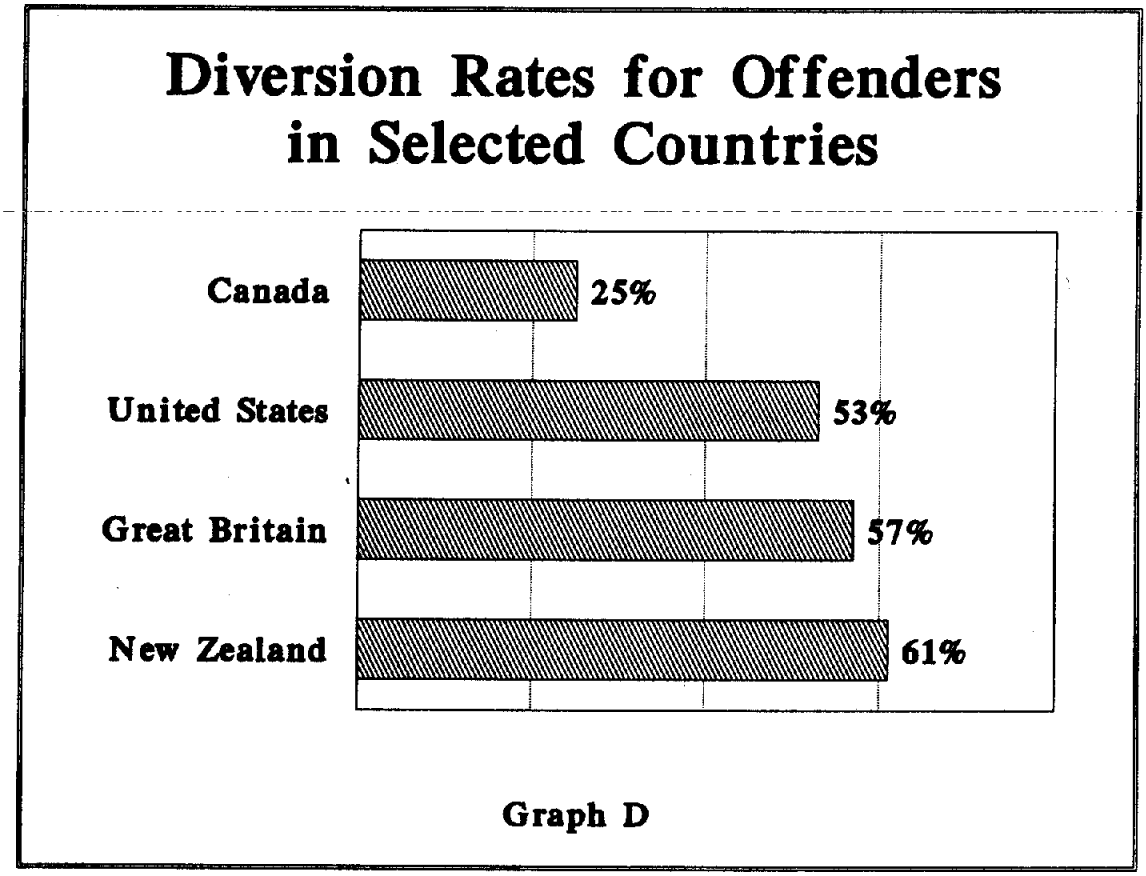
In 1998, Toronto lawyers condemned young prosecutors who "don't have the guts to challenge police officers."[4] In one case that was allowed to go forward, a woman had been illegally strip-searched in the presence of male officers. Other cases had resulted from an "epidemic" of police officers who claimed to smell marijuana as their excuse for illegal fishing expeditions in which suspects were sometimes forced to strip to their underwear in public. Such violations of our Charter of Rights most often happen to poor youths or members of visible minority groups. As mentioned in Chapter II, inadequately supported charges, or charges based on illegally obtained evidence, might explain why the rate of conviction is lower for charges laid against Blacks. Poor filtering by the Crown could also be the reason why Aboriginal accused from Manitoba were charged with more offences at the same time than non-Aboriginal defendants.

Diversion

The most modern use of the Crown's power to suspend or withdraw charges is through diversion, which removes from the formal criminal justice process people charged with minor offences who do not have serious criminal records. At first, this could only be done for young accused aged 12 to 17, but since 1996 it can be done for people of all ages. To be eligible for diversion, the accused must admit responsibility for their offences and agree to participate in alternative measures programs. This usually entails having to perform acts of contrition or redress, such as writing an essay, writing a letter of apology to the victim, performing community service work, providing restitution or compensation, or making a charitable donation. Except in Ontario, those who complete the programs successfully do not have to go to court, although they acquire an RCMP or police record. In Ontario, diversion can happen only following a court appearance.

Diversion saves court time, which is very attractive to clogged courts. It also recognizes that bringing inexperienced offenders into the criminal justice system can do more harm than good. Although diversion is increasingly used in Canada, we are still far behind many other countries in that regard. Graph D, on the next page, compares diversion rates in Canada (25 percent), the United States (53 percent), Great Britain (57 percent) and New Zealand (61 percent). Canada's record

would be even worse if it were not for Quebec, where nearly 50 percent of young offender cases were diverted to alternative measures in 1993.[5]



This is only one of many indications that the widespread impression that Canada's Young Offenders Act is "soft" on youth crime is simply wrong. Another is that in the decade following the introduction of the Young Offenders Act in 1984, the number of charges laid against young people under 18 increased by 60 percent in Ontario, although youth crime had not increased during that period.[6] This was partly due to an increase in police and Crown prosecutor charges, but also to a 1986 Young Offenders Act amendment that made "failure to comply with a disposition," such as a fine, probation, or community service order, a separate punishable offence.[7]

The increase in police activity led to criticisms that they were increasingly charging youths for trivial offences like shoplifting cheap earrings or candy bars, and that as a result, many diversion cases were in reality net widening that brought into the system young people who would not have been brought in before:

> (A)ll too often diversion programs camouflage a new refusal by the Crown to simply withdraw charges that formerly would never have been considered worth a trial, unless the accused agrees to enter into a series of sometimes difficult obligations. All too often these new obligations are ones which, though simple on paper, cannot be fulfilled by the legions of the inept, the handicapped, the resentful, and the poor who comprise our offender population.[8]

As this comment indicates, diversion can have a different impact on offenders depending on their financial situation. More specifically,

> In the case of shoplifting, for example, the goods are generally recovered, eliminating in most cases any need for an order of restitution. As a result, diversion agreements often require the individual to make a charitable donation. Such a requirement leads to a situation of differential impact: requiring a fifty-dollar donation from a person receiving social assistance is proportionately a much larger hardship than requiring the same donation from someone who is employed.[9]

Diversion decisions are also very uneven because of differences in the availability of alternative programs - few or none exist in remote and Aboriginal communities, for example - and the offences covered. People who committed drug offences are only eligible for diversion in the provinces where these charges are prosecuted by provincial Crown attorneys, that is in Newfoundland, Quebec and Alberta. This has serious consequences for Black men, who are massively overrepresented among those charged with drug offences in Ontario.[10] Most worrisome, considering the proportion of poor accused who are denied bail, is that people who are detained in custody until their trials are generally considered ineligible for diversion.[11]

Another type of diversion is used to remove from the justice system people who are mentally ill. An elderly man who had been arrested for minor theft was visibly confused when he made his first appearance in a Toronto court in 1996 to face the charge. Because a new Mental Health Court Support Program had recently been set up, experts were on hand to conduct a quick mental health assessment. When the tests indicated that the man was probably suffering from dementia, the mental health workers recommended diversion and found him a bed in a nursing home.[12]

Mental health court programs are rare, however, and many mentally ill people who appear before Canadian courts end up in jail. A 1990 study of remand prisoners in Vancouver found that 18 percent were severely mentally disordered.[13] These imprisonments probably violated our criminal laws, which specify that mentally incompetent people should be treated, not tried, and should not be convicted for offences committed when they did not understand the consequences of their actions.

The most frequent cause of criminal charges being withdrawn is that victims and witnesses are unwilling to co-operate. Some of these are sexual assault cases in which the victims are reluctant to appear in court or are afraid of revenge. Others involve situations in which the offenders and victims come to an agreement to settle out of court. Quebec critics cite the Belmoral Mine case as a classic example. After ten years of drawn-out procedures, criminal complaints against the company officers whose actions had allegedly caused the death of employees were withdrawn in 1990 after the company committed itself to paying $25,000 to each of the victims' families.[14]

Needless to say, poor offenders are not in a position to make generous offers to their victims. This can be a severe handicap, because "When victims receive restitution, their desire to punish the offender is greatly reduced."[15] Victims who were not compensated for their losses are more likely to insist that charges be proceeded with and taken to trial, even when the offences are relatively small. The wishes of complainants or victims are an important factor in Crown decisions to proceed or not with a case.[16]

Finally, prosecutors' decisions concerning the type of charge can make an important difference. Criminal Code offences are classified into three types: summary conviction offences, which are the least serious; indictable offences, which are the most serious; and mixed offences, which are in the middle and include most offences. In the case of mixed offences, the Crown can choose to proceed as if the offence were either a summary conviction offence or an indictable offence. This choice can have serious consequences for sentencing. For example, a person convicted of the indictable offence of common assault can be sentenced to a maximum of five years in prison and receive an unlimited fine. The same person convicted on summary conviction for the same common assault faces a maximum of six months in prison and a $2,000 fine. (Another difference is that accused people who are charged with indictable offences can choose to be tried by a jury, instead of a judge alone.)

What criteria do Crown prosecutors use to make these decisions? As well as the seriousness of the harm done, the accused's previous record, and the length of time since the offence was committed (because there is a six-month limit on summary conviction), they also consider other, more discretionary factors. The Ontario Commission on Racism found that for charges involving drug offences and assaulting a police officer, Toronto Crown prosecutors were more likely to proceed by indictment when the accused were Blacks. The Commission cautioned that in the absence of details on the incidents, it was not possible to conclude that the differences were due to discrimination.[17] Still, these and many other Crown decisions to proceed by indictment rather than by summary conviction raise concerns because they are heavily based on information contained in police reports.

Legal Representation and Plea Bargaining

If you get in trouble with the law and money is no object, the smart thing to do is to immediately hire the best available lawyers in the field, who are not the same for tax fraud or drug trafficking or driving under the influence of alcohol, for example. For a large fee, they will visit you in jail, in the middle of the night if necessary, and do everything possible to get you out right away, or at bail hearings the next day, because they know that detention increases the likelihood that you will be convicted and receive a prison sentence. They will also be there whenever you are questioned by the police, to ensure that your rights are respected and that you do not make confessions or incriminating statements that can later be used against you.

Well-paid lawyers whose fees are not limited by legal aid tariffs will scrutinize all aspects of your case and take all possible measures to strengthen your defence or have the charges withdrawn. If evidence was obtained by illegal means that violate the Charter of Rights, or if there are other weak points in the prosecution, they will insist that the case be dropped. If this fails and the case goes to trial, they will bring these issues to the attention of the judge. If you are convicted, they can try to appeal the judgment all the way to the Supreme Court. Lawyers can offer generous compensation to victims, locate witnesses who can establish your innocence, vouch for your good character or provide sureties for bail. Lawyers also question their clients about their intentions. If you "borrowed" a car for a joy ride intending to take it back to its owner afterwards, for example, you are not legally guilty of theft, but perhaps of the less serious offence of taking a motor vehicle without consent.

If it turns out that you have a plausible defence, you will be advised to plead "not guilty." You will be warned that pleading guilty "just to get it over with" is almost always a bad mistake, because you will then have a criminal record, and as mentioned earlier, a record can lead to losing your job or being unable to obtain one in the future. A record can also make it difficult or impossible to enter foreign countries. Your privacy may suffer because once your fingerprints, photograph and record are entered into the criminal records computers, you may be targeted as a possible suspect for similar offences in future police investigations. In all future dealings with the criminal justice system, a person with a record wears a "recidivist" label and, after a few convictions, is perceived as a "hardened criminal." Contrary to widespread belief, young offenders' criminal records are not erased when they become adults unless they obtain a pardon.[18]

If you decide to plead guilty, your lawyer will engage in plea bargaining on your behalf. Because so few criminal cases go to trial, the "trial," in the vast majority of cases, is the plea bargaining session which the accused are not allowed to attend.[19] Plea bargaining, as mentioned earlier, refers to the negotiations defence lawyers enter into with the police and Crown prosecutors in order to strike a deal for their clients. Typically, the lawyers commit themselves to convincing their clients to plead guilty in exchange for a reduction in the charge (for example, reducing from assault causing bodily hard to common assault) or a less onerous punishment. The result is "negotiated justice," in which the offenders are let off more easily in exchange for the State being able to save resources to prosecute a greater number of more serious criminals.[20]

If you are a poor person represented by a legal aid lawyer, you cannot expect the same kind of attention. Many legal aid lawyers are very competent, but they work under much more stringent time and income restrictions. In 1998, for example, some Toronto lawyers denounced the "common practice" of defence lawyers who plead clients guilty in the face of "obvious and flagrant Charter violations" because these lawyers do not identify the violations or are unwilling to present Charter arguments that require longer preparation and are badly remunerated under legal aid tariffs.[21] As Ontario's legal aid plan is among the best-funded in Canada - though far from the best, as we showed in our 1995 report, Legal Aid and the Poor - the situation is probably worse in most other jurisdictions.[22] Everywhere in Canada, judgments involving low-income defendants are almost never taken to appeal courts.

Representation by a legal aid lawyer may not be the best possible protection, but it is much better than having no lawyer at all. Our research on legal aid, as well as other studies of poor people

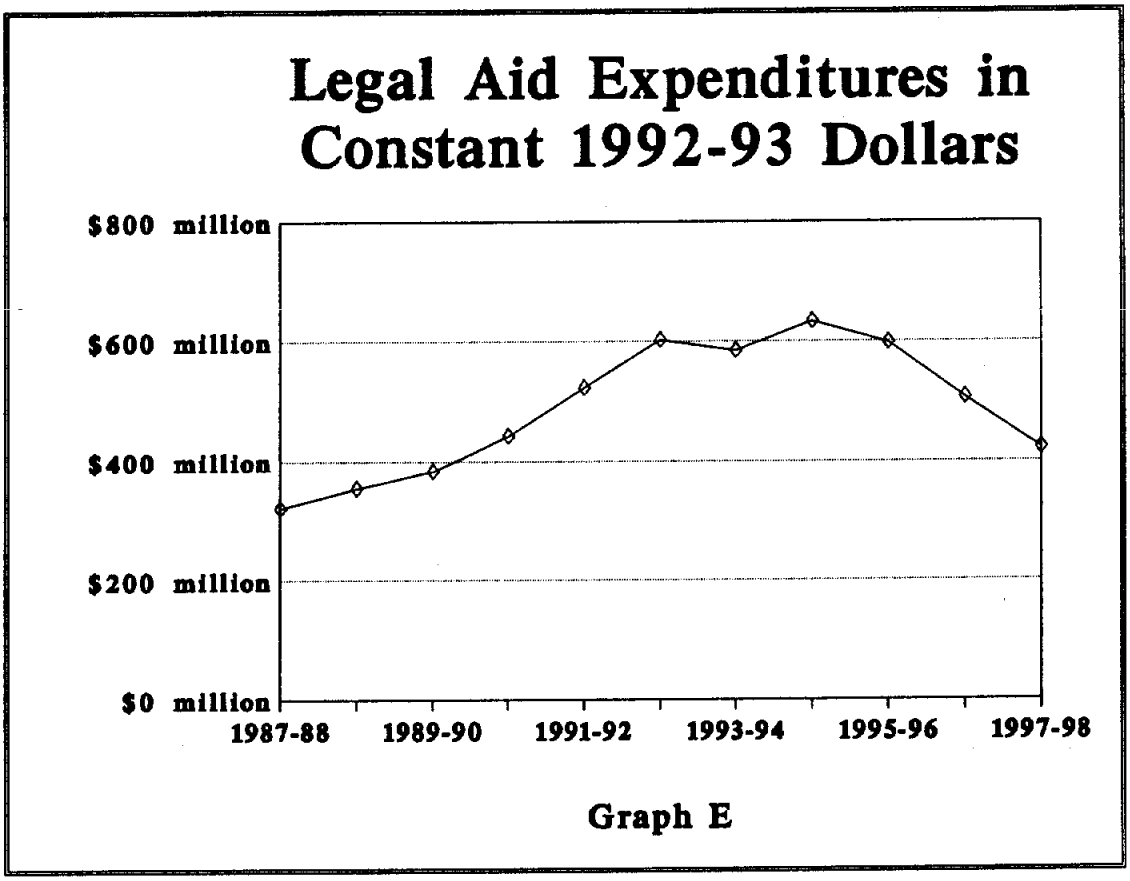
and the criminal justice system, revealed that a large proportion of people who are accused of criminal offences, perhaps the majority, are not entitled to legal aid.[23] The only lawyers they have access to are duty counsel, who are free for everyone but are usually available only for rushed representations at first appearances and bail applications. If the accused do not want to plead guilty and the case goes to trial, or if they plead guilty and sentencing is delayed, as often happens, duty counsel generally cannot provide representation. Courts in areas with large Aboriginal populations have native courtworkers who get high marks for their work, but they have limited legal training and are overworked. Their role is usually restricted to giving basic legal information and helping with legal aid applications, although some courtworkers also make representations to judges regarding sentences.[24]

One main cause of this widespread lack of legal representation is the federal cost-sharing conditions for criminal law cases. The federal government, which pays a substantial share of criminal legal aid services, contributes to the cost of providing legal representation only in cases where the accused are youths under the age of 18 or adults charged with an offence for which "there is a reasonable likelihood that upon conviction, there will be a sentence of . . . imprisonment."[25] In practice, this includes all the more serious indictable offences, but not summary conviction offences unless they are likely to lead to a prison sentence.

These conditions have perverse effects on legal aid services, which come under the responsibility of each province and territory. In the case of summary conviction offences such as shoplifting, disturbing the peace or impaired driving, jail sentences are rare for first offences but are not unusual for second and subsequent offences. As a result, legal aid plans represent all financially eligible accused people under 18, but not all poor people above that age. Adults are represented only when they are accused of serious offences or when they are repeaters who have been convicted of other offences in the past. Because no statistics are kept on the number of adults charged with criminal offences who had previous convictions, it is not possible to know how many accused might be affected by these restrictions.

The other barrier facing accused people who need legal representation is financial eligibility criteria. Our report on legal aid described extreme disparities in these criteria in different parts of Canada, with eligibility for a couple with two children ranging from a maximum income of $13,000 in Quebec to a maximum of $34,000 or more in Ontario.[26] The situation was most critical in Newfoundland, Quebec and Saskatchewan, which excluded almost everyone other than welfare

recipients. Low-income earners were ineligible in almost all jurisdictions. Graph E shows that prospects for improvement in legal aid coverage are not good. After rising almost continuously until 1994-95, legal aid budgets have been in free fall in the past few years.[27]



Graph E

What proportion of the accused who appear before our criminal courts are unrepresented? We do not know, but rumours abound that their numbers have increased in recent years as legal aid budgets were being reduced. The most recent research on this subject was a study of Halifax court statistics which examined charges laid against women between 1984 and 1988. It found that in as many as 43 percent of all appearances in court, the women were not represented by lawyers. Compared to those who had lawyers, the women who appeared alone were less likely to be acquitted or to be given a conditional discharge or probation. They were also twice as likely to be sentenced to pay fines.[28]

This is consistent with the results of a 1981 Halifax study which found that 54 percent of the defendants appearing before the courts were without representation. The authors concluded that this observation alone calls into serious question the reality of the adversary model of justice in our country.[29] Instead of our ideal of justice, which envisions having the police on one side, the defence lawyer on the other side with his or her client, and objective Crown prosecutors and judges who wisely assess the evidence, what we have in about half of the cases is the police and the Crown prosecutor together on one side, the silent accused alone on the other side, and a judge who makes decisions on the basis of inadequate and one-sided information.

One thing is certain: accused people who cannot get legal representation almost always plead guilty whatever the facts of their cases. The Manitoba Aboriginal Justice Inquiry found that lack of legal representation was one of the main reasons why 60 percent of Aboriginal defendants pleaded guilty, compared to 50 percent of non-Aboriginals with similar offences and records. Aboriginal accused were also much more likely to receive a "full sentence," meaning a sentence in which the most serious charge had not been reduced. The fact that 79 percent of Aboriginals had received this "full sentence" on unreduced charges, and 65 percent of non-Aboriginals, seems to indicate that the vast majority of both Aboriginal and non-Aboriginal defendants did not have lawyers to engage in plea bargaining on their behalf. Of Aboriginal women and the courts, the Manitoba Inquiry wrote:

> A number of women commented that they did not understand the court procedures. Some said they could not understand the language that was being used. Some knew nothing other than they were told to plead guilty, so they did.[30]

Imprisoning the Most Disadvantaged

Following decades of complaints that the sentences imposed by Canadian judges were wildly inconsistent and simply reflected their individual prejudices, the Criminal Code was amended in 1996 to specify that sentencing should have the following objectives: 1) to denounce unlawful conduct; 2) to deter the offender and others from committing offences; 3) to separate offenders from society where necessary; 4) to rehabilitate offenders; 5) to provide reparations to victims or the community; and 6) to promote a sense a sense of responsibility in offenders and acknowledge the harm they did. According to some experts, these objectives are almost useless in bringing about more consistency in sentencing, since judges remain free to pick and choose the objectives in the Code that suit their own views.[31]

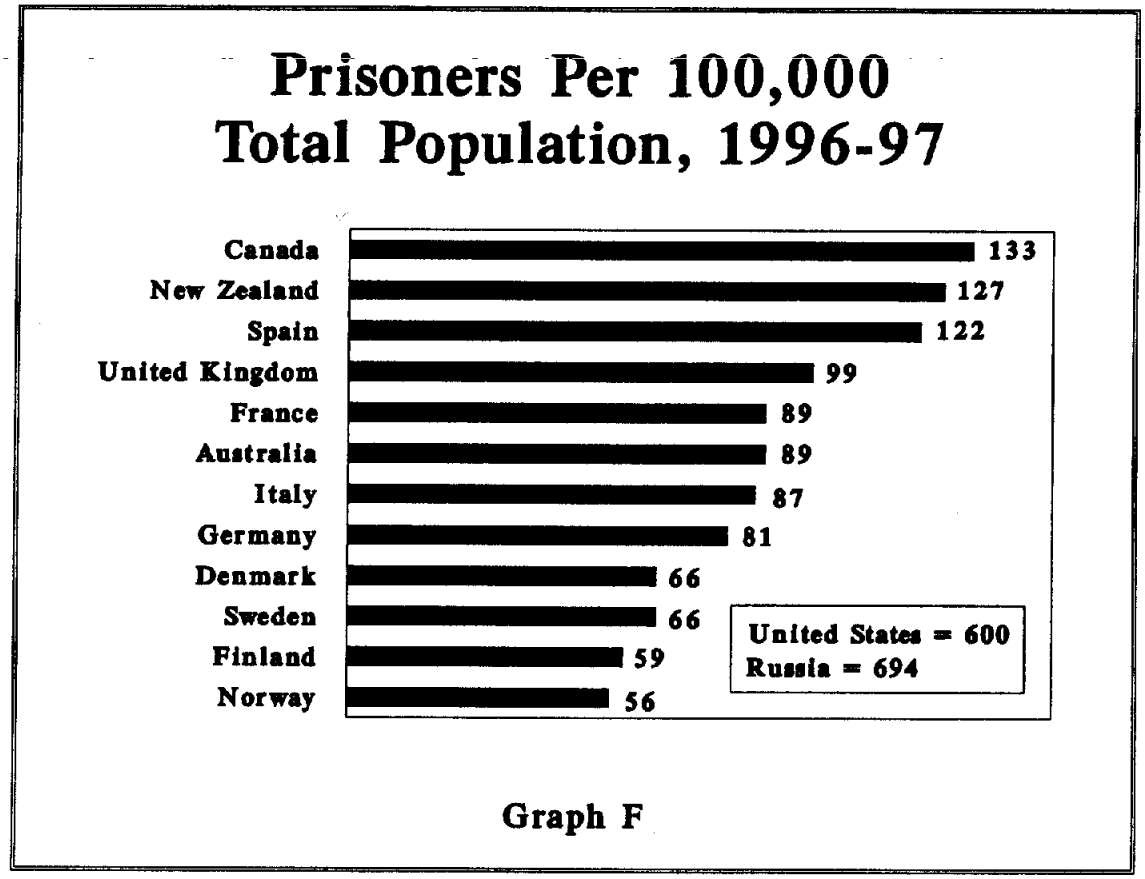
More promising are other 1996 amendments that introduced sentencing principles. The most important are: 1) that a sentence must be proportional to the gravity of the offence and the responsibility of the offender; and 2) that all reasonable available sanctions other than imprisonment should be considered for all offenders, especially if they are Aboriginal. The reason for the special mention of Aboriginal people was the recognition, following the findings from several task forces and commissions of inquiry, that "racism and discrimination have played a major role in the difficulties that Aboriginal people have experienced with the criminal justice system."[32]

In a judgment issued in April 1999, the Supreme Court unequivocally ruled that this new provision concerning Aboriginal offenders was not simply a restatement of existing practices, but new law that requires judges to approach the sentencing of Aboriginal people "individually, but also differently, because the circumstances of aboriginal people are unique."[33] Part of this uniqueness, according to the Supreme Court, is that there is widespread bias against Aboriginal people within Canada, and "evidence that this widespread racism has translated into systemic discrimination in the criminal justice system."[34] The concrete result has been a massive overrepresentation of Aboriginal Canadians in penal institutions:

> By 1997, aboriginal peoples constituted close to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates. The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia.[35]

The purpose of the new Criminal Code provision concerning the sentencing of Aboriginal people, according to the Supreme Court, is to force courts to take special steps to remedy this discrimination. From now on, sentencing judges are obliged to proceed with sensitivity and understanding of the difficulties Aboriginal people face within the criminal justice system and society at large and to take into account "all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an Aboriginal person."[36] If the offender has no legal representation, judges must now do whatever can be done to obtain the necessary information. The Supreme Court expects this fairer process to produce fewer prison sentences for minor offences, but sentences similar to those of non-Aboriginals when the crimes committed are very serious and violent ones.

Commenting more broadly on the new Criminal Code provisions, the Supreme Court wrote that they were meant to respond to the general problem of overincarceration in Canada,[37] and should therefore reduce prison sentences for all ethnic groups. The Court cited figures similar to those which appear on Graph F, showing that although the United States had by far the highest rate of incarceration among industrialized democracies in 1996-97, at 600 prisoners per 100,000 people in the population, Canada's rate was second or third at 133 per 100,000 people. The graph actually underestimates the number of Canadian inmates because it does not include all young Canadians in custody. Except for Spain, all the European countries shown are much less likely to lock up their citizens than Canada.[38]



Graph F

The graph also tells only part of the story. It fails to reveal that Canada's youth justice system sentences young people to custody at four times the rate for adults. Since the introduction of the

Young Offenders Act in 1984 there have been huge increases in the proportion of young people incarcerated, to the point where Canada has become "a world leader in jailing kids."[39]

> . . . the rate of youth incarceration in Canada is twice that of the United States, and ten to fifteen times the rate per 1,000 youth population in many European countries, Australia and New Zealand. Although offences committed by youth are usually non-violent, these offenders are treated by the system similarly to violent offenders. . . Since 1990-91, the number of youths sentenced to custody and the number held in custody on remand have risen by 20 percent. Unlike the adult system, the youth justice system has no parole or other form of conditional release.[40]

Children and adults continue to be imprisoned in droves in spite of the fact that the majority of the experts in the field, as well as every inquiry and commission on the justice system in the past 150 years, have condemned imprisonment as being harsh and ineffective in reducing crime.[41] On the contrary, what they found was that

> Most of those in prison are not dangerous. However, cruel lock-ups, isolation [and] the injustices and harassment deliberately inflicted on prisoners unable to fight back, make non-violent inmates violent, and those already dangerous more dangerous . . .[42]

The recommendations of these reports reveal constant themes, which are that imprisonment does not reduce crime, that it should be avoided if possible, and that it should be reserved for the most serious offences, particularly those involving violence. Echoing these sentiments, the House of Commons Standing Committee on Justice and the Solicitor General wrote the following in 1988:

> Since imprisonment generally offers the public protection from criminal behaviour for only a limited time, rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.
>
> The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society . . . Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments . . . (E)xcept where to do so would place the community at undue risk, the "correction" of the offender should take place in the community and imprisonment should be used with restraint.[43]

Unfortunately, the April 1999 decision of the Supreme Court did not go on to specify when sentences of imprisonment should and should not be used. Many observers of our criminal courts believe that prison populations will not diminish until judges are given no option.[44] It is therefore unclear what effect, if any, the new Criminal Code principles will have on the sentencing of people from non-Aboriginal groups, and especially for Blacks. The Ontario Commission on Racism found that Blacks were more likely to be sentenced to prison than Aboriginal people. In 1992-93, Black men were imprisoned at five times the rate for Whites, while the rate for Aboriginal men was three times the rate for Whites.[45]

The greatest prison overrepresentation the Commission on Racism found in Ontario was for Black and Aboriginal women. The likelihood of being sent to an Ontario prison was five times higher for Aboriginal women and seven times higher for Black women than for women who were White.[46] Studies suggest that judges' reactions to women offenders are similar to those of the police. They tend to be lenient and "chivalrous" with women who fit the traditional female stereotype, who live in "normal" two-parent families and are "dependent, gentle and compliant," and to treat the women who do not conform to this White cultural model the same as men.[47]

Discrimination in sentencing is particularly common with young girls. They are more likely than young men to be brought to youth court and to be detained "for their own protection" on the basis of non-criminal administrative offences such as "breach of bail conditions" and "failure to appear in court."[48] An extreme example occurred in an urban southwestern Ontario court when a judge sentenced a 13-year-old girl to custody for "breach of probation." The reason for the sentence had nothing to do with the girl's trivial offence, but was "out of concern for the fact that the girl had been involved in street prostitution and her history included many serious risk factors for subsequent disturbance, such as sexual abuse."[49] The sentence, which was itself abusive, was overturned on appeal.

The reason for the courts' severity is that many judges feel that "young females cannot protect themselves; the courts, on behalf of the state, must take extraordinary measures to protect them."[50] Like the well-intentioned police officers discussed in Chapter II, who want to bring children under age 12 into the criminal justice system so they can be "helped," judges want to "fix" misbehaviour in young girls. In order to do so, they treat them more severely than adults and young male offenders who commit the same offences, imposing terms

> . . . such as an order to reside in a group home and to report and to perhaps stay away from a certain class of people and maybe so far as to keep her out of a certain area of town, on the first offence. Now what they have been able to do very successfully is criminalize that entire young woman's social behaviour . . . Now if she tries to follow her social conduct, she is dragged before the courts on a 524 warrant breach of undertaking and the process starts again. And it gets gradually more punitive each and every time. . . More conditions are added until finally there is a detention order on someone that should have been released on a straight undertaking to begin with.[51]

Participants in a conference of the Law Society of British Columbia condemned this use of the criminal justice system to try to fix social problems:

> How should the laws, policies, and procedures be changed to improve the justice system's response to female juvenile offenders? Female juvenile offenders typically reject persons in authority; in most cases, the previous authority figures in their lives abused their trust. When the courts attempt to control their behaviour, the cycle begins again. A different approach is needed to address the problems. . . particularly runaways. The judiciary should not use the criminal process to fill the gaps in child welfare policy because the ultimate response within the criminal system must be incarceration . . . Resources should be used to fund public and private organizations that are able to address the needs and problems of these young women.[52]

Even if judges treated men and women equally in handing out sentences, the impact would be harsher on women. Because more women have incomes below the poverty line than men, they cannot afford to pay the same fines. Most imprisoned women are poor mothers, and the worst offence many of them committed is shoplifting.[53] The study of women who appeared before Halifax courts between 1984 and 1988 found that the major crime they were charged with - accounting for 42 percent of all the charges - was theft under $1,000. Overall, 68 percent of the charges were for crimes against property. The number of charges for theft under $1,000 started to increase in August - when children need school clothes - and peaked in December, around Christmas time.[54]

There is also evidence that imprisonment may be psychologically harder for women than men. Part of it is that there are fewer women's prisons, making the distances longer between the women's home communities and the institutions. The impact of confinement may also be more severe for women because a greater proportion were victims of physical and emotional abuse. At least 80 percent of federally sentenced women were abused, and an even greater proportion of Aboriginal women. Self-injurious behaviour, including suicide, attempted suicide and self-mutilation (slashing)

is more common in women's prisons than in men's. In 1991-2, six Aboriginal women committed suicide at the Prison for Women in Kingston, Ontario, which housed only about 110 women.[55]

Most painful for women inmates, perhaps, is the separation from their children. The cost of incarcerating female offenders includes child care and also the immense human cost of separating mothers from their children. It is not unusual for inmate mothers to be declared "unfit" parents whose children are taken away by child welfare authorities. Women's prison conditions are also harsher than men's. Because there are so few of them compared to male inmates, minor and serious female offenders are often housed together in maximum-security institutions, and female prisoners have access to a much smaller range of programs, treatment facilities and resources.[56]

No study has been done to establish whether the new Criminal Code sentencing principles made a difference in the sentences judges hand out to Aboriginal and Black men, to poor female offenders, or to the street people who are the traditional clients of the criminal justice system. We hope the new principle according to which a sentence must be proportional to the gravity of the offence will curb judgments like the ones described in a 1997 Quebec report. In one case the researchers saw, a homeless man who stole a bottle of wine from a grocery store was charged with an indictable offence and sentenced to one year in prison. In another case, a homeless man who was clearly mentally disordered was given nine months in jail for taking a construction hat from a construction site. He was still wearing the hat when the police arrested him minutes after the "theft."[57] Without vigilant legal aid lawyers who will take bad judgments and bad sentences to appeal courts, such cases will persist whatever new provisions are added to the law.

Disparities in Sentencing

Apart from ordering harsher punishments to members of disadvantaged groups, how consistent have Canadian judges been in handing out sentences? To find out, researchers gave a group of judges the same hypothetical cases, asking them what sentences they would hand down in such situations. The answers varied tremendously, with the greatest differences showing up for a case of assault causing bodily harm (the loss of sight in one eye). The judges' sentences ranged from a $500 fine with six months' probation to five years in a penitentiary.[58] Given such huge disparities, it is not surprising that stories circulate about lawyers who advise their clients to do anything, including breaking a leg if necessary, to avoid appearing before some notorious "hanging judges."

Huge disparities in sentencing exist both within and between Canadian jurisdictions. One survey concluded that there were wide differences in the sentences of offenders charged with possession of marijuana in five locations in Ontario.[59] Disparities in sentencing between the provinces and territories are also huge. One indication is different rates of imprisonment. In 1994, the number of adult sentenced inmates actually in prison on a given day per 1,000 residents was: 1.43 in Newfoundland, 1.27 in Prince Edward Island, 1.52 in Nova Scotia, 1.22 in New Brunswick, 0.88 in Quebec, 0.76 in Ontario, 1.43 in Manitoba, 1.93 in Saskatchewan, 1.29 in Alberta, 0.81 in British Columbia, 2.56 in Yukon, and 7.08 in the Northwest Territories. The average for Canada was 0.98.[60]

Among the provinces, Ontario had the lowest rate and Saskatchewan the highest. Both territories had much higher rates than the provinces. The Northwest Territories, the only Canadian jurisdiction in 1994 where the majority of residents were Aboriginal people, had a phenomenally high rate of 7.08 people in prison per 1,000 inhabitants. The United States, which is the country with the highest incarceration rate in the Western world as mentioned earlier, had a rate of imprisonment of 6.0 in 1994.[61]

Apart from differences in the severity of judges, the other possible explanation for the disparities in incarceration rates between the jurisdictions is differences in the number of criminal charges. The rationale behind this explanation is that perhaps judges from some jurisdictions send more people to jail because they hear proportionally more cases and issue proportionally more sentences than their colleagues in other provinces and territories. As we saw in Chapter 1, higher official crime rates and higher rates of criminal charges do not necessarily reflect more real offences but may be the result of stricter enforcement policies, or of stronger police forces that launch more investigations and lay more charges for minor offences.

Crime rates do not explain disparities between the jurisdictions, however, because when researchers looked at the number of prison inmates per 1,000 people charged with crimes, instead of per 1,000 people in the population, the results still showed huge differences in the rates of imprisonment.[62] The rank order of the jurisdictions was changed, though, indicating that charging more people with crimes has some effect on imprisonment. This relationship seems clearest for the jurisdictions with the highest rates of criminal charges, which are the Northwest Territories (rate of 89.6 charges per 1,000 residents in 1994), Yukon (67.0), Saskatchewan (40.2), Manitoba (33.7) and Alberta (33.1).[63] These jurisdictions also had the highest or near-highest rates of imprisonment.

But outside these jurisdictions, there seems to be little relationship between rates of criminal charges and rates of imprisonment. Newfoundland, Prince Edward Island, and Quebec, for example, had very different rates of imprisonment but shared the same lowest rate of criminal charges (21.8 per 1,000 residents). Charge rates for the remaining provinces also seemed to have little relation to the number of people they sent to prison. They were: Nova Scotia (25.5), New Brunswick (22.4), Ontario (23.7) and British Columbia (27.1).[64]

Another, more direct source of information on disparities in prison sentences in different parts of Canada is the sentences judges issue for specific offences. This is shown in Table 2 on the next page, which gives the rates of incarceration and the average prison sentences in nine jurisdictions for selected relatively minor offences for years ranging from 1993 to 1995. This information is available only for provincial (lower) courts, which means that a small number of the more serious instances of the offences listed are not included. Figures for New Brunswick, Manitoba and British Columbia were not available. The nine jurisdictions shown represent about 85 percent of all cases reported to the police.

The top part of Table 2, which shows the percentage of cases where judges issued a prison sentence, reveals consistently different approaches. It shows that Ontario judges handed out more prison sentences than judges from the other provinces for practically all the offences listed. This is surprising because we just saw that Ontario has the lowest rate of imprisonment in Canada. Next in severity were judges from Prince Edward Island, who were less consistent in sending offenders to jail than their Ontario colleagues, but who had the highest overall rate of imprisonment for these offences at 42 percent. Territorial judges also seem to have been very severe for cases involving Level 2 assaults, which are assaults with a weapon or causing physical harm.

At the other end of the spectrum are judges from Quebec and Nova Scotia, who consistently sent the smallest proportion of offenders to prison for all the offences listed. Judges from Saskatchewan and Alberta also sent relatively few offenders to jail, which again seems surprising because we saw above that these provinces have the highest provincial rates of imprisonment.

TABLE 2

INCARCERATION RATES AND AVERAGE PRISON SENTENCES BY JURISDICTION, 1993-1995[65]

1) PERCENT OF CASES WITH A PRISON SENTENCE

Offence	Nfld.	P.E.I.	N.S.	Que.	Ont.	Sask.	Alta.	Yukon	N.W.T.	CANADA
Assault, Level 2	50	43	32	19	59	32	45	61	77	49
Assault, minor	10	39	8	5	25	11	16	23	26	20
Break & enter	55	78	46	33	72	47	56	33	37	61
Posses. stolen goods	18	16	16	12	43	29	25	43	18	39
Theft under $1,000	4	9	7	20	26	9	11	27	24	20
Mischief under $1,000	14	16	4	9	19	7	6	8	11	13
Impaired driving	20	75	4	8	23	12	12	29	20	16
Drive disqualified	42	14	16	36	78	20	41	65	30	53
Fail to appear	51	38	22	24	62	22	16	47	37	50
Fail to comply	50	63	31	28	62	25	28	57	21	45
Drug possession	5	3	3	9	20	6	5	6	2	15
Total for all offences	19	42	10	15	34	17	19	31	25	26

2) AVERAGE PRISON SENTENCE IN DAYS

Assault, Level 2	61	167	147	164	115	195	161	119	200	132
Assault, minor	56	20	59	83	46	97	66	66	78	51
Break & enter	92	270	337	275	190	245	236	70	171	210
Posses. stolen goods	44	11	73	114	83	123	111	53	45	85
Theft under $1,000	14	36	41	63	46	78	66	27	52	47
Mischief under $1,000	38	17	33	67	38	66	55	38	54	44
Impaired driving	47	10	44	55	45	34	54	61	45	46
Drive disqualified	53	85	29	51	47	79	67	30	30	53
Fail to appear	22	17	39	32	32	37	33	23	26	32
Fail to comply	27	32	37	53	39	49	40	29	36	42
Drug possession	29	9	37	48	39	42	55	25	14	41
Total for all offences	48	33	101	71	54	85	80	54	84	60

The bottom part of Table 2, which gives the average length of the prison sentences ordered by judges, helps reconcile these contradictions. It shows an inverse relationship between the percentage of offenders judges sent to prison and the length of the prison sentences they ordered. Judges from Ontario and Prince Edward Island, who sent more people to jail than their provincial colleagues, imposed the shortest sentences, presumably because the offenders they sent to jail were less deserving of severe punishment. For Ontario, the combined effect of jailing more minor offenders for shorter periods of time produces a relatively low rate of imprisonment in provincial prisons.

Judges from Quebec, Nova Scotia, Saskatchewan and Alberta, on the other hand, sent a much smaller percentage of convicted offenders to jail but issued the longest sentences. The overall result for Quebec and Nova Scotia is a relatively low rate of imprisonment in provincial prisons. Things are different for Saskatchewan and Alberta, which have the highest rates of imprisonment in provincial prisons, perhaps because of their very high rates of criminal charges. If more criminal charges are the explanation, Table 2 may give a false impression of leniency in the sentences of judges from these Prairie provinces, because their caseloads might contain a greater proportion of trivial charges than in other jurisdictions. This is partly confirmed by complaints that the police forces of these provinces harass Aboriginal people with minor charges.[66] The same may be true in the Northwest Territories.

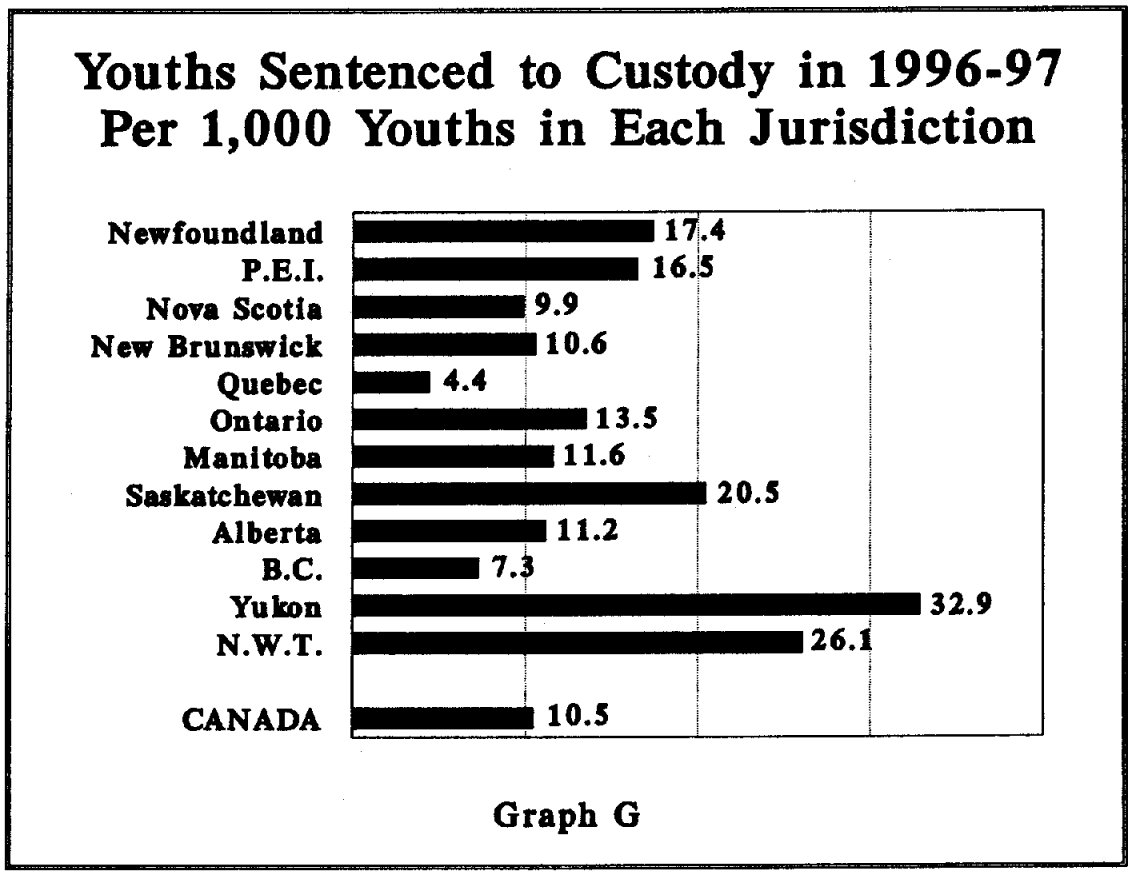
Table 2 also reveals that most of the people judges send to prison did not commit violent offences. According to a 1990 report by the federal Justice Department,

> In federal institutions, the percentage of offenders admitted for violent crimes has risen in recent years, although a significant percentage are still admitted for property crimes. Minor property or alcohol-related driving offences have accounted for the highest percentage of admissions to provincial institutions for the last several years. The offences of theft, possession of stolen goods and break and enter [burglary] are the next highest offences on admission. The statistics consistently show that three out of every ten admissions are for fine default.
>
> Concern has been expressed about the appropriateness of using incarceration for property and non-violent offenders. Crowded prisons are not schools of citizenship.[67]

Determining whether the provinces and territories make consistent justice decisions is even more difficult for young offenders than for adults because less information is available, especially from Ontario and Quebec. One comparison that can be made relates to the number of young people

sentenced to correctional facilities per 1,000 youths in the jurisdiction in 1996-97. This is similar to the rate of admissions of young people during the year; it counts the same people more than once if they are admitted more than once in the year.

According to Graph G, Yukon was far more likely to send youths to correctional facilities than the other jurisdictions, with 32.9 young people sentenced to incarceration per 1,000 youths in the population. Next highest and above the national average of 10.5 were the Northwest Territories (26.1), Saskatchewan (20.5), Newfoundland (17.4), Prince Edward Island (16.5), Ontario (13.5), Manitoba (11.6), Alberta (11.2) and New Brunswick (10.6). The jurisdictions with the lowest rates were Quebec (4.4), British Columbia (7.3) and Nova Scotia (9.9).[68]



Graph G

When such disparities in youth incarceration were discussed before the House of Commons Justice Committee in 1997, criminologist Anthony Doob presented the results of a study he had done

on similar youth court statistics for the provinces of Quebec, British Columbia, Ontario and Saskatchewan:

> Ontario and Saskatchewan bring dramatically more youth cases to court, find more youth guilty of offences and put more of them into custody than do the provinces of British Columbia and Quebec. It is unlikely that this variation reflects differences in the behaviour of young people in these provinces. . . In fact, there is no evidence to suggest that young offender-aged youth in Quebec and British Columbia are more law abiding than their counterparts in Ontario and Saskatchewan. Rather, these findings are attributed to disparities between the provinces in the use of more informal or community-oriented approaches, including police diversion/cautioning and pre and post-charge alternative measures, for minor offences committed by youth.[69]

Sentences and Factors Used in Sentencing

If Canadian judges are too severe and send too many poor offenders to prisons, why do opinion polls regularly indicate that most Canadians believe sentences to be too lenient? When the public was asked more specific questions, the answers revealed that most people have very little idea of actual sentencing practices and draw their information from sensational media stories that denounce exceptionally lenient sentences.[70] When the Canadian Sentencing Commission, which was appointed by the federal government to do a major study on the subject in the late 1980s, asked a representative group what proportion of crimes they thought involved violent acts, three-quarters estimated that 30 to 100 percent of crimes were violent, while the reality was close to 6 percent. They also believed that about 50 percent of ex-offenders committed other offences while they were still on parole (supervised release), while the actual figure is around 5 percent.[71]

Canadian studies carried out in the past decade found that the gap between the public's and judges' perceptions of sentences is exaggerated. When members of the public and judges were asked what sentences they would hand out in identical cases, the vast majority of both groups agreed on which offenders should be sent to jail.[72] And when ordinary people were given more information about the types of sentences judges can choose from, they actually became less punitive than the judges and recommended fewer sentences of imprisonment for some types of offences. The Canadian Sentencing Commission concluded that the public wants more severe sentences for violent offenders, but that it favours limitations on imprisonment for the non-violent offences that make up the bulk of criminal and prison caseloads.[73]

How do judges make decisions on sentences? One influential factor is previous sentences issued by other judges, especially by higher courts. These past decisions suggest a range of punishments for each type of offence, from very severe to very lenient depending on a large number of possible mitigating and aggravating circumstances, such as a supportive family background (mitigating) or a previous criminal record (aggravating). Within such loose upper and lower limits, which are not necessarily binding, sentences are very individual decisions based on judges' personal views, life experiences and cultural values. Almost always, they are the views, life experiences and values of White upper-middle-class men who have at best a vague understanding of the life conditions of the mostly poor offenders on whom they pass judgment.

Sentences for relatively minor offences are usually made in minutes, with almost no information about the offenders' backgrounds and the circumstances that led to their offences. This maximizes the risk that these decisions will be influenced by stereotypes, which are preconceived expectations about certain groups of people. Experts who know how judges make decisions advise people who are about to be sentenced: "You need to make a good impression on the judge. When you go to court, be clean and neatly dressed . . . be polite . . . show respect for the court . . . call the judge 'Your Honour,' speak clearly . . . don't eat or chew gum."[74] People who work with women offenders say that "Many women cannot afford to dress 'respectfully'."[75]

For more serious cases and for young offenders, judges often order pre-sentence reports that are usually prepared by probation officers, most of whom are White middle-class men. Victims also sometimes make "impact statements" to the court if they wish. Pre-sentence reports are very influential, with studies showing that judges follow their recommendations in 80 to 85 percent of cases.[76] Comments about the harm done by the insensitivity of some of these reports reveal very narrow conventional standards of behaviour for offenders. Aboriginal offenders often receive negative assessments because they are perceived as being withdrawn, unresponsive and showing little remorse.[77] Black offenders often receive negative assessments because probation officers perceive them as being aggressive, troublesome and uncooperative.[78] White middle-class offenders, who share the judges' values, instinctively know they will receive more lenient sentences if they are, or pretend to be, humble and remorseful.

In the rare cases where the person being sentenced is rich, the sentencing scene becomes an elaborate stage. As sometimes seen on television, rich offenders stride into the courtroom surrounded by teams of sad but supportive family members and high-powered lawyers, all of them looking

wonderful with expensive haircuts and designer suits. Psychiatrists are brought in to describe obscure syndromes that supposedly caused the defendants to lose control. (The most imaginative was the "Twinkie defence" used in a California trial, where a killer was found to have diminished responsibility as a result of eating too much junk food.)[79] Even if the offence was heinous, such as murder, rape, or defrauding people of millions of dollars, pillars of the community come forward to testify with tears in their eyes that the offence was a tragic exception to a life of virtue, and that the offenders are the kindest and most generous persons they have ever known.

Strange as it may seem, the severity of the harm caused is often the least important factor judges and juries take into account in sentencing. A textbook on criminal justice illustrates this with the following example:

> On the same day in June 1985, Robert Rowbotham, 35, of Toronto, and Michael Waite, 22, of Drayton, Ontario, were sentenced in different Ontario courtrooms for the crimes of drug trafficking and criminal negligence causing death. Both charges carried a maximum sentence of life imprisonment . . . Rowbotham was sentenced to 20 years in a federal prison for his part in a large marijuana importing drug operation . . . Waite received a sentence of two years less a day in a provincial jail after killing four teenagers on a hayride. He was driving down the wrong side of a road with only his foglights on in the dark, after drinking seven bottles of beer.[80]

Judges have many choices of sentences to impose. The types of sentences are essentially the same for adult and youth offenders, but in most cases the fines are smaller and the lengths of the punishments are shorter for young people. (For very serious offences, youths are sometimes tried in adult court and subjected to adult sentences.) The main sentences are absolute and conditional discharges, fines, community sanctions and imprisonment.

Absolute and conditional discharges

Receiving a discharge means that you pleaded guilty or were found guilty of an offence but were not officially convicted. People who get an absolute discharge do not have a criminal record, and if someone asks a person who received any type of discharge whether he or she has ever been convicted of a criminal offence, the person can truthfully say no. With an absolute discharge, there is no sentence to serve. A conditional discharge, on the other hand, places you under a probation order requiring you to "keep the peace and be of good behaviour" and to obey whatever conditions

the judge finds necessary in the circumstances. If you fail to respect the probation conditions or if you commit other offences, the discharge can be replaced with another sentence.

Discharges cannot be granted for very serious offences and are almost never granted to people with previous convictions or to people who were denied bail and held in detention. The main criteria are that the offender be "a person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions."[81] Deciding whether a person you see for two minutes is of "good character" is a chancy exercise. According to a native courtworker who saw many judges make these decisions, "the difference between a discharge and a record is a neatly pressed pair of pants."[82]

The second criterion, on "significant repercussions," also works to the advantage of the haves and against the have-nots. If you are a poor unemployed young man with dim future prospects, a criminal record will hurt you less than if you are a well-employed man who risks losing his job. In 1998, an Ontario court granted a discharge to a police officer who had been found guilty of assault causing bodily harm. After he and another officer had stopped a car and the driver had lightly jostled the other officer - who considered the shove insignificant - the first officer punched the driver in the face. The court ordered a conditional discharge because the officer had been a police officer for 20 years, was of previous good character and might be hampered in his new career as a real estate agent by having a criminal record.[83]

Fines

The fine is the most common punishment for adult offenders sentenced in provincial courts, which hear most criminal cases. It may also be the most common sentence in higher courts, but this information is not available. It has been said that "Prison symbolises our idea of punishment, but by and large, our practice is defined in terms of taking money away from people for the crimes and offences they commit."[84]

Fines are imposed alone or with other sanctions for almost all types of offences, but they are most common in cases of first offences of impaired driving, for which the Criminal Code imposes a minimum fine of $300, and for morals charges such as soliciting for purposes of prostitution. Here is how Toronto defence lawyer Clayton Ruby explains the popularity of fines:

> Everyone loves the fine. It has been said that the fine is simple, uncomplicated, adaptable, and popular, because it involves no expense to the public, no burden on the prison system, no social dislocation and less stigma than most other criminal sanctions.[85]

Unfortunately, Mr. Ruby is wrong. If you are a poor person who has no money to pay a fine and who risks ending up in jail for non-payment, you do not love the fine. How many people end up in prisons for fine default? Table 3 on the next page shows that in 1997-98, 29,514 people were admitted to provincial prisons for non-payment of fines. Quebec had the largest number (14,927), followed by Alberta (12,709) and far behind by Ontario (679). In proportional terms, Alberta had an exorbitant rate of imprisonment for non-payment of fines, at 60.7 persons per 10,000 adult residents, followed by Quebec with a rate of 26 per 10,000 and then Prince Edward Island with a rate of 8.5. Figures were not available for the territories. The vast majority of the people admitted to prison because of fines are there because they have no money to pay, and a disproportionate number are Aboriginal people.[86] Table 3 shows all types of imprisonment for fines, including those under federal criminal laws and for quasi-criminal provincial offences such as traffic violations.

Who goes to prison for non-payment of fines and what offences did they commit? Very little recent information on this is available, and none on young offenders. Almost the only thing we know about the situation in Alberta is that more than three-quarters of the imprisonments for fine default in that province in 1997-98 were for violations of provincial laws and municipal bylaws. A study of women inmates in 1989-90 found that fine default played a major role in their incarceration, especially for Aboriginal women in the Prairie provinces. The proportion of female inmates admitted for fine default was 47 percent in Saskatchewan, 39 percent in Alberta, 30 percent in Manitoba, 29 percent in Ontario and 22 percent in Quebec.[87]

A 1994 Quebec survey found that 35 percent of the imprisoned defaulters had been fined for offences under the Criminal Code or other federal criminal laws (average fine of $262 or, in case of default, average of 26 days in prison), 10 percent for both federal and provincial offences (average $1,366 or 50 days), and 55 percent for violations of provincial laws (average $342 or 13 days) or municipal bylaws (average $116 or 8 days). The vast majority (65 percent) of the fines had been issued for driving/traffic offences, mostly under provincial laws (45 percent). The rest of the fines were for thefts and other property offences under the Criminal Code (5 percent), violations of drug laws and other federal statutes (3 percent), assaults and other offences against the person (2 percent), illegal hunting, poaching and other violations of provincial laws (2 percent), failure to appear in court

and other Criminal Code violations (15 percent) as well as unspecified municipal offences (8 percent).[88]

TABLE 3

ADULTS ADMITTED TO PROVINCIAL PRISONS IN 1997-98 FOR FAILURE TO PAY FINES (INCLUDING FINES FOR FEDERAL CRIMINAL OFFENCES AND FOR QUASI-CRIMINAL PROVINCIAL AND MUNICIPAL OFFENCES)[89]

	1990-91	1997-98	Rate per 10,000 Adult Residents in 1997-98
ALL PROVINCES*	40,369	29,514	12.8
Newfoundland	468	12	0.3
P.E.I.	420	87	8.5
Nova Scotia	251	402	5.5
New Brunswick	259**	114	1.9
Quebec	7,273	14,927	26.0
Ontario	10,367	679	0.8
Manitoba	1,647	72	0.8
Saskatchewan	523	195	2.6
Alberta	17,425	12,709	60.7
British Columbia	1,736	317	1.0

* No figures were available for the territories.
** This New Brunswick figure is for 1993-94. No earlier figure is available.

The majority of these inmates were poor single unemployed men under the age of 35 whose levels of education were below the provincial average. Those who had been employed at the time of their arrest almost all had poorly paid and insecure jobs. Four percent were students. Three-quarters of the fine defaulters had been to prison before, in about half the cases for other fines. Very

few had gone to prison of their own free will. Instead, most had been arrested and brought in by police officers, usually after stops for routine inspections or for small offences. The police then discovered in doing computerized checks that the offenders had outstanding detention warrants. This was most likely to happen to street people and to men who drove dilapidated cars that attracted police attention because they violated motor vehicle safety regulations.[90] We will see later why enforcement was so passive in these cases.

The National Council of Welfare believes that the current system is blatantly unfair to poor people. Since capital punishment has been abolished in Canada, imprisonment is "the ultimate weapon of the criminal law,"[91] the most severe punishment we have for serial murderers, vicious rapists and other loathsome people. How can a system have any pretensions of fairness when it imprisons the poor just for being poor, while it sends to prison 41 percent of those who appear before provincial courts for (mostly minor) violent crimes? According to the Law Reform Commission of Canada, "the whole system of criminal justice becomes suspect when the fine is seen not as a sanction but as a means of purchasing liberty."[92] The only people who should be sent to prison for fines, according to many justice inquiries, are those who wilfully refuse to pay even though they can afford it.[93]

A century ago, our ancestors recognized the inhumanity of the practice of imprisoning people for debt and abolished it for civil matters. Imprisonment for debt was also abolished because it is a stupid practice that is expensive to taxpayers and places debtors in a position that makes it impossible for them to repay what they owe. Since the Charter of Rights came into force in 1985, commentators argued that imprisoning people for fines without bringing them back before a judge immediately before they are detained, to give them a chance to explain why they cannot pay, and to ask for a further delay or an alternate sentence, violates the Charter's provision that "Everyone has the right to . . . liberty . . . and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[94]

This is not to say that nothing has been done to improve the situation. As Table 3 shows, the number of people sent to prison for fines has greatly decreased between 1990-91 and 1997-98, from a total of 40,369 annual admissions to a total of 29,514. The exceptions are Quebec, where the numbers doubled during that period, and Alberta, where the drop has not been as substantial as elsewhere.

One factor in the overall reduction was legal decisions, followed by changes to the Criminal Code in 1996, which made it clearer that judges must not impose fines unless they are satisfied that the offender is able to pay or is able to discharge the fine under a community service work program. In addition, the Criminal Code now states that no warrant to imprison can be issued against someone who has failed to pay a fine within the period allowed until the judge has verified a) that other means to collect have been considered first, including suspension of a driver's license or other permits, or civil collection procedures; and b) that the offender has, without reasonable excuse, refused to pay the fine or to discharge it under a community work program. This means, in effect, that it is now against the law to imprison people for non-payment of fines for criminal offences without bringing them again before a judge immediately before the imprisonment to give them a chance to explain their failure to pay.

Another reason why imprisonment for fines diminished in Canada since 1990 was the setting up by the provinces and territories of community work programs, usually called Fine Option programs, to allow people who owe fines to discharge them by doing "volunteer" work whose value is counted on the basis of the provincial minimum wage. The first of these programs was established in Saskatchewan in 1975. The Quebec version is called a Compensatory Work Program and is not an option because people who can afford to pay fines are not allowed to participate. In defence of this policy, Quebec officials said that offenders should not have the right to choose their own sentences and that when people who could pay refused to do so, the government should proceed through a civil action and save community work opportunities for those who are truly unable to pay.[95] Given the scarcity of funds for community work these days, this seems to be a fair decision.

Why does imprisonment for fines persist in spite of these changes in the criminal laws and the establishment of community work programs? The most important reason seems to be the procedures for imposing fines under provincial laws, such as the Highway Traffic Act (including parking tickets) and the Liquor Control Act, as well as under municipal bylaws, which do not take into account people's ability to pay. This problem is expected to worsen, and the periods spent in jail for fines to get longer, as more provincial, territorial and municipal fines are imposed for more offences and as the fine levels keep being raised by governments in need of additional revenue.[96]

Other possible problems are that community work programs are not as well funded as they should be and are mostly concentrated in larger centres. Insecure funding is a constant worry for these services because they are usually run by private non-profit organizations whose budgets have

been slashed in these times of government cutbacks. In Quebec, a recent report by the ombudsman severely criticized the shortsightedness of the provincial government, which on the one hand adopted a policy of incarcerating as few people as possible, but at the same time reduced its budget for Compensatory Work Programs.[97]

This was not the only inconsistency in Quebec's position on incarceration. The other was a long-standing provincial policy, based on a controversial legal interpretation, to the effect that people whose fines resulted from violations of the Criminal Code and other federal statutes were not eligible to pay off these fines through the provincial compensatory work programs. In the 1994 study described above, this eliminated from participation close to half of all those who were imprisoned for fines in Quebec. As mentioned earlier, 35 percent were imprisoned for fines resulting from ineligible federal offences, and an additional 10 percent were only partially eligible because they owed fines for both federal and provincial or municipal violations.

The 1996 changes to the Criminal Code relative to fines removed the legal justification for these exclusions. It was not until April 1999, however, that the policy was officially changed and that people whose fines had been imposed for offences under the Criminal Code and other federal laws were allowed to participate in Quebec's compensatory work programs. The first batch of "federal" clients was referred to compensatory work organizations in the summer of 1999, which means that the effects of this change will only become apparent in Statistics Canada's figures for 2000-2001.[98]

Even if the new system produces a 45 percent reduction in imprisonment for fines, which is unlikely, it would still leave more than 8,000 admissions a year to Quebec prisons for fine default. When a Quebec Justice Department spokesperson was recently asked if anything was planned to correct the situation, he answered that the problem was only apparent.[99] According to him, very few fine defaulters actually spend any time in prison because Quebec prisons have been overcrowded in recent years. As a result, enforcement against fine defaulters has been minimal, and many of those who were brought to prisons for fines were sent back home almost immediately because there was no room to take them in.

Because overcrowding varies from one region to another and even from one day to another, the result appears to have been a kind of lottery system in which some Quebec fine defaulters were jailed and some were sent home, depending on when and where the police executed warrants. And

now that Quebec's general policy of decarceration is starting to bear fruit and its prisons are less crowded, it can start again to take in all the fine defaulters who are brought to prison!

At the national level, another frequent criticism of community work programs is their insensitivity to the needs of certain groups. Some tasks require literacy and other abilities that ensure failure for many offenders. Organizations representing Aboriginal people have long stressed the necessity of creating programs run by native people according to native work habits and values. For example, many Aboriginal people prefer to be given specific tasks they must accomplish on their own before a certain date, instead of having to show up regularly at a place of work. People with family responsibilities, especially if they are employed for long hours, are often unable to find the time to complete the work. Women have particularly high rates of failure, which is not surprising because many mothers are already overworked and few programs provide child care to participants.[100]

Evaluations of Fine Option and Compensatory Work programs also note that community work is not appropriate for everyone. For their own protection, program organizers bar from participation people who are hostile or have committed aggressive sexual assaults. It is also unrealistic, if not ridiculous, to expect vagrants, homeless drug addicts and chronic drunks and people with severe mental illnesses, to show up at regular times to do volunteer work for other people whose needs are probably less great than their own.[101]

Even if all the problems described above were solved, imprisonment for fines could increase again in the future because much of the progress accomplished by the federal government in obliging judges to verify offenders' means before imposing fines for criminal offences was undone by 1999 Criminal Code amendments concerning mandatory victim fine surcharges. Under these new provisions, automatic victim fine surcharges are imposed on everyone convicted of a criminal offence in order to fund victim assistance programs. The minimum amount of the fine surcharge is 15 percent of any fine imposed or, if no fine is imposed - perhaps because the judge decided the offenders could not afford one - $50 for a summary conviction offence and $100 when the Crown prosecutors proceeded by indictment. These fine surcharges are worse for the poor than ordinary criminal fines because they are imposed without verifying the offenders' ability to pay and cannot be discharged by doing community work.

Automatic victim fine surcharges are waived only when the offenders take the initiative of convincing the judge that a fine surcharge would cause "undue hardship" to themselves or their

families. Unlike the law relating to ordinary criminal fines, which now obliges judges to verify that offenders can pay before imposing a fine, the law on victim fine surcharges puts the responsibility upon the offenders to bring up the subject of "undue hardship" and to present convincing arguments demonstrating such hardship in their situation. This is not going to happen in the large proportion of cases where the offenders are ill-educated, low-income people who do not know what "undue hardship" means and who do not have legal representation. The only protection poor offenders have against going to jail for non-payment of victim fine surcharges is a strict application of the law forbidding officials from issuing a warrant to imprison unless the offenders are brought back again immediately before the imprisonment before a judge who finds that the offenders are able to pay but refuse to do it without a reasonable excuse.

Fines, work-for-fines and fine surcharges have been criticized for a fundamental reason, which is the flagrant inequity resulting from the different impact of the same fine sentence on the affluent and the poor.[102] One critic said that "the use of imprisonment for fine default grotesquely discriminates against the already poor and disadvantaged."[103] Is it fair, for example, that for the exact same offence, committed in the same circumstances and with the same criminal record, a rich man should receive a sentence of $1,000, which is no hardship for him, while a poor man who cannot pay the $1,000 fine is forced to do community service work for 20 days or go to jail for 20 days? This is obviously unjust, and most of those who studied this issue in the past 30 years concluded that fines should take into account differences in the offenders' capacity to pay.[104]

Studies of judges' decisions indicate that for many types of offences, the starting point is a standard "tariff sentence," which they vary upward or downward depending on mitigating or aggravating circumstances.[105] When the sentence is a fine, some of them also try to take the offenders' means into account, with messy and inconsistent results. Substantial downward adjustments are impossible when the law itself imposes a minimum fine. The most notable case is the $300 minimum fine for a first offence of impaired driving, which is responsible for many low-income people being sent to prison.[106] The Canadian Sentencing Commission denounced the effect of mandatory minimum fines on the poor and recommended that they be abolished:

> Mandatory fines also have the effect of undermining restraint. Although in theory a fine is a community sanction [meaning a punishment that is served in the community, rather than in prison], in current practice it results in imprisonment for many offenders who default in their payment. If the mandatory fine is imposed on an indigent offender who otherwise would have received an alternate community sanction,

including the possibility of a discharge, then it no longer represents the least onerous acceptable sanction.[107]

Western European countries, as well as some Central and South American countries, have been very concerned with the effect of fines on the poor for a long time, and developed a solution ensuring that the fines imposed have a similar impact upon both rich and poor.[108] The solution is a "day-fine" system, which has been in force for some time in many countries including Austria, Denmark, Finland, France, Germany, Sweden (which initiated day fines in the 1920s), Costa Rica, Brazil, Peru and Bolivia.

The idea of day-fines is not new in Canada. Several justice inquiries recommended that they be tried or adopted here, starting with the Law Reform Commission in 1974.[109] Due to our governments' lack of interest in making changes to our justice system in favour of a group with little political power, these recommendations were never pursued. In the United States, as a result of strong leadership by the influential Vera Institute of Justice, successful pilot projects took place in the late 1980s and early 1990s, and by 1995 the day-fine system was up and running in at least seven jurisdictions.[110] Day-fines are also called "structured fines" in the United States.

What are day fines or structured fines and how do they work? Day fines are established using a two-step process that takes into account both the seriousness of the offence and the financial resources of the offender.[111] In the first step, the judge determines how many units to impose based on the severity of the offence. In the second step, the units are multiplied by the offender's net daily income, which is adjusted for the number of dependents. Here are rough examples to illustrate how day-fines systems work:

Case 1: Mary, who has no previous record, was convicted of minor theft for shoplifting $100 of merchandise and was sentenced to 15 day-fine units. Mary is a 30-year-old unemployed single parent, is unlikely to find a new job soon, and supports herself and her two children on net unemployment benefits of $30 a day. Adjusting her income for three people to support brings it down to $8 per day. Her total fine (15 day-fine units multiplied by $8) is $120.

Case 2: Henry, who has no criminal record, was convicted of minor assault for striking a man during a barroom fight, and was also sentenced to 15 day-fine units. Henry is a 23-year-old sales clerk who makes $70 net a day and who lives alone. Adjusting his income for the number of people

he supports (himself only) produces a daily income of $35. His total fine (15 day-fine units multiplied by $35) is $525.

Case 3: Frank, who has a previous record for serious fraud targeting senior citizens, is convicted again of the same offence and sentenced to 80 day-fine units. He is a 58-year-old widower with a company pension income of $70 net per day and has no dependents. Adjusting his income for his own support brings it to $35 per day, which is the same as Henry's in Case 2. His total fine (80 day-fine units multiplied by $35) is $2,800.

Supporters of day fines argue that they are easily the most desirable sentences to use for all but the most serious crimes. When reasonable installment payment schedules are devised, even welfare recipients and others with very low incomes are able to pay them. It has been said that restructured fines are unequivocally punitive while still being flexible, credible, economically beneficial, effective, efficient and fair:

> The policy of using structured fines in lieu of incarceration appears to have been remarkably successful in West Germany. Between 1968 and 1976, the number of prison sentences with terms shorter than six months dropped from more than 110,000 to approximately 10,000 - a 90-percent decrease.
>
> These Western European countries have made fines the sanction of choice in a high proportion of criminal cases, including many involving serious crimes. In Germany, for example, structured fines are used as the sole sanction for three-quarters of all offenders convicted of property crimes and two-thirds of offenders convicted of assaults.[112]

An evaluation of the 1988 day-fine experiment in Richmond County (Staten Island), New York, concluded that the mechanics of the two-step process worked smoothly, that the average fine amounts imposed for criminal law offences rose by 25 percent, and that collection rates were increased. In this experiment, as in all the others performed since then in the United States, judges, prosecutors, and defence lawyers who participated generally agreed that structured fines were fairer than traditional fines.[113] Most important, day fines almost completely eliminated imprisonment for fines. In Sweden, for example, the prosecutor can still convert unpaid day fines into prison days, but by the late 1980s, only 20 to 50 people were jailed annually.[114]

Opponents of day fines will almost certainly argue that a similar system was tried and failed in England and Wales. Introduced in October 1992, the "unit-fine" scheme, as it was called, was abandoned seven months later. It was similar to day fines, but based on a week's income instead of a day. Before this introduction, careful feasibility studies were done to test the concept and adapt its European features to the United Kingdom. These studies produced a consensus among judges and court staff at all the courts involved that unit fines were an improvement on the previous system (similar to Canada's), to the point where all continued to use the system after the six-month experiments ended. The resulting fines were more consistent between courts and enforcement was easier, with fines paid more quickly and less imprisonment for default.[115]

Encouraged by these results, the government introduced legislation to make unit fines mandatory. Unfortunately, there were important differences between the new national system and the pilot systems. One of the most crucial was that unlike the pilot studies, in which fines could be reduced for poor people but could not be increased for people who were better off, the new national system produced substantially higher fines in some cases.

The foreseeable results were ludicrous, much-publicized cases that destroyed the credibility of the system in the public's mind. One man was fined 500 pounds (about $1,200) for illegal parking after his car broke down on a road where parking was forbidden. Another was fined 1,200 pounds (almost $3,000) for throwing a bag of potato chips on the ground instead of placing it in a nearby garbage can.[116] Magistrates did not have the authority to change these ridiculous fines. Appeal courts could and did, but the damage had been done. As a result of these fiascos,

> . . . unit fines came under such heavy and sustained attack from large sections of the media - and often from magistrates - that government ministers felt it better to scrap what was felt to be too mechanistic and rigid a scheme. What has replaced it does not take England and Wales back to the preexisting situation; courts are now able to increase fines for the better-off and to reduce them for the poor. The legislation also makes it clear that means are still relevant when setting fines, and courts can evolve whatever measures they think most appropriate for taking means into account.[117]

The conclusion to be drawn from this experience is that day fines work, but that they must be planned and introduced very well and very carefully.

The last and most powerful reason for reforming the current fine system is what happens when, before imposing a fine, conscientious Canadian judges question offenders on their financial

means and find out that they are too poor to pay the standard fine for their offence, or even a reduced fine. One answer is revealed in a textbook on sentencing in Canada, which cites a judgment about a man who had been sentenced to pay a fine, but was unable to do it because he had gone bankrupt. When the man returned before the judge to explain his situation, the judge ruled that a fine should not be imposed in that case, because imposing a fine on someone who cannot pay amounts to imposing a sentence of imprisonment, which is inappropriate. Instead, the judge cancelled the fine and replaced it with a sentence of imprisonment![118]

As this example reveals, changing the Criminal Code to force judges to take financial means into account can have unforeseen consequences. We will see in the section on imprisonment that people who cannot afford to pay fines are often sent directly to jail instead. As a result, it may be that the well-intentioned amendments of the past decade to our criminal laws on the subject of fines have not really diminished the imprisonment of the poor, but have simply hidden it from public view. The new ill-thought-out automatic victim fine surcharges will also greatly increase the fines imposed on people who are unable to pay them.

Community Sanctions

The expression "community sanctions" refers to all sentences other than imprisonment, and therefore usually includes fines. In this report, however, fines were considered separately because of their particular importance for low-income people. Other community sanctions include:

- Probation, in which an offender is released into the community under specific conditions. A probation order can last a maximum of three years, and is imposed together with a conditional discharge, a suspended sentence, a fine, or a term of imprisonment of a maximum of two years. The conditions included in probation orders are discussed below.

- A suspended sentence means that the judge did not name a punishment immediately, but instead placed the offender under a probation order with specific conditions. If these conditions are not respected, the judge can hand down sentences for violating the probation conditions as well as for the original offence. If the conditions are obeyed until the probation order expires, no other sentence is issued.

- A conditional sentence is a stricter version of a suspended sentence. In this case, the judge imposes a sentence of imprisonment, but allows the offender to serve it in the community under conditions which are similar to those of a probation order, except that "the unexpired portion of the sentence hangs over the offender like the proverbial sword of Damocles, waiting to drop should the offender violate the terms of the release."[119] If the terms are violated, or another offence is committed before the end of the conditional sentence, the rest of the sentence is usually served in jail and a sentence for the new breach or offence is also imposed. Conditional sentences are new and controversial. In Quebec, "the media have started to refer derisively to [this type of sentence] as a prison sentence which is not a prison sentence."[120] Studies of a similar sentencing option in England found that it tended to widen the net. Instead of being given to people who would otherwise have been sentenced to prison, these new sentences were handed down to people who would previously have been given probation or a suspended sentence.[121]

- Restitution orders in favour of victims can be made when property has been damaged, or stolen and not returned. When the property is no longer available or the offences involve physical harm, the amount is the replacement or monetary loss, including loss of income. Restitution has priority over other monetary penalties such as fines. As mentioned earlier, restitution can reduce sentences by diminishing the victims' desire to punish offenders and by making a good impression on the judge, but low-income offenders can seldom benefit from this.

- Prohibitions can be ordered for some offences, such as against driving in cases of impaired driving offences, against owning or possessing firearms in cases of serious offences involving violence, or against going to public places where children are found, in cases of offences against children.[122]

Probation is the most common sentence for young offenders, accounting for 48 percent of all youth punishments.[123] Among adults, it is slightly less popular than fines and is usually ordered in low-risk cases such as first-time offenders whose offences were non-violent.[124] The main purpose of community sanctions is to maintain the offenders' social and economic ties to the community, because the disruption of those ties would diminish their likelihood of resuming a normal life in the future.[125] According to a supporter of community-based sanctions,

> Probably the ultimate argument [for using community-based sanctions instead of imprisonment] is the one of simple common sense. We cannot train people to swim successfully by tying them hand and foot and placing them on the side of the pool. To learn to swim, they must be in the water. . . To learn to live successfully in the community, one must live in the community.[126]

As in the case of bail, unemployed offenders are less likely to be given community sentences than employed ones because judges are very hesitant to interrupt ongoing employment. Employed people are also assumed to be more trustworthy and less likely to re-offend because they have more to lose. As a result, offenders with jobs are more often released on probation or with a suspended sentence, while unemployed offenders with similar offences and records go to prison. The Manitoba Inquiry found that Aboriginal offenders were also less likely to be granted probation for many reasons, including the lack of legal representation and the lack of probation officers within reach of their communities.[127]

Probation orders are considered by many people, especially police officers, as lenient sentences where the offenders are "let off."[128] Other people, including probation officers and employees of the John Howard Society who work with offenders, disagree because they know that the conditions imposed can be deeply intrusive and severely curtail people's privacy and freedom of movement, to the point where they may sometimes be harsher than fines or even imprisonment.[129] Some of these conditions are not related to the offences committed, but are included because the courts believe they will "improve" the offenders.[130] Many of the same conditions can be imposed under parole, which refers to conditional releases after serving a prison sentence.

The problems with conditions in probation and conditional sentence orders are similar to those discussed in Chapter II concerning conditional bail releases. Intrusive conditions are often condemned for "setting up" the offenders to fail.[131] Conditions for convicted offenders can be even more intrusive and heavier than for accused people on bail, because the convicted are not presumed to be innocent. As well as the usual clauses to keep the peace, report to a probation officer, stay away from their victims and from people with criminal backgrounds, abstain from alcohol or drugs or using firearms, make efforts to find a job or, in the case of youths, obey curfews and attend school, convicted offenders can be required to perform community service work, participate in treatment programs or submit to house arrest or electronic surveillance (by means of a device on a wrist or ankle).

The treatment programs include all sorts of activities tailored to the offenders' perceived problems, such as impaired drivers' courses, counselling programs for shoplifters (the best known being run for women and young people by the Elizabeth Fry Society) or counselling programs for drug or alcohol addictions or for assaultive spouses. Since the early 1990s, victim-offender reconciliation projects were also developed, with some probation orders coming to an end after offenders have reached compensation or restitution agreements with their victims.[132]

Reconciliation projects are particularly recommended for Aboriginal offenders as more consistent with their cultural values. Also appropriate for Aboriginal people, at a more general level, are punishments proposed by "resolution conferences" which replace court hearings and allow all parties to express opinions and contribute to a disposition. Sentencing circles, which include the offenders themselves and elders of their communities, are a type of resolution conference. These conferences are still unusual but have become more common in recent years.[133] An assistant Crown attorney from Kenora, Ontario, who observed the work of sentencing circles in Hollow Water, at the southeastern tip of Lake Winnipeg, reported on some of the results:

> They have dealt with a total of 48 sexual offenders, and five of those people ultimately went to jail. They wouldn't participate in the healing program, and they went to jail. Forty-three of them worked with the team, and only two of them ever went into a repeat of their behaviour. The other 41 remained in the community, remained in the healing program, remained in their jobs, remained a part of the outside life, with no recidivism. This is over a 10-year period. And that's a record which, I suspect, cannot be matched anywhere in the other system.[134]

On the other hand, it must be said that some Aboriginal women have expressed concerns about using these methods in cases involving family violence and sexual offences. They feel that violence against women and children is too serious for the typically mild solutions proposed by resolution conferences, and that soft treatment is unlikely to discourage offenders from committing the same crimes again. They believe that the members of sentencing circles are not always knowledgeable enough about the dynamics of family or sexual abuse to respect the victims' point of view and the victims' need to be protected from harm.[135]

Some treatment and community work programs for offenders on probation or conditional sentence orders are very good, but they are far from being universally available and are very vulnerable to funding cutbacks. As usual, the most acute lack of services is in Aboriginal and remote communities. When judges were surveyed by the Canadian Sentencing Commission, 81 percent said

that the huge variations in the availability of community programs from one region to the next created disparities in their sentences.[136] Female offenders who have children are also disadvantaged by the lack of child care facilities and other essential supports in the programs that exist.[137] The Sentencing Commission strongly supported community sanctions and recommended "that the federal and provincial government provide the necessary resources and financial support to ensure that community programs are made available and to encourage their greater use."[138]

Surveys of probation officers identified other problems. One was the huge caseloads many of them carried, ranging from 80 to more than 100 cases in Atlantic Canada. In Quebec, only 30 percent of probation officers believed their caseloads permitted them to give effective supervision. Probation officers also agreed that judges misused probation sentences, sometimes ordering probation for offenders who had abused probation opportunities in the past, and often imposing probation on offenders who probably should have received a fine or a few days of community service work. In many cases, the officers said, these orders included conditions on curfews and abstinence from alcohol that were difficult to enforce and merely led to contempt for the whole process.[139]

The Manitoba Inquiry on Aboriginal people was also particularly critical of conditions requiring abstinence from alcohol and drugs. Instead of improving offenders, the Inquiry wrote, abstinence conditions can in fact prevent offenders from seeking treatment for an addiction because probation officers are often the only people the offenders know who can refer them to alcohol or drug rehabilitation centres. To obtain such a referral, the offenders would have to admit that they had been drinking or taking drugs, in violation of the conditions of their probation orders.[140]

Similarly, studies of recidivism among ex-prisoners released on parole find that half of their new "crimes" are technical violations of their release conditions.[141] One example was "a fraud offender who was told to abstain from alcohol and drugs while on release (who) decides to celebrate his newfound freedom by getting drunk at a party. The police are called . . . and find out the offender is on parole."[142] The end of the story is missing, but if the police wanted or felt obliged to enforce the law, the ex-prisoner was taken right back to jail.

Another main problem with community sanctions is net widening. As usual, the reason this regularly happens is because

> . . . judges and Crown attorneys realize that the current punishment-based system is not effective in either changing behaviour or making people take responsibility for their actions. Thus, in cases where judges may otherwise simply order a conditional or absolute discharge or a term of probation, additional terms are added for the offender's 'benefit'. . . Failure to adhere to the conditions attached can lead to the offenders being charged with failure to comply with probation. . .[143]

Between these kinds of probation and parole violations and non-payment of fines, and other convictions for minor offences, many Aboriginal, homeless, addicted, and mentally ill youths and adults end up with constantly revolving convictions that keep them destitute and going in and out of jail for the rest of their lives. Judges who understand the role they are playing in this unedifying process are becoming increasingly critical of the system. According to Judge David Cole of Ontario:

> A surprising number of judges feel that much of this activity of processing and reprocessing petty social misfits does very little to prevent or control crime. They are beginning to challenge the theory and practice of sentencing in Canada today.[144]

Imprisonment

Canada does not publish good statistics on its court sentences for adults. This contributes to disparity in sentencing, since judges cannot be expected to hand down sentences that are consistent with those of their colleagues when they do not know what they are. Court statistics for young offenders are better kept.

For adults, the most recent available statistics on sentences for federal criminal offences only cover provincial courts in nine jurisdictions in 1993-94.[145] They indicate that the ten offences that sent the largest numbers of offenders to prison were, in order, failure to appear before the court (20,588 people); break and enter/burglary (19,733); failure to comply with a court order (15,755); being unlawfully at large (13,695); driving while disqualified (7,814); drug trafficking (7,245); impaired driving - over 80 mg of alcohol (5,402); minor assault (4,730); robbery (4,704); and theft under $1,000 (4,284). By comparison, only 85 people were sent to prison for manslaughter, 126 for aggravated sexual assaults and 486 for aggravated non-sexual assaults.

For young people under age 18, the ten offences which produced the largest numbers being sent to secure custody in all Canadian courts in 1997-98 were failure to comply with a court

disposition (2,378); break and enter/burglary (1,794); failure to appear before the court (1,152); theft under $1,000 (937); possession of stolen property (840); minor assault (717); escaping custody (692); robbery (525); assault with a weapon (423); and being unlawfully at large (414).[146]

Except for robbers, youths convicted of assaults with a weapon, and perhaps escapees, there is no indication that the offenders in the top ten categories that fill our prisons have committed violent acts. The little we know about offenders who fail to appear for their court hearings, or who fail to comply with court conditions, suggests that many of them are alcoholics or drug addicts, street kids or other homeless people, or members of other marginal groups who are incapable of keeping track of things like when and where they are due to appear in court (or to go back to prison after an authorized absence, for those who are unlawfully at large).

The huge numbers sent to jail for failing to appear and other technical violations also demonstrate how easily people with irregular lifestyles, or people who are fully occupied by basic survival, such as many Aboriginal people, can be captured by the criminal justice system for trivial offences and then never let go. Between 1987 and 1997, the number of charges against young people for failure to appear increased by 129 percent.[147] Since criminal law provides that a person should not be found guilty unless he or she intended to commit an offence, and such intention is missing when people simply forget to appear, or are too disorganized to remember what day it is, or suffer from mental illnesses that make intentions impossible, the large number of convictions for technical violations raises serious doubts about the quality of these people's legal representation, assuming they had some.

Many people who work in the criminal justice system believe that criminal records and imprisonment mean little to street people and other social misfits because they already lead such miserable lives. Some Montreal criminologists disagree. They pointed out that each encounter with the criminal justice system increases the visibility of these misfits with the police and other justice officials, ensuring harsher treatment and a longer prison term the next time around. For many borderline street people who precariously hang on to normal life, by keeping a rented room for example, imprisonment is often the last straw that makes them lose their few belongings and social assistance benefits and throws them entirely out on the street. Once they are labelled "criminals," they are also feared by service providers in places like shelters and mental health institutions, with the result that they are often banned from admission to the social and health services they desperately need.[148]

Although no Canada-wide study has been done to confirm it, mental health experts believe that the proportion of mentally ill who end up in our prisons has increased as deinstitutionalization continues to push more people into the community who would formerly have been kept in psychiatric facilities. Many of them are on the street, with estimates that between 20 and 30 percent of homeless people in Canada are mentally ill.[149] U.S. studies indicate that many people fall through the cracks of the system by being considered too "dangerous" to be accepted for treatment but not disturbed enough to be committed.

As a result, "the criminal justice system may have become the institution that cannot say no . . . the default option for disposition of persons who are not able to be treated within the mental health system."[150] After finding that the probability of being arrested was 20 percent greater for the same offence when the suspects showed signs of mental disorder, U.S. experts commented that "Clearly, the way we treat our mentally ill is criminal."[151] According to Judge David Cole, the situation is not better in Canada:

> What most of us [judges] are doing is a lot of routine processing of petty offenders - most of whom are mentally ill. We are getting tired of watching the parade.[152]

Two other offences among the top ten for adults, impaired driving and driving while disqualified, are also related to alcohol. For impaired driving, judges may have been obliged to order a prison sentence because minimum sentences of imprisonment are specified in the law for second offences (minimum of 14 days in prison) and subsequent offences (minimum of 90 days). A British Attorney General called mandatory minimum punishments "a great evil" that "tends to corrupt the administration of justice by creating a will to circumvent it."[153] The rumour in Canadian legal circles is that when Crown prosecutors encounter situations where a prison sentence would have devastating effects on "respectable" people, they "forget" to inform the court that the accused have previous impaired-driving convictions. These lapses of memory are not likely to happen when the accused are unemployed low-income people.

The Canadian Sentencing Commission reported that almost all the submissions it received on this issue argued for the abolition of mandatory minimum penalties. One of the reasons was that "an accused person facing a mandatory term of incarceration has nothing to gain by pleading guilty and may take full advantage of procedural tactics and appeal mechanisms that he or she may otherwise

have eschewed."[154] Sophisticated legal tactics of this kind are beyond the reach of low-income defendants represented by lawyers from tight-fisted legal aid administrations.

If their legal manoeuvres fail, "respectable" people who are found guilty of impaired driving for a second or subsequent time can still avoid going to jail by asking the judge to give them another type of non-prison prison sentence (the first one we saw was a conditional sentence). This is an "intermittent sentence," which can be served on weekends, for example. This type of sentence is given to people of good character and "is often imposed to permit the offender to continue employment."[155]

In a pilot project carried out in British Columbia, offenders who had been convicted of impaired driving did not go to prison at all but were allowed to serve their intermittent sentences by means of house arrest with electronic surveillance. They went to work every day as usual but were not allowed to leave home on the weekends and sometimes had to respect curfews too.[156] Toronto lawyer Clayton Ruby may have had this special treatment in mind when he wrote that there is a real fear that electronic monitoring may become the substitute to imprisonment for the middle class.[157] People cannot receive house arrest sentences if they do not have a fixed address and a telephone.

When the Sentencing Commission questioned judges about mandatory minimum sentences, more than half said they restricted their ability to impose a just sentence. On the other hand, almost three-quarters of the judges believed that these sentences were useful in conveying a message to the public about the seriousness of certain offences. The Commission included this in its public opinion survey and obtained the following results:

> When asked to name an offence carrying a minimum penalty, very few correctly identified any. They were provided with a list of five offences and asked to identify the one carrying a minimum. Only 28 percent correctly identified impaired driving . In fact, a comparable number [wrongly] thought manslaughter carried a minimum penalty. Thus few members of the public are aware which offences carry minimum penalties. Fewer still know the severity of those minima.[158]

The Sentencing Commission recommended the abolition of all mandatory minimum criminal penalties, whether they are fines or periods in prison, for all offences except murder and high treason. One of the reasons for its decision was that "For offences carrying a mandatory minimum, the exercise of discretion becomes less visible as the discretion shifts from the judge to Crown counsel

and police. Accountability is then jeopardized . . . Accountability in the use of discretion dictates that, wherever possible, discretion should be exercised in an open forum."[159]

The top ten offences that send the largest numbers of people to prison also include two small offences, minor assault and theft under $1,000. Why were such small offenders sent to prison? There are many reasons, and all of them work to the disadvantage of the poor. The first reason is that people who have no money have no bargaining power in court. When an Ottawa duty counsel was asked whether poor and affluent defendants received equal treatment in the court where she worked, she indignantly denied any possibility of discrimination. On second thought, however, she admitted that poor defendants had less negotiating power in her bargaining sessions with prosecutors over "less time for more fine."[160] Because poor people have no money for "more fine," they routinely end up doing more time for the same offences.

The fact that poor people are sent to jail when better-off people are fined is confirmed by a Winnipeg study which examined more than a thousand cases heard in Provincial Court. It came to the following conclusion:

> Whether income, social status or type of job is used as a measure, similar results emerge. Those of lower socio-economic status are treated more harshly. The best measure has proved to be employment status . . . The pattern is clear. Those who are employed pay for their crime with money, and those who are unemployed with a relatively short loss of freedom.[161]

Studies on the sentencing of Aboriginal people conclude that:

> Socio-economic factors such as employment status, level of education, family situation, etc. appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.[162]

Poor offenders are also sentenced to prison more often than others because they are more likely to have criminal records and to have already been to prison. At first glance, a criminal record seems to be a reasonably objective factor to use in determining whether an offender is basically a good person who should be given another chance, or a hardened criminal who should be locked up to protect society. As we saw throughout this report, however, the criminal justice system is so biassed against low-income people that previous convictions may reveal less about poor offenders' criminal dispositions than about the extent to which they were discriminated against.

This is most obvious in the treatment of Aboriginal people and Blacks, but it is also true of other poor people caught in the cycle of interminable arrests and convictions for minor offenses. Clayton Ruby writes that one of the most common errors committed by judges consists of handing out very long prison sentences for minor offences to people who have extensive criminal records. A typical example of this was described earlier, in which a homeless Montreal man was sentenced to a year in jail for stealing a bottle of wine. Ruby cites many appeal courts that reversed such decisions on the principle that "Breaking and entering a town dump and stealing a small quantity of scrap metal consisting of copper wire and a coil for a car heater, probably worth less than $1," must be treated as a trivial crime regardless of the length of the offender's record.[163] Unfortunately for poor people with long records who receive such abusive sentences, the chance of their cases reaching an appeal court quickly enough to do them any good is less than a thousand to one.

Sentences for recidivists with more serious offences also raise questions. Although most accused people who appear in court for repeat offenses do not show any escalation in viciousness or in seriousness of crime, second-time offenders almost invariably get hit very hard when it comes to handing out sentences. For example, more than 50 percent of young break-and-enter recidivists are sentenced to custody, compared with 14 percent of first-time break-and-enter youth offenders. This produces huge disparities in sentences for the same criminal acts. According to Anthony Doob, custodial options are used in such cases "because we simply don't know what else to do."[164]

By contrast, the officers of Quebec corporations whose violations of the Occupational Safety Act caused the death or maiming of their employees can never be sent to prison because imprisonment is not an option under that law. The maximum fines it allows for recidivists are $2,000 for individuals and $50,000 for corporations. These amounts are extremely low given the enormous financial resources of many corporations.[165]

When imprisonment was an option under a previous version of the Act, no employer was ever sent to prison. A historical study found that the same was true for the rest of Canada:

> While all jurisdictions allowed for the potential imprisonment of an offender, no one was ever incarcerated. In fact, we have not been able to find any case in the history of Canadian occupational safety and health laws where conviction resulted in imprisonment.[166]

It is mind-boggling that our justice system should deal so much more severely with a homeless drunk who stole a bottle of wine - and got one year in jail - than with employers whose offences bring about the death or maiming of their workers.

IV. JUSTICE FOR ALL - RECOMMENDATIONS

Let's end the talk about getting tough or being soft on crime, being for victims or being for offenders, as if you can only be for one . . . These young people in conflict with the law are members of our communities, not aliens. They come from our families, as do their victims. They are coming back to our communities. What we do with them in the meantime through serious interventions that stress positive and meaningful accountability and services to their victims will make the difference in whether we are a strong or weak community.

Church Council on Justice and Corrections, 1999[1]

Who's in Charge?

Experts on Canada's criminal justice system agree that it really is not a system at all.[2] It is irrational, fragmented, full of duplication and uncoordinated. The people who work in different parts of the system do not share similar philosophies and goals. Decisions are made haphazardly. Long-term planning is nonexistent because, as Anthony Doob said, "Nobody is in charge."[3]

The main elements of the criminal justice system are as follows:

- Laws. The most important are criminal statutes, including the Criminal Code, the Young Offenders Act and the Controlled Drugs and Substances Act. The federal government has complete responsibility for these laws, which are often the object of intense public scrutiny. As a result, federal politicians who consider changes, such as the proposed Youth Criminal Justice Act currently before Parliament that would replace the Young Offenders Act, consult widely and are very aware of public attitudes. Provincial, territorial and municipal quasi-criminal laws and bylaws impose fines that can lead people to prison if the fines are not paid.

- Administration of justice. This is the responsibility of the provinces and includes the supervision of the police (both municipal and provincial) and the appointment of provincial court judges, who handle the vast majority of criminal cases. The provinces also manage the personnel and facilities of the provincial courts, including Crown prosecutors. Outside Ontario, Quebec and to some extent Newfoundland, there are no provincial police forces and provincial-level policing is done by the RCMP, which for these purposes reports to the respective provincial governments.

• Corrections. Correctional facilities and related services such as parole officers also come under the authority of the provinces. The exception is federal penitentiaries, which handle a much smaller number of more serious offenders with sentences of imprisonment of two years or more.

In addition to the above, many other professions interact on a daily basis with the criminal justice system because they deal with the same clients. These professionals include doctors, psychiatrists, psychologists and other health officers, social service and child welfare personnel, and educators in the school system. One example of the lack of coordination between these professions and the justice system is the deinstitutionalization of people who are mentally ill, which led to many of them becoming regular clients of police forces, courts and jails. Another example is the adoption of "zero tolerance" policies in cases of violent incidents in schools. Doob warned that such decisions by school boards and other authorities have the potential to flood youth courts without any policies having been established to deal with the increase in volume.[4] The House of Commons Committee on Youth Justice wrote that:

> The Committee heard in every jurisdiction in this country how we have used the criminal justice system as the place to dump all our failures. Attempts to resolve conflicts and minor transgressions of the law informally or at the community level have been overshadowed by costly, formal criminal justice responses.[5]

Does the Criminal Justice System Reduce Crime?

The main criticism of the criminal justice system is that it is not working effectively. This view is very widely held by experts and by the public. The problem is that they do not mean the same thing. Surveys of Canadians find that at least three-quarters think the criminal justice system does not work in reducing crime because sentences are not harsh enough. More generally, the public believes that crime is rampant and increasing, that a large proportion of all crimes are violent (the reality is less than ten percent), that police forces do a very good job of arresting those who commit crimes and of protecting citizens, but that once the offenders get to court, overly indulgent judges let too many of them off too soon so they can commit more crimes.[6] The foundation of the public's attitude is that severe punishment works in discouraging people from committing crimes, and that more severe punishment works even better.

Public sentiments have not changed in more than 25 years of surveys and may have been the same a century ago. Between 1873 and 1903, following the arrival in Canada of more than 95,000 poor children from the United Kingdom, there was widespread fear and condemnation of urban homeless juveniles, who were called "street arabs."[7] In Vancouver at the turn of the century, "Public officials perceived the rise in juvenile crime . . . as the result of immigrant gangs being involved in interracial violence and drug trafficking and use."[8] In that case, the immigrants were from Asia.

Each of these historical "youth crime panics" coincided with periods of economic depression and fierce competition for jobs. Each time, politicians were quick to seize on the theme of outsider youths running wild to distract their constituencies from other problems. It always worked, and the tradition continues. Youth unemployment has just started to decrease after a decade in which it was at its highest point since the Great Depression of the 1930s. Instead of launching a war on youth unemployment, governments launched a war on youths, charging and imprisoning a steeply increasing proportion for drug and technical offences, even though drug use was declining and victimization figures showed no significant increase in crime since the early 1980s.

One of the main platform planks of the victorious Progressive Conservative party in the last provincial election in Ontario was a promise to increase police forces to make communities safer. One of its main pieces of legislation was a so-called Safe Streets Act, which prohibits squeegeeing and restricts panhandling and provides for sentences as high as $1,000 or six months in jail or both. Throwing street kids and vagrants in jail is much easier and more popular with taxpayers than reversing the policies and cutbacks that contribute to putting poor people on the street.

For its part, the federal government recently introduced new legislation to replace the much-maligned Young Offenders Act with a new Youth Criminal Justice Act "that will put public protection first and that will command respect, foster values such as accountability and responsibility, and make it clear that criminal behaviour will lead to meaningful consequences."[9] These are very strange words to describe the replacement of a law that, since its introduction in the early 1980s, has given Canada one of the highest youth incarceration rates in the world, twice as high as that of the United States and ten to fifteen times the rate for many European countries.[10]

Anti-crime political propaganda from all levels of government, amply supported by sensational and sometimes racist media coverage of criminals and Hollywood crime productions, panders to the public's fears and reinforces them. The result is a poorer quality of life for women and seniors, who

are most fearful of becoming victims of crime - though we saw earlier that the risk of crime victimization for seniors is very small. The sad truth is that in a large proportion of cases, when violence strikes women and seniors it does not come from a stranger.

Contrary to the public's beliefs, experts who have studied the criminal justice system know that there is little or nothing the system can do to reduce crime and that it may even make it worse.

- Except at the extremes, such as having almost no police officers or having one on every doorstep, the level of policing in a community has little or no effect on crime. Hiring more police officers and instituting proactive policing programs does not reduce crime but makes the criminal justice system less efficient by clogging up the courts. Police sweeps, police "stings," intensive arrest programs and aggressive drug policies create only an illusion that something is being done to curb criminal activity. In reality, "the evidence suggests that all they really do is round up petty offenders long known to the criminal justice system, offenders whose arrest can only be regarded as a nuisance to the courts and the correctional system."[11]

- The most effective way for the police to handle inexperienced young offenders is to hand out stern warnings and do as little else as possible. Most young offenders stop their criminal activities as they get older in any case, with or without police intervention. Bringing inexperienced offenders into the formal criminal justice system, especially by institutionalizing them on remand or otherwise in the company of more experienced criminals, greatly increases the likelihood that they will become real criminals.[12]

- Canadian judges are not lenient. On the contrary, the majority of people they send to prison are minor offenders who committed non-violent offences and present no danger to society. When judges impose non-prison sentences such as conditional discharges or community sanctions, the conditions they impose are often deeply intrusive to the point where surveys of offenders find that many would prefer a short term in prison.[13]

- The reason for a sizeable portion of repeat offenders is not because their punishments were not severe enough. Severe penalties do not deter criminals from committing other crimes. Studies of the deterrent impact of harsh sentences "demonstrate quite clearly that harsher penalties will not have an impact, even for offences like tax evasion . . ."[14] Little research has been done on the impact of long prison sentences on the spouses and children of inmates,

though it is known that one of the causes of youth criminality is lack of parental attention and supervision.

- The most effective ways of reducing crime have nothing to do with the criminal justice system. They involve support programs for vulnerable families and the creation of opportunities for young people. Some programs help correct deficiencies in parenting skills so that parents can teach their children self-control. Creating opportunities for young people means providing them with something more meaningful to do than standing around and getting into trouble - the best opportunity being a good job. Also recommended are policies that support as large a number of caregivers relative to the number of children as possible, so children will receive more attention and supervision. Some experts believe that a very effective way to reduce crime is to help delay pregnancies among unmarried girls and young women, many of whom are not in a position to be good mothers to their children.[15]

In recognition of these realities, many Canadian governments have set up crime prevention programs that subsidize various kinds of initiatives, including many community-based projects such as a John Howard Society project providing supports to at-risk children of criminal, abusive men. This is only one of many projects funded throughout Canada by the National Strategy on Community Safety and Crime Prevention, which is administered by a federal government agency, the National Crime Prevention Centre. This funding phase of the National Strategy, started in 1998, involves spending about $30 million a year for five years on community-based programs and other initiatives such as a national clearinghouse and website.

Programs such as the National Strategy are very difficult to evaluate. Many of the projects funded seem very good, and $30 million a year sounds like a great deal of money, but the funds are only committed for five years and are a drop in the ocean compared to the billions governments spend on a justice system that promotes crime by hounding poor kids and throwing them in jail for minor offenses.

Another problem is that when new funding programs are introduced, they often subsidize projects that should and maybe would have been funded under other programs. One example is a $912,500 four-year National Strategy grant to Calgary groups, co-funded by the Alberta Justice Department, the City of Calgary and others, to set up a domestic violence court and duty counsel with integrated justice and community services. The project sounds excellent, and Calgary no doubt

needs a domestic violence court like those already in existence elsewhere in Canada, but such an essential institution should be paid for by regular provincial and federal justice budgets, not out of a special crime prevention fund.

The National Council of Welfare recommends that all Canadian governments jointly develop and adopt a co-ordinated plan to prevent crime and to make the criminal justice system fairer and more efficient, with detailed steps and a timetable for implementation. This plan should contain steps to diminish reliance on ineffectual and often harmful criminal justice solutions in favour of more productive interventions such as family support programs and community youth activities and employment.

Principles for Reforming the Criminal Justice System

In considering the problems described in this report and the measures that should be taken to correct or reduce them, three main principles or objectives are used:

- The need for restraint. Every Canadian report on the criminal justice system, and more particularly the reports of the Law Reform Commission of Canada and the federal Canadian Sentencing Commission, emphasized the importance of restraint.[16] In its broad sense, restraint implies a) that the criminal justice system should not interfere in people's lives unless intervention is necessary to protect other people from harm; and b) that the justice system should not be used to accomplish tasks that would be better done by other institutions. More specifically, the principle of restraint requires that the punishments imposed on offenders be the least severe possible that are still consistent with fairness and the protection of society.

- Equality. This principle requires that inasmuch as possible the impact of the criminal justice system be substantially the same on people with similar backgrounds and offences, regardless of their gender, age, race, sexual orientation, national or ethnic origin, religion, employment or family status, income, social class, physical or mental disabilities or place of residence within Canada. It also means that people who are caught up in the criminal justice system should have the same access to means of defending their rights, such as adequate legal representation.

- Effectiveness in reducing crime. This criterion is so obvious that it seems almost unnecessary. In the criminal justice system, however, most people are so caught up in the day-to-day workings of their own isolated segment of the system that they have little or no idea of the broader impact of their decisions and are oblivious to the global picture.

Justice in Policing

Policing in poor neighbourhoods, as we saw in Chapter I, is at once too lax and too vigorous. Fearful citizens, and older people in particular, want more police patrols to make them feel better protected. Some young people, on the other hand, find it unjust that the police should pay so much more attention to them than they do to the college kids who live in the suburbs. The picture is completed by local merchants and members of community organizations who insist that police officers (and security guards in malls) keep a close watch on unusual or scraggly looking young people and tell them to "break it up" or get out of sight.

In response to these concerns, the Ontario Commission on Systemic Racism in the Criminal Justice System made extensive recommendations about the establishment of community policing committees that would include young people (even ex-offenders) and that would develop policing plans and informally resolve complaints. The Commission also recommended that the relevant provincial government department develop guidelines for the exercise of police discretion to stop and question people, and that laws concerning trespass on private properties like malls and the powers of security guards be reviewed to prevent unjustified exclusions or other problems most often encountered by young people from low-income visible minority groups.[17]

These suggestions may help in addressing the specific needs of some communities, but they are not likely to solve the problem of the greater police scrutiny of young people who live in low-income neighbourhoods. One of the findings of our legal aid report was that poor people are much less likely to be aware of their legal rights, and that even when they know their rights they are less likely to exercise them. This is particularly true when the young people we are concerned with are not complete innocents, but normal adolescents who have probably already committed some sort of minor criminal offences.

According to criminologist Marc LeBlanc, who spent most of his career studying this question, the main solution is a general provincial or territorial philosophy that will acknowledge the fact that delinquency is a normal part of growing up for most adolescents, especially boys. He recommends:

> . . . a policy of total nonintervention or at least in favour of minimal intervention. There should be intervention only in order to avoid diverting the natural process of diminishing delinquency and to avoid uselessly overburdening the mechanisms of social control. Without going so far as a general laissez-faire policy, intervention should be used only in the case of necessity.[18]

To a much greater extent than elsewhere in Canada, this has been the approach taken by Quebec governments and Quebec police forces.[19] It goes a long way to explain why Quebec has by far the lowest rate of incarceration of young people in Canada.

The National Council of Welfare supports the approach of Quebec provincial authorities toward minor youth crime, and recommends that all jurisdictions adopt a general policy of minimal police intervention except when absolutely necessary. This rules out overzealous policing and aggressive enforcement programs that target poor neighbourhoods.

Government cutbacks in welfare, housing, health and other programs have greatly increased the number of people on the street. Mentally ill people and beggars have become common sights in large urban areas, joining the street prostitutes who continue to be with us whatever provisions pretend to control them in our hypocritical laws. (Prostitution among adults has never been a crime in Canada, but the Criminal Code makes it illegal to communicate in public places for the purposes of prostitution, which clearly discriminates against the poor.) Residents who are intolerant of differences, or have real fears of mentally ill people who appear menacing, insist that the police do something about the situation. Because the only tools police officers have are prisons and courts, that is where many social misfits and mentally ill people end up.

Communities in other countries have better ways of coping with this problem. They have permanent multidisciplinary teams that can quickly assess individual cases and try to find the most appropriate interventions. These teams include social workers who see to the provision of shelter for borderline mentally ill people who are rejected by normal shelters and by mental institutions. They also involve health care workers who can do quick psychological assessments and organize referrals

to substance abuse treatments. Child welfare interveners are also on hand to make recommendations or referrals for cases involving child prostitution and child abuse. The best of these teams do not work only on a case-by-case basis, but also make in-depth analyses that try to address the underlying problems driving their clients to the street, such as the lack of subsidized housing.[20]

The National Council of Welfare believes that ongoing multidisciplinary teams are needed to deal with the multiple problems of many street people who end up in the criminal justice system with substance abuse and mental health problems. We recommend the setting up of such teams wherever they are needed in Canada.

Most of the overpolicing problems low-income people experience are not caused by the ill will of individual police officers but by the system which deploys police forces on the basis of factors such as the number of calls to the police and official crime rates. In some cases, however, there is no doubt that the problem is personal characteristics of particular police officers such as aggressivity or prejudice. For these situations, it is important that the people who have been unfairly treated be able to bring their complaints to impartial bodies that can investigate their grievances and order compensation or sanction, as well as appropriate changes to police policies and practices.

The National Council of Welfare recommends that all Canadian police forces be accountable to impartial independent review bodies that have the power to investigate and adjudicate on complaints by private citizens.

On the subject of domestic violence, we saw in Chapter I that the most recent research raises grave doubts about current policies that make it mandatory for the police to lay charges regardless of the wishes of the victims. According to this research, mandatory charges can have the effect of increasing wife abuse, especially when the husband is unemployed. As a result, some experts recommend that mandatory charge policies be repealed. This should not be done precipitously, however, because these findings have not yet been replicated in Canada, and U.S. results suggest that cultural and ethnic factors may make a difference. It is also important to keep in mind that the original problem, which led to the introduction of mandatory charges in the first place, was that police officers did not take violence against women seriously and neglected to lay charges when it was generally agreed that they should.

The National Council of Welfare recommends that provincial and territorial ministers responsible for criminal justice set up impartial, independent research projects to verify the effects of mandatory charge policies in cases of domestic assault, and adjust law enforcement policies if necessary in light of the results. This is an urgent matter that should be addressed as soon as possible.

Justice in Bail Decisions

The current bail system is heavily biased against low-income people. Many are kept in jail until trial because they are homeless or because they are unemployed. Apart from the obvious hardship this causes, incarceration at this stage increases the likelihood that these people will be found guilty at trial and that they will be given a sentence of imprisonment. Discrimination in bail decisions appears to be most severe in police decisions to jail accused people overnight or over the weekend until a bail hearing before a judge. Unlike judges' decisions about bail, which are made in open court, police decisions are made in police stations on the basis of factors that are largely unknown. In order to correct this, the Ontario Commission on Racism made specific recommendations that could make a difference.

The National Council of Welfare supports the adoption in all parts of Canada of the following recommendations made in 1995 by the Commission on Systemic Racism in the Ontario Criminal Justice System:

a) that a police officer who arrests and detains a person be required to explain in writing why the person was not released; the officer in charge should counter-sign this statement;

b) that the accused be shown these reasons and be able to give a response, also recorded;

c) that these statements be given to Crown attorneys and defence lawyers at bail hearings; and

d) that a similar process be used when the police impose conditions on the release of an accused person, to explain why each condition is deemed necessary.[21]

Observation of the bail hearing process suggests that in some courts at least, low-income accused who arrive from jail are herded in like cattle and have only a few minutes to consult with the duty counsel who will handle their cases. Some jurisdictions have "bail interview officers" who can meet with the accused in jail before the hearing to collect the necessary information concerning the accused's place of residence, employment, family situation and criminal record, but such services are rare and their sources of funds are insecure. To make things even worse, these hearings which are extremely important for the future of the accused are sometimes handled by inexperienced lawyers who have financial incentives to request unnecessary adjournments.

The National Council of Welfare supports the recommendation of the Commission on Systemic Racism asking legal aid authorities to hire "bail interview officers" to assist in the preparation of bail hearings.[22] Legal aid plans should also ensure that all duty counsel who represent people at these hearings have experience in the field of criminal law and meet minimum standards for adequate performance.

The main legal criteria for denying release on bail until trial are that imprisonment is necessary to ensure the attendance of the accused at trial, to protect the public from further crimes, or to prevent interference with witnesses or evidence. In practice, however, most accused people who are detained without bail are not dangerous to the public. One of the main differences between accused people who are released and accused people who are detained is that the people who are kept in jail are unemployed.

U.S. studies have questioned the value of basing bail decisions on this kind of personal information, but no research has been done to measure the relevance of criteria like unemployment in Canada. If, for example, research demonstrated that the short-term recidivism rate of unemployed people charged with minor assault is 5 percent, the effect of jailing all unemployed people who are charged with minor assault until their trial would be to incarcerate 95 percent who pose no risk at all.

Critics have taken judges severely to task for their lack of responsibility in tolerating a situation in which the only feedback they receive on the accuracy of their bail predictions - about who is dangerous, who is likely to re-offend, and who will show up in court - is from the media and the public uproars that occur when people commit crimes while they are out on bail. The result of this abysmal system of feedback is that judges who handle bail hearings become increasingly conservative in their decisions without having any objective evidence that severity is justified:

> Although reforms of the last 30 years have changed bail practices in many ways, they have skirted the principal issue: the responsibility of the judiciary to manage pretrial release decisionmaking and to ensure its quality . . . With rare exceptions, courts have not undertaken rigorous self-analysis concerning their exercise of judicial discretion in pretrial release . . .
>
> It is fair to target the role of the judicial decisionmaker in assessing the state of affairs of pretrial release and detention because, despite scarce resources, poor information, and jail overcrowding, the critical nature of the pretrial release decision requires that criminal courts perform the function optimally.[23]

Similar criticisms are also justified concerning judges' orders of conditions upon releasing some accused people until trial. These conditions often include deeply intrusive and unnecessary interventions such as prohibitions from drinking alcohol. This has frequently been condemned by experts who say that such measures set up the accused person to fail. The result may be increases in criminal charges and incarceration as the people who cannot respect these conditions are picked up by the police and then sentenced to prison. Another problem with pretrial decision-making that should be investigated is the inexplicably large proportion of women prisoners who are detained on remand.

In several U.S. courts, multidisciplinary research projects were set up in which court personnel, in partnership with social science researchers, examined pretrial release decision-making and developed policies about the use of pretrial decision criteria.[24] The failure of the Canadian judiciary to undertake evaluations of bail criteria and of the results of their bail decisions is inexcusable.

The National Council of Welfare recommends that Canadian judges take the lead in setting up multidisciplinary research projects such as the ones undertaken at several U.S. courts to evaluate bail criteria, to develop well-thought-out policies about their use, and to examine the effects of granting bail with conditions.

Other than unemployment, the factor that most often leads to accused people being jailed before their trial is the lack of a fixed residence. The best way to avoid this problem is to establish bail supervision programs and bail supervision hostels to monitor people released on bail and to provide them with temporary housing if necessary. These programs can also help the accused find services they need and make sure they are reminded about where and when to appear in court. This

is particularly important because failure to appear before a court is among the main offences for which Canadians are sent to jail. In 1993-94, more than 20,000 adults and more than 1,000 youths under age 18 received sentences of incarceration for this offence.[25]

Bail supervision programs and hostels are not well established in Canada. In some places where they exist, such as Ontario, they were reduced in recent years. This was denounced as being illogical since the supervision programs cost much less than keeping the accused in jail. The Manitoba Aboriginal Justice Inquiry recommended that these services be greatly expanded because they are extremely important for native people and can prevent many of them from being jailed.[26]

The National Council of Welfare recommends that all provinces and territories establish and provide stable funding to bail supervision programs which can monitor accused people without a fixed residence who are on bail, and bail supervision hostels which can provide them with temporary housing if they need it.

The other urgent concern of Aboriginal peoples is the removal to southern detention centres of people who were accused of offences that were mainly minor property crimes. As mentioned in Chapter II, this resulted in hundreds if not thousands of Aboriginal people, including many youths and many mothers, being jailed far away from their homes and families for relatively long periods before their trial. Given what we know of the factors that lead to criminality, these practices appear to be a recipe for increasing crime in Aboriginal communities.

The National Council of Welfare joins the Manitoba Aboriginal Justice Inquiry in recommending that provincial and territorial governments use whatever methods are necessary, including video conferencing, to conduct bail hearings with the accused remaining in the community where the offence was committed.[27] The Council also recommends reducing the length of time spent in jail prior to bail hearings by holding these hearings seven days a week.

Justice in Trials and Sentencing

As well as increasing the likelihood of being found guilty and eventually being sentenced to prison, detention until trial almost automatically makes accused people ineligible for alternative

measures that divert minor offenders out of the formal criminal justice process. Diversion is also excluded in many jurisdictions for some types of charges such as drug possession. Lastly, diversion is not possible when alternative measures programs are not available, which mostly happens in rural and Aboriginal communities and in the North.

The National Council of Welfare condemns the practice of Crown prosecutors of automatically excluding accused people from alternative measures programs only because they are detained in jail until trial, since many are denied bail mostly because they are poor. The Council recommends that arrangements be made to make alternative measures programs available everywhere, and to ensure that all types of charges can be considered for diversion.

Except in Quebec, diversion rates for young offenders are much lower in Canada than in other countries such as the United Kingdom and the United States. This explains in part why Canada's rate of imprisonment for young people is among the highest in the world. It is a shameful state of affairs that should be corrected without delay.

The National Council of Welfare recommends that the ministers responsible for criminal justice in the provinces and territories take whatever measures are necessary to increase the use of diversion in their jurisdictions to the point where their diversion rates will become similar to those of Quebec and of many industrialized nations.

One of the indications that legal aid services are inadequate in Canada is that no study has been done in ten years or more to find out what proportion of people who are accused of criminal offences are not represented by a lawyer, what types of people are not represented for what kinds of offences, and the consequences on their lives of this lack of representation. The most recent numbers, for female defendants in Halifax courts between 1984 and 1988, revealed that at least 43 percent of their court appearances were without benefit of a lawyer.[28]

The rationale for denying legal representation to poor suspects in criminal cases where there is little or no risk of a sentence of imprisonment is that other sentences such as fines or other community sanctions do not cause serious hardship. This is very doubtful. It fails to take into account the people who go to prison for non-payment of fines. It also ignores the plight of people who receive community sanctions with difficult conditions that are very intrusive. A survey of inmates found that the majority preferred a short term of imprisonment to a longer community

sanction - such as probation - with conditions that would prevent them from leading normal lives.[29] Convictions for minor charges also accumulate and produce records that eventually lead judges to impose sentences of imprisonment.

Since very few non-lawyers know criminal law, it is certain that some defendants who plead guilty without representation have defences that could have led to their being found not guilty. Having no lawyer also means there is no plea bargaining, and that accused people almost certainly plead guilty to the most serious of the charges against them. This almost never happens when defendants have a lawyer and is equivalent to being an inexperienced traveller to the Middle East who pays the full price quoted for some merchandise, when people who are familiar with the system know that the real price is half or one third of that. People without lawyers are also extremely unlikely to obtain discharges. With a discharge, a person can truthfully say he or she has never been convicted of a criminal offence, which can make an important difference in applying for a job.

For these reasons, and because the lack of legal representation of poor people in the criminal justice system makes a mockery of the principle of equality of treatment before the law,

The National Council of Welfare condemns the decisions of the federal Department of Justice and of legal aid administrations to deny legal representation to low-income people accused of minor criminal offences that do not normally bring sentences of imprisonment. At the very least, these defendants should get legal assistance from paralegal personnel or law students. As a first urgent step, all legal aid plans should perform studies to find out the proportion of defendants who are not represented and the consequences of their lack of representation.

As mentioned in Chapter III, judges are often criticized because the sentences they impose are very subjective and inconsistent. It is not unusual to find wide disparities in the sentences different judges issue in very similar cases and to find identical sentences issued by different judges to very different offenders. Huge disparities were also noted in the sentences imposed by different courts in the same province and by courts from different provinces or regions. On the basis of the figures we examined, there seems to be little doubt that people with similar backgrounds who are caught for the same minor offence are treated more severely by judges in Ontario than by judges in Quebec, with the reverse perhaps being true for more serious offences.

Although judges understandably defend their right to issue disparate sentences, other experts working in the criminal justice system believe this is a serious problem:

> Crown and defence counsel across the country were asked . . . by the Sentencing Commission: "Do you think that there is unwarranted variation in sentences?" Usually these professional groups have strikingly divergent views on matters relating to sentencing. On this occasion, however, both groups responded similarly: 40 percent endorsed the view that "there is a great deal of unwarranted variation." Fifty-seven percent indicated that there is some unwarranted variation. Only 3 percent perceived no unwarranted disparity.[30]

According to David Daubney, who headed the 1988 House of Commons Committee on Sentencing and Parole, "Clearly, the kind of disparity we're seeing is unacceptable and doesn't do anything for the public image of the criminal justice system."[31] The two Manitoba Aboriginal Inquiry commissioners, who were themselves judges, also deplored the inconsistency and lack of thoughtfulness of judges' sentences, blaming part of it on the fact that in order to make well-thought-out sentencing decisions, judges need much more information than they have now:

> They need to receive feedback about the sentences they and their colleagues have imposed in the past. They need to know, for example, how particular individuals fared in particular programs and whether any went on to commit further crimes. More generally, they need information about the effectiveness of the various sentencing options. Regrettably, this information is not collected or made available. While judges receive reports from some probation officers, there is no formal system to provide them with feedback on the effectiveness of sentences they have imposed. In fact, the courts often do not receive adequate information about the sentencing options available to them.[32]

Judges are ill informed because they have traditionally insisted on their impartiality and independence from all other institutions and routinely refuse to cooperate with researchers.[33] When Canadian judges are asked who they are accountable to, their typical answers are "to God," "to my conscience," or "to the public."[34] Identification with the public, along with lack of knowledge or understanding of research findings in criminology, may explain why members of the public and judges who are given similar hypothetical cases produce similar sentences, with both groups showing too much reliance on incarceration.

The Canadian Sentencing Commission, which reported in 1987, condemned the system which still exists today, with its over-reliance on incarceration, its lack of clear policies for sentencing, its unjustified disparities, and the almost total lack of feedback on the effects of the various sentence options. It proposed the establishment of a permanent sentencing commission that would develop clear sentencing guidelines to assist judges in deciding when to choose a community sanction as opposed to incarceration, and when to choose one community sanction instead of another. The permanent sentencing commission was also to do research on the effectiveness of the various sanctions, and in particular on their net widening effect.[35] These and other Commission proposals were initially supported by the federal government but were never implemented, in part because of judges' opposition.

The National Council of Welfare is appalled by the shocking disparities, the over-reliance on incarceration, and the lack of solid foundation of Canadian sentences, and it supports the proposal of the Canadian Sentencing Commission to establish a permanent sentencing commission that would examine these issues and develop coherent sentencing guidelines.

If this recommendation is not implemented and no permanent sentencing commission is established, Canadian judges will continue to make decisions on the basis of inadequate information. In spite of the efforts of the Canadian Centre for Justice Statistics, which is part of Statistics Canada, the most recent data published on the sentences imposed to adults are incomplete (New Brunswick, Manitoba and British Columbia are missing), more than five years old (1993-94) and cover only provincial courts.[36] These figures give almost no breakdowns by sex or other personal characteristics or between sentences imposed on first offenders and on career criminals.

Published data on sentences imposed on young offenders are more recent (1997-98) and include all provinces and territories and more breakdowns by age and sex.[37] On the other hand, statistics on youths in correctional institutions are much less complete than the comparable information for adults. For reasons which are said to be technical but may also be political, Quebec has not provided Statistics Canada with figures on young offenders in secure custody since 1995-96 and Ontario has not provided them since 1993-94.[38] The other provinces and the territories provided them for 1996-97. Neither Statistics Canada nor the provinces and territories publish data indicating who goes to prison for non-payment of fines and why.

The National Council of Welfare asks all levels of government to cooperate in the preparation and publication of complete and recent data on all aspects of the criminal justice system, particularly on imprisonment for failure to pay a fine.

The Canadian Sentencing Commission believed that the use of fines was to be encouraged. It proposed that once judges have decided that a community sanction is appropriate, they should consider a fine as a first option for more serious offences, "because the fine is one of the most onerous of all the community sanctions available."[39] On the other hand, the Commission recognized the problem of the differential impact of fines on people of different means:

> . . . two offenders who are convicted of exactly the same offence and are ordered to pay identical fines may nevertheless suffer the consequences of the sentence in vastly different ways, depending upon their individual financial circumstances.[40]

As a result, the Commission concluded that "the Scandinavian day-fine system should be investigated with a view to its possible implementation in Canada."[41] The proposed permanent sentencing commission was to help the courts find ways of adjusting the day-fine system to Canada. As we saw in Chapter III, day fines were introduced in Sweden in the 1920s and have been used for some time in other European countries (including Austria, Denmark, Finland, France and Germany) as well as in many countries in Central and South America. Since the Canadian Sentencing Commission issued its report in 1987, many successful day-fine pilot projects took place in the United States - where day fines are called "structured fines"- as a result of which structured fines are now used in at least seven U.S. jurisdictions.

Day fines equalize the impact of fines on rich and poor by using a two-step process that takes first the seriousness of the offence and secondly the financial resources of the offender into account. In the first step, the judge determines how many day-fine units to impose based on the severity of the offence. For example, a minor theft might bring a sentence of 15 day-fine units while a violent assault might produce a sentence of 80 day-fine units. In the second step, which is usually handled by clerks, the day-fine units are multiplied by the offenders' net daily income. If two first offenders commit similar minor thefts and are both given sentences of 15 day-fine units, for example, the first offender who is a welfare mother with a net income of $8 a day will have to pay a fine of $120 (15 times $8), while the second offender who is a sales clerk with a net daily income of $35 will have to pay a fine of $525 (15 times $35).

The result, according to accounts from all jurisdictions that have used the day-fine or structured fine system, is a sentence that is unequivocally punitive while being flexible, credible, economically beneficial, effective, efficient and fair.

The National Council of Welfare recommends that all Canadian governments cooperate in setting up pilot projects on the use of a day fine system that would eventually apply to all fines imposed by all levels of government.

Throughout this report, many references were made to the unavailability or the inadequacy of various programs, personnel and facilities in the criminal justice system. As well as denouncing the unjust results of these inadequacies, especially for Aboriginal people, critics often pointed out that the government decisions which caused these problems were often penny wise and pound foolish, because the result was more high-cost incarceration and incalculable costs in terms of damage to human beings, sometimes over several generations. Among these problems are:

- The need for more justices of the peace in northern and Aboriginal communities to handle bail hearings and minor cases locally, instead of waiting for infrequent circuit court visits or transporting accused people to the south.

- Lack of essential bail support services such as bail interview officers, bail supervision programs and bail supervision hostels.

- The unavailability in many regions, especially in northern and Aboriginal communities, of alternative measures programs for minor offenders who should be diverted out of the formal criminal justice system.

- The unavailability or underfunding of treatment programs and community service work programs. Insufficient funding leads to poor planning and organization and lax supervision practices that undermine the credibility of community sanctions.

- The huge workloads of probation and parole officers, which make it impossible for them to be anything but impersonal law enforcers. Many studies have shown that recidivism can be reduced by up to 50 percent by good supervision practices for ex-offenders. Most effective are intensive services for high-risk offenders, including closer and friendlier relations between offenders

and parole or probation officers, who serve as role models and advisers, encourage desirable behaviour and help the offenders find solutions to their problems.[42]

• Essential services for ex-inmates that are being cut back. A few years ago, the Progressive Conservative government of Ontario closed the province's halfway houses, which used to help ex-prisoners gradually reintegrate to life in the community. This probably had the effect of increasing the proportion of ex-inmates who end up homeless on the street.

The National Council of Welfare recommends that the provinces and territories provide sufficient and ongoing funding to all these services in order to provide equal treatment to low-income people in the criminal justice system and to maximize the chance that ex-offenders will stay out of the justice system in the future.

In 1987, the Canadian Sentencing Commission recommended an integrated approach to sentencing that would include: 1) a consistent statement of the purposes and principles of sentencing; 2) changes to sentencing laws that would make them consistent with these purposes and principles; 3) the development of guidelines to remedy unwarranted disparities; and 4) the abolition of minimum penalties except for murder and high treason.

In the ten years that followed, the federal government produced: 1) inconsistent statements of purposes and principles; 2) many laws that contradicted its own official policy to reduce incarceration; 3) one guideline which favours incarceration in some drug cases; and 4) many new mandatory minimum sentences.[43]

An overview of the criminal law amendments since 1987 concluded that their principal trend was "toward an increase in the use of punishment."[44] One of the amendments raised the maximum penalty for young offenders from five years to ten, which can produce longer periods of imprisonment for youths than for adults for the same offences because the Young Offenders Act does not provide for parole in the juvenile justice system. A new drug law increased the penalties for drug offences and created a presumption in favour of imprisonment in some situations. A Firearms Act whose purpose was to control the possession of firearms raised so much controversy that in order to demonstrate a tough stance toward crime, the federal government attached a minimum penalty of four years in jail to ten offences, when they are committed with a firearm.

The ten offences to which this new minimum penalty applies are all very serious ones, but the amendments were based on purely political considerations that had nothing to do with whether there was a demonstrated need for a change in sentences for these crimes. To give an example of the result, let us imagine an 18-year-old young man who has led a blameless life until now, who falls in with a bad crowd that induces him to get drunk and then, for fun, to borrow his father's gun and rob a corner store. Because of the minimum penalty law, a judge would have no option but to sentence him to four years of imprisonment. If the young man is from a well-off family, large sums of money will likely be offered to compensate the staff of the store, perhaps leading to memory lapses about a firearm, or even a withdrawal of their complaint. If the young man is from a poor family, he will be sentenced to four years of penitentiary and his life will be ruined.

Political considerations also inspired the recent adoption of automatic mandatory minimum victim fine surcharges of $50 for all summary conviction offences and $100 for all offences punishable by indictment. These fine surcharges are much worse for the poor than ordinary fines. Unlike ordinary fines, they cannot be worked off by doing community work and they are imposed even when no fine was ordered for the offence because the judge decided that the offender was unable to pay it. Victim fine surcharges can only be waived when the offenders take the initiative of convincing the judge that the surcharges would cause undue hardship to them or their families. As we saw in Chapter III, presenting "undue hardship" arguments to the court is an impossible task for almost all poor and ill-educated offenders who do not have legal representation.

These examples illustrate why mandatory minimum punishments have been called "a great evil" that sends the poor to jail and that "tends to corrupt the administration of justice by creating a will to circumvent it."[45] As we saw in Chapter III, when the Canadian Sentencing Commission surveyed judges about such sentences, more than half said they prevented them from imposing just sentences. The Commission recommended that mandatory minimum sentences be repealed for all offences except murder and high treason.

The National Council of Welfare denounces mandatory minimum sentences and asks that they be abolished as soon as possible for all offences except murder and high treason.

Another ill-thought-out measure is the relatively new provision in the Criminal Code allowing victims to make "victim impact statements." At one level, as Anthony Doob writes, a victim's impact statement appears to make enormous sense, because the present law highlights the principle that

sentences should be proportional to the harm inflicted or threatened, and one obvious way to obtain this information is to have the victim present such evidence in court.[46]

The other side of the coin, Doob continues, is that victims' statements can drastically increase disparities in sentences. He gives the hypothetical example of two similar offenders who break into his own house and his neighbour's house. Within a few days Doob himself, who is well insured, has replaced the stolen items and put the burglary out of his mind. His neighbours, who are fearful and uninsured people, now have trouble sleeping and end up suffering serious long-term harm from the burglary:

> The question that this hypothetical, but not implausible, scenario raises is simple: should one offender be treated leniently while another is punished harshly because he or she, by chance, happened to get a more vulnerable victim? Victims vary enormously in their responses to victimization, and for many crimes offenders do not choose their victims very carefully . . . should the judge punish my neighbour's offender harshly and let mine off with a 'mere slap on the wrist'?[47]

Parliament did not address this crucial point when it decided to allow victim impact statements, with the result that different judges will probably give different weight to victim statements and sentences will become even more inconsistent. As we saw in Chapter III, low-income offenders are disproportionately affected by victims' attitudes and victims' statements because they are unable to obtain forgiveness by providing financial compensation.

The National Council of Welfare deplores the federal government's lack of responsibility in adopting amendments to criminal laws that increase incarceration rates and make sentences harsher, more inconsistent and more unequal than before. As proposed by the Canadian Sentencing Commission, we recommend that the federal government formally commit itself to an integrated, coherent approach to sentences.

CONCLUSION

Canada's criminal justice system is anything but just. Wealthy businessmen easily pay fines for offences that endanger the lives of their workers while vagrants are imprisoned for stealing a bottle of wine. Although there is no evidence that young people from poor families commit more crimes or more serious offences than youths whose parents are well off, the majority of young people who are arrested and whose lives are damaged by contacts with the criminal justice system are from low-income backgrounds.

Most affected by this intolerable discrimination are the poorest of our poor, Aboriginal people. They are most overpoliced and most likely to be denied bail and to be subjected to intrusive judicial orders, such as alcohol prohibitions and curfews that set up minor offenders to become lifetime jail residents. In 1990, Saskatchewan's population was 8 percent Aboriginal and Alberta's 4 percent, but 85 percent of all women in provincial prisons in Saskatchewan were Aboriginal and 48 percent in Alberta.[1] Hundreds of Aboriginal youths are imprisoned for technical offences such as failing to appear in court on the due date. It is easy to understand why Aboriginal people refer to the criminal justice system as the "Just-Us" system that drags them into a "revolving door of despair."[2]

Who is in charge of this criminal justice system that is not only unjust but so ineffective that many experts believe it may increase crime instead of reducing it? It would appear that nobody is in charge. Many institutions with authority over people dump their failures into the criminal justice system, thereby creating more crime while purporting to fight it.

School boards that fail to teach non-violence respond to acts of violence by adopting "zero tolerance" policies that send kids into the streets and eventually to jail. Municipal governments reluctant to increase unpopular taxes impose more and higher fines to raise revenue, sending to prison the poor who can't pay fines directly or by doing community work. Provincial governments constantly denounce crime and promise more police to produce safer streets. At the same time, their cutbacks to health, welfare and employment services throw more mentally ill, homeless families and unemployed youths into the streets, where they frighten local residents.

The federal government is also part of the problem. While denouncing overincarceration and deploring Canada's record as a world leader in imprisoning young people, it increased jail populations by adopting more severe sentences and mandatory minimum jail provisions. Governments and

political parties that are constantly promising largely futile or counterproductive anti-crime measures spread fear in the population by giving the impression that crime is widespread and growing in Canada. This is reinforced by sensationalist media coverage of criminal events.[3] It is no wonder that so many Canadians, especially seniors and women, are fearful and misinformed about crime.

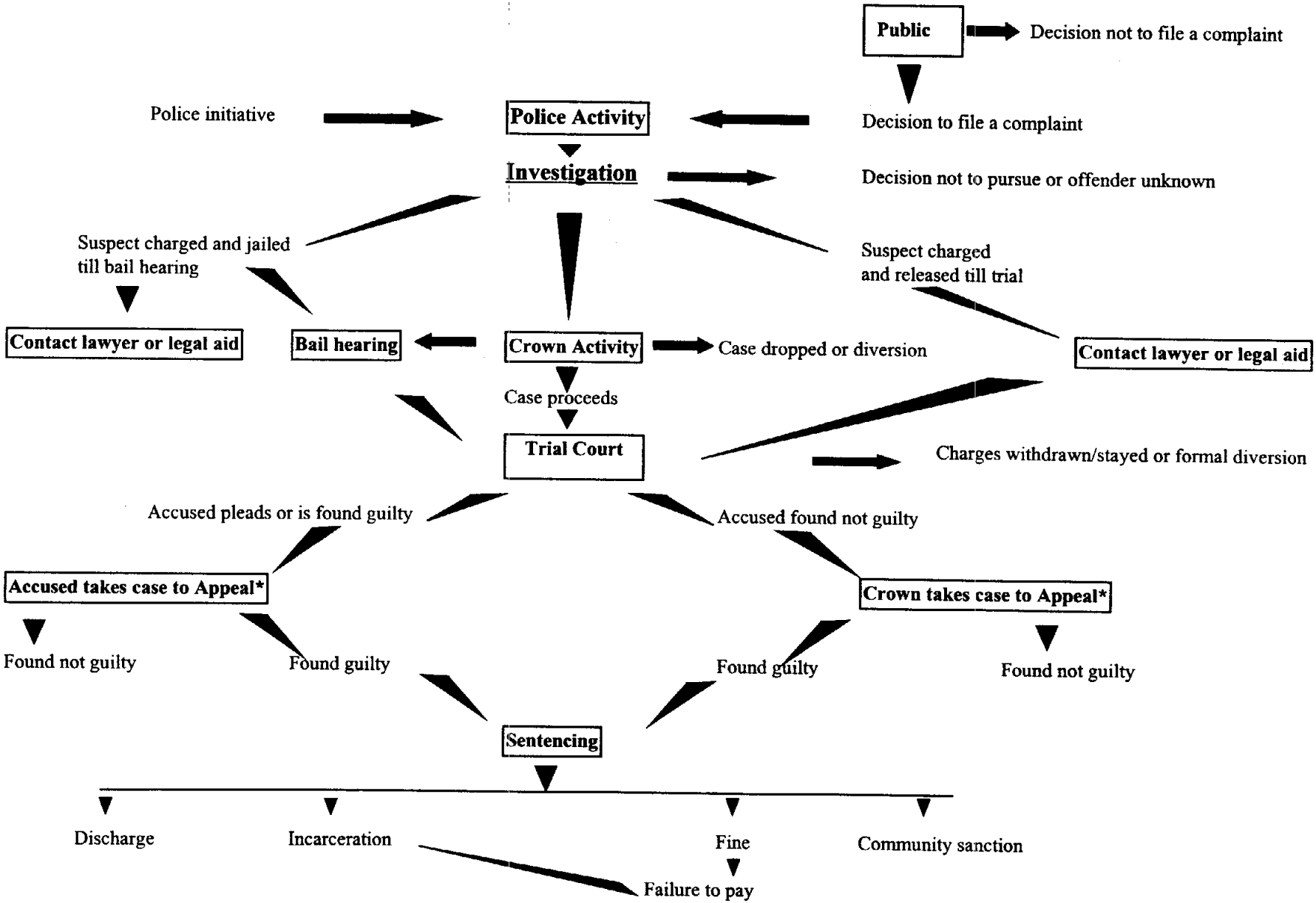
In the previous chapter, the National Council of Welfare made many specific recommendations to improve the criminal justice system. We also believe that two broader recommendations should be adopted:

- **Canadian governments and political parties should stop using crime as a political weapon.** They, along with the media, should renounce fear-mongering, and instead launch and support campaigns to make it known to everyone that Canada is one of the safest countries in the world, that it has one of the lowest levels of crimes of violence in the world, and that crimes of violence are not increasing in this country.

- **Canadian governments and political parties should be truthful about the limitations of the criminal justice system.** They must stop implying that our streets will be made safer by hiring more police and adopting tougher laws and longer prison sentences. The public should be told that the criminal justice system can do almost nothing to reduce crime, and that crime prevention is best done by helping vulnerable parents, maintaining a strong social safety net and creating good jobs for young people.

Only when this has been done, and people in positions of authority sit down together in good faith to address the problem, will there be any hope that the criminal justice system can be reformed. Until then, the criminal justice system will continue to be an unjust and ineffective tool that imprisons low-income people and poor minorities for relatively small offences while allowing rich offenders, by paying fines they can well afford, to break our country's laws.

APPENDIX
SIMPLIFIED OVERVIEW OF PROCEDURE FOR CRIMINAL CASES



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Notes to pages 4-6

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The Council consists of members drawn from across Canada and appointed by the Governor-in-Council. All are private citizens and serve in their personal capacities rather than as representatives of organizations or agencies. The membership of the Council has included past and present welfare recipients, public housing tenants and other low-income people, as well as educators, social workers and people involved in voluntary or charitable organizations.

Reports by the National Council of Welfare deal with a wide range of issues on poverty and social policy in Canada, including: income security programs, welfare reform, medicare, poverty lines and poverty statistics, the retirement income system, taxation, labour market issues, social services and legal aid.

On peut se procurer des exemplaires en français de toutes les publications du Conseil national du bien-être social, en s'adressant au Conseil national du bien-être social, 2e étage, 1010, rue Somerset ouest, Ottawa K1A 0J9.