AN HISTORICAL ANALYSIS OF BILLS C-67 AND C-68: IMPLICATIONS FOR THE NATIVE OFFENDER

Brian D. MacLean

R.S. Ratner

INTRODUCTION

In June, 1986, The Solicitor General of Canada, Jim Kelleher, alerted the media, the Canadian public, and politicians in Ottawa to a situation which he portrayed as an acute emergency. Kelleher argued that unless parliament moved swiftly, approximately forty violent offenders would be released upon the Canadian public over the following three months.[1] Within the fervour of the moral panic created by Kelleher's warning, an emergency meeting of Parliament was called. Its purpose was to pass legislation which would prevent the statutory release of these prisoners. The outcome of this emergency sitting was the passage of Bills C-67 and C-68, Acts to amend the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act, and the Criminal Code of Canada.

While the amendments to the above Acts of Parliament have serious implications for the entire correctional process in Canada, our concern in this paper will be the impact which Bills C-67 and C-68 are likely to have upon the Indigenous Peoples incarcerated in Canadian penitentiaries. As of September, 1986, Natives (Indians, Eskimo/Inuit, and Metis) already accounted for approximately 31 percent of the total federal inmate population in the Prairie Region of Canada.[2] The immediate question is whether the new amendments are likely to accentuate this disproportion or reduce it. Ideally, such an assessment

would make use of records produced by the implementation of the new legislation; however, because of the recency of legislation, the data is insufficient to permit a rigorous analysis of the correctional trends produced by new practices incurred by the legislation.[3] Our strategy, therefore, entails an historical analysis of the evolution of parole legislation in Canada. Such analysis will clarify previous trends produced by conditional release practices, and in comparing these trends with the principles underlying the older legislation, we shall be in a position to speculate on how these are likely to be altered or reinforced by the recent amendments.

THE LOGIC OF CONDITIONAL RELEASE 1800-1959

In 1974, H. Carl Goldenberg, Chair of the Standing Senate Committee on Legal and Constitutional Affairs, distinguished three periods of parole evolution in Canada:

> In Canada release of offenders from penitentiaries and prisons, other than by normal expiration of sentence, has been effected by state intervention either through clemency or parole. Three distinct periods of state intervention can be identified...
>
> 1. Prior to 1899-Royal Prerogative of Mercy...
> 2. 1899 to 1958 -- Ticket of Leave Act....
> 3. 1958 - The Parole Act... (1974: 15-16).

Each of these periods marks a substantial shift in the official logic of correctional legislation which requires some elaboration. Statistical trends which might clarify the outcome of the actual practices engendered by the legislation of each of the three periods are impossible to produce. Such a situation is not the product of inaccessibility to these data, but rather, where they exist, they are unreliable and much less than ideally accurate. As Goldenberg notes in his investigation into parole in Canada:

> This Report had made little use of statistics on parole because the information is inadequate. It is not reliable enough to give even accurate head counts. It neither permits actual statistical descriptions, nor meaningful assessments of various programs (1974: 125).

Despite the lack of data which might inform policy formation on conditional release, numerous investigations have been carried out which have contributed to the production and modification of certain legislation. These dubious "fact-finding" missions have resulted in legislation which is simply congruent with the dominant ideology of the times.[4] It is only recently that informative correctional data have been published, and we shall make use of such data later in our argument.

Prior to the Ticket of Leave Act (1899) the Royal Prerogative of Mercy was used at the discretion of the Governor General and represented an exercise of clemency for humanitarian reasons. Because staff were not appointed to supervise releases under this clemency it was unconditional (Goldenberg 1974: 15). In 1938 Justice Archambault, commenting on the Royal Prerogative in his report of The Royal Commission to investigate The Penal System of Canada stated:

> There will always be cases in the wise administration of justice where it is necessary to exercise the royal prerogative of mercy. No category of rules can be laid down in advance that will govern the principles that ought to be applied in any particular case. The prerogative is one of **mercy and grace**, and not one of **right**. It should only be applied in cases where a gracious and merciful sovereign, having regard to the welfare of his subjects, would in his wisdom see fit to extend mercy, lest by the rigorous enforcement of the law injustice be done. [Emphasis in original] (1938: 235).

During the earliest period of parole development in Canada, conditional release was not seen as being rehabilitative in nature. A retributive justice philosophy carried with it the possibility that the sentences imposed by the court may have been overly severe in certain cases. Thus, there would always be instances where, for humanitarian reasons, the act of mercy might be warranted.

Releases under this practice tended to be very short (Archambault 1938), and since they involved the decision of only one person, they were not applied in any systematic manner.

With the passage of the Ticket of Leave Act (1899), the notion of rehabilitation of the prisoner became enshrined in conditional release logic, and although early releases were still granted for clemency, ". . . through experience and as rules of procedure were adopted, the possible reform of the offender became a more important factor in the decision to release him" (Goldenberg 1974: 15). For this reason the Ticket of Leave Act can be seen as the first step towards a system of parole, and is characterised by a gradual shift from an ideology of retribution to one of rehabilitation:

> Parole grew out of the change in point of view in penal philosophy from one of retributive punishment to one of reformation. Many people began to believe that the most socially economic way of protecting society was to restore the offender to normal functioning. This belief led to a view that it might be neither necessary nor desirable for a criminal to spend his full sentence in prison. (Miller 1980: 377).

The concept of rehabilitation is, of course, ideologically loaded. The restoration of any offender to "normal functioning" implies firstly, that the offender adopts a particular lifestyle, and secondly, that some form of supervision will ensure that no deviation from that lifestyle will occur. Said differently, adoption of dominant ideology by the offender is ensured by a set of power relations which are committed to this dominant ideological framework. Certain problems, however, are raised by this rehabilitative strategy. For example, what actions become necessary if it is decided that the releasee does not demonstrate satisfactory progress towards "normal functioning"? The 1931 amendment to the Ticket of Leave Act (1899) attempted to prevent this situation

by legislating a number of conditions attached to the licence to be at large in schedule A of the Act:

> 1. The holder shall preserve his licence and produce it when called upon to do so by a magistrate or a peace officer.
>
> 2. He shall abstain from any violation of the law.
>
> 3. He shall not habitually associate with notoriously bad characters such as reputed thieves and prostitutes.
>
> 4. He shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.

In addition to the above conditions, authority was given by the Act to the Governor General to impose any conditions of release that he deemed appropriate. Because the violation of any of these conditions could result in the offender's return to prison, they might be viewed both as a yardstick by which the return to "normal functioning" could be measured, and as the prescription of punishment for failing to adopt the dominant ideology to a satisfactory degree.

At the same time, a system of good conduct remission was authorized by the Penitentiaries Act. Time off for good behaviour was not only supposed to provide the motivation for satisfactory behaviour while the offender was incarcerated, but it could also be used as a measure of the offender's progress for the purpose of assessing the suitability of the offender for a licence under the Ticket of Leave Act. "Before 1959 an inmate in a federal penitentiary was granted statutory remission for good conduct and industry up to a maximum of six days per month until he had accumulated seventy-two days. Thereafter, he earned remission at the rate of ten days per month" (Goldenberg 1974: 57).

Clearly, there is a logical distinction between early conditional release and good conduct remission. The former stems from an ideology of reformation and the adoption of conventional values and beliefs. The latter, a social control

strategy, serves as a motivation for the offender not to create difficulties for the prison administration. Nevertheless, there has been an historical tendency to confuse these two types of early release which is based upon the material fact that each type of release has been administered by the same agency.

Since the decision for Ticket of Leave releases rested with the Governor General, it became necessary to establish an agency whose function was to administer the Act. Furthermore, because the administration of good conduct remission was also required, the Remission Service was established to carry out these functions:

> The administration of the Act, as well as the royal prerogative of mercy, was handled by officers in the Department of Justice who finally constituted a section in the Department known as the Remission Branch and later the Remission Service. First head of the Branch [was] appointed in 1913 (Miller 1980: 381).

While a number of developments in after-care took place during this period of parole history (Miller 1980), there was very little legislative reform. In 1953, Stuart S. Garson, Minister of Justice at the time, appointed a committee to inquire into the principles and procedures followed by the Remission Service which was chaired by Gerald Fateux. The two major areas of investigation, which are of interest here, were parole under the Ticket of Leave Act, and good conduct remission under the Penitentiaries Act. The committee saw the former as a key step in the process of rehabilitation, as underscored in the committee's justification for parole:

> Parole offers an opportunity for the practical application of rehabilitation programs prior to the expiration of sentence. It encourages the inmate to maintain maximum contact with relatives, friends, and prisoner's aid and after-care societies, thus keeping him keenly aware of the existence of a free society of which he continues to be a member despite his imprisonment. The prospect of parole stimulates the inmate to derive maximum benefit from the facilities provided by the prison as preparation for parole, i.e. the educational,

> vocational, religious, recreational and other services furnished by the institution. It offers assistance to the individual upon release. The possibility of parole revocation operates as a deterrent to anti-social conduct. The possibility of parole may be an incentive to good conduct in the institution. Parole provides a means whereby, in proper cases, the term of imprisonment may be shortened. It allows the timing of release to be related to the completion of vocational and other training programs. It offers an opportunity for the prison administration to evaluate the influences of the penal system. It is a socially just procedure because it enables society to play an auxiliary role in the readjustment of the individual who may have become a criminal partly through shortcomings in society itself. It may serve as a proper means of mitigating excessively severe punishments imposed under the influence of aroused public emotions. It offers a means of protection to society from further criminal activity on the part of released offenders. Finally it offers an opportunity to re-evaluate the role of institutional treatment and the relative merits of alternative less punitive techniques. . . To this list we would add another consideration that to us seems important in Canada. Parole is a cheaper form of treatment than institutional care. It therefore represents a savings of public funds (1956: 51-52).

The ideological biases in the above citation are fairly evident. The notions of deterrence, motivation and readjustment, and of vocational, educational and religious training all characterize dominant White hegemony[5], and the material basis of these concepts is located in middle class capitalist culture. It would seem, therefore, that the question of whether or not an offender is well on the road to normal functioning is really the question of the extent to which the offender has adopted this hegemony. More recent literature has suggested that the very concept of parole is one which stems from a middle class orientation, and the principles upon which parole is established do not consider the orientation of the offenders themselves (Maclean 1984).

The Fateux Report also noted that the Remission Branch, in following a set of rules during the decision-making process for license under the Ticket of Leave Act, did not provide enough latitude for the consideration of individual merits. Indeed, while the commission praised the Remission Service, they also

noted that due to the volume of cases investigated by the Service, and as a result of the practices which they followed, the spirit of conditional release was not being met:

> For a long time the policy within the Remission Service has been to recommend parole not on compassionate grounds, but upon ascertaining that the inmates are apparently reformed, likely to behave in future and may safely be paroled. The investigation procedure of the service, however, in the main still reflects the traditional view that a Ticket of Leave is in the nature of an exercise of clemency, and has to be applied for (Fateux 1956: 66).

The Fateux Committee also took a critical stance in terms of the practices for good conduct remission which were being followed at the time:

> The device of awarding statutory remission for good conduct and industry on the part of prison inmates is used in most countries. It is undoubtedly considered by prison administrators to be a valuable means of maintaining discipline. However, in Canada, the application of the device results in anomalies and inequities... The system of computing statutory remission is cumbersome and difficult to explain... The goal should be to put into effect a system of statutory remission that would eliminate anomalies and inequities... (1956: 60-61).

It is evident that the Fateux Commission viewed good conduct remission and conditional release as two distinct methods of early release. The former was designed, in the committee's opinion, to provide motivation for prisoners to be of good conduct and industry during their period of incarceration, while the latter was designed as a step in the rehabilitation process. Prisoners who were deemed to have reconciled their own views with the hegemonic ideology were considered to be reformed to the point where their early release under specified conditions did not represent a risk to the community, and the conditions of release were expected to reinforce the prisoners' apparent embracing of conventional values.

The result of the Fateux Report was the drafting of legislation which provided for the abolition of the Remission Service, the development of a parole

system in Canada, and the establishment of the National Parole Board (NPB). Consequently, in 1959, the Parole Act was proclaimed.

PAROLE LEGISLATION 1959 TO PRESENT

From 1959 onwards the National Parole Board was solely responsible for the early conditional release of prisoners who were deemed by the Board to be at minimal risk. Prisoners who did not receive a favourable decision from the Board and those who did not even apply for parole were released into the community on their warrant expiry date less the amount of good conduct remission standing to their credit (Ratner 1986a). Following an earlier recommendation by the Fateux Committee, the possibility of statutory conditional release was investigated by the Canadian Committee on Corrections, established in 1965 under the chair of Roger Ouimet.

The Ouimet Report (1969) marks a significant shift in the logic and principles underlying conditional release in Canada. The Committee argued that the history of conditional release in Canada was characterised by the release of low-risk prisoners into the community where they would be under supervision and subject to certain controls represented by the conditions of release. Those prisoners who were unsuccessful in parole hearings, however, were considered to be the higher risks, yet they were being released into the community with no controls of supervision whatever:

> Canada's experience, like that in most other countries, has been that during the early development of parole releases were made cautiously and were granted to the better risks among prison inmates. . . . Increasingly, however, it is being pointed out that the practice of paroling only the better risks means that those inmates who are potentially the most dangerous to society are still, as a rule, being released directly into full freedom in the community without the intermediate step represented by parole. . . . At present, about 25% of

> inmates coming out of the federal penitentiaries do go on parole. The other 75% come out without any supervision. . . . Since there are about 3,500 releases from the penitentiaries each year, the number who are being released without supervision is considerable. Among them are many of the most dangerous who could not meet the requirements for parole (Ouimet 1969: 348).

So convincing were the arguments made by the Ouimet Report that amendments to the 1959 Parole Act were legislated, taking effect in August 1, 1970 (Griffiths et al. 1980). Central to these amendments was the provision for statutory conditional release, or mandatory supervision. Section 15 (1) of the amended Act states that:

> Where an inmate to whom parole was not granted is released from imprisonment, prior to the expiration of his sentence according to law, as a result of remission, including earned remission, and the term of such remission exceeds thirty days, he shall, notwithstanding any other Act, be subject to mandatory supervision commencing upon his release and continuing for the duration of such remission.

The effect of the establishment of mandatory supervision has been the negation of good conduct remission. If the history of pre-1959 parole logic has been characterised by a confusion between clemency and rehabilitation (Fateux 1956), then the post-1970 tendency has been to confuse the two issues of good conduct remission and conditional release. From the perspective of the prisoner, he has been granted good conduct remission, only to find that he is subject to the same conditions of release as a parolee and as such can be returned to prison for committing a new offence, for violating a condition or special restriction attached to his release, or at the discretion of his parole supervisor. This condition is embodied in Section 15 (2) of the Parole Act which states:

> Paragraph 10(1)(e), section 11, section 13, and sections 16 to 21 apply to an inmate who is subject to mandatory supervision as though he were a paroled inmate on parole and as though the terms and conditions of his mandatory supervision were terms and conditions of his parole.

Since 1970, Mandatory Supervision (MS) has been the subject of considerable debate (Miller 1980) despite the fact that prisoners and administrators alike agree that it is unfair:

> . . .given the meaning in terms of sentence mitigation which it has taken from 'earned remission'. . . the Working Group finds the inmate position on the unfairness of MS to be perfectly understandable (Report of the Working Group, 1981: 92-93).

Nevertheless, MS remained intact and virtually unchanged until 1983 when the NPB, acting under its own policy initiatives, instituted the procedure of "gating." Under the assumption that some MS cases due for release represented an undue threat to the community, the NPB acted to have revocation warrants issued under its discretion by the authority given by the Parole Act. Gating consisted of a tri-partite agreement between the NPB, the corrections and parole services branch, and the RCMP. Prisoners would be released, taken to the front gate of the prison, and given over to the custody of the RCMP who would exercise the previously validated suspension warrant:

> The term "gating" was coined by William Outerbridge, Chairman of the National Parole Board. It refers to the immediate revocation of release directly after the inmate formally embarks on mandatory supervision (Ratner 1986a: 152).

The practice of "gating" aroused immediate attention by the media, and the legal community, summoned by the prisoners who fell prey to such practice, was successful in bringing the matter to the Supreme Court of Canada.[6] Despite the outcome which favoured the prisoners' argument, Robert Kaplan, then Solicitor General, claimed that the practice would be legalized by amendments to the Parole Act:

> Such justification [for continued institutional control] has been symbolized by the former policy of gating and a Solicitor General's vow to introduce legislation that would amend the Parole Act to permit "gating" (since the Supreme Court of Canada had ruled the practice

illegal). Indeed the Senate approved legislative proposals that would give provincial superior courts the power to "gate" federal inmates who fit the Criminal Code definition of "dangerous offenders" (Ratner 1986a: 152).

Such legislation was passed by the House of Commons in its emergency meetings of June 26, 1986 under the title of Bill C-67 and Bill C-68. While numerous amendments to the Parole Act were introduced by this legislation, amendments to the Penitentiaries Act, the Prisons and Reformatories Act and the Criminal Code essentially make these changes compatible with other existing legislation.

There are three salient changes in the new parole legislation which command our attention here:

1. The NPB has been given the authority to refuse a prisoner release under MS where the Board feels that such release might result in serious harm to any person (either physical or psychological as defined by the legislation).

2. Certain community correctional facilities may be designated by the NPB as the location of residence for MS releasees.

3. There is an expansion of the use of special conditions and technical restrictions of behaviour as advocated by the NPB for MS releasees.

It is clear from the new legislation that the logic of conditional release has once more been inverted. Those prisoners for whom MS has been denied by the NPB are clearly those who have been considered as the most dangerous to the community (assuming, of course, that the procedures followed by the NPB in such determinations are reliable and valid--a bold assumption in itself given the decisions handed down by the NPB historically). Mandatory Supervision was recommended by the Ouimet Commission (1969) as a safeguard against the release of dangerous offenders in that they would not be totally free but under supervision and certain controls. With the new legislation, however, these

offenders are held until the completion of their sentences, only to be released into the community with no controls and no supervision. The logic of conditional release has come full circle, the outcome of which has been a more punitive and repressive carceral system with prisoners being detained longer (MacLean 1986) and with good conduct remission essentially being negated. The rehabilitative principles upon which parole legislation evolved in Canada have passed into principles of containment and, by implication, punishment.

This brief history of parole legislation in Canada has illustrated that, while the principles have changed, the effect has been the same. Those persons believed to have adopted the dominant ideology, (or withdrawn their resistance to it), are excused from penal sanction, and those who have not have been subjected to increasing severity of punishment. Two important question raised by these developments are whether there is a differential ability of various populations to adopt this hegemony, and to what extent the principles of parole have been differentially applied to different populations. Studies of parole have been sparse and yield conflicting answers to these questions. For example, some writers have argued that younger prisoners are more likely to receive full parole than their older counterparts (Maclean 1984; Nuffield 1979), while others have shown that the criminal career of the offender is more important in the decision than ascriptive characteristics (Demers 1978). The Goldenberg Committee (1974) concluded that the problems experienced by the Native offender went well beyond parole or criminal justice:

> The [problems] originated in the economic, social and cultural conditions of native people and we concur with. . . the brief on behalf of the inmates. . . that there is "no doubt that any final answer to the problem of Native offenders must await a solution to the general social and economic conditions under which the Native people live" (1974: 115).

But such a position ignores the real and present injustices experienced by the Native offender at the hands of the NPB, as we illustrate in the following section.

PAROLE AND THE NATIVE OFFENDER

In March, 1981, the Solicitor General's Report of the Working Group completed its study of the decade of parole since the 1970 amendments to the Parole Act which introduced Mandatory Supervision. This in-depth study included 155 pages of text plus a number of appendices and additional tables. Within the body of the report, under the heading of "Special Offenders Groups," only two paragraphs are given on the subject of Native offenders, and each deserves quotation at length:

> Native offenders have a lower full parole release rate and a higher revocation rate than the population as a whole (Demers, 1978). This is not an indicator of racism in corrections, but in many cases reflects a lack of release plans considered appropriate by releasing authorities. Native offenders sometimes consider this judgement of their release plans to be an insistence by authorities that Natives try to adapt their plans and post-release lifestyle to a standard appropriate for white offenders, but not necessarily for Natives.
>
> The Working Group was not in a position to examine this problem in the detail it deserves. We recommend that the Solicitor General's recently constituted study group on Native offenders and the criminal justice system give special attention to the release question during their initial six-month survey of the problems faced by Natives (1981: 117-118).

A number of interesting conclusions can be drawn from the above citation. First, if Native offenders have lower full parole rates and higher revocation rates, it means that a disproportionate number of Native offenders are released under MS, and are more likely to be revoked under either status of conditional release. The reason given for such disparity is not that Native offenders are

more dangerous as the official logic of parole suggests about releasees under MS, but rather that their release plans are unacceptable. Secondly, the structural disparities in the treatment of Native offenders have been individualized in a "blaming the victim" fashion, and these offenders are considered to be deserving of harsher treatment due to cultural deficiencies. Although culture is common to a group of people, the parole decision-making process rarely considers this when specific cases come under scrutiny. Rather, the cultural differentiation is seen as an individual characteristic, and in comparison to dominant White culture is viewed as an "object" which the individual is lacking. In this manner culture is individualized in the assessment process, and the authorities obscure the reality of "racism" by designating Native offenders under the non-racist category of "special offender"--one which requires "special treatment". Thus the institutionalised racism which characterises the parole process is ignored, while its result is conceptualized as individual defect. In this manner the sociological questions of cultural difference become psychological questions of cultural deficiency. On the topic of individual explanations for social problems, Emile Durkheim, hardly considered by many to be radical in his functionalist perspective, declared that:

> In a word, there is between psychology and sociology the same break in continuity as between biology and physio-chemical sciences. Consequently, every time that a social phenomenon is directly explained by a psychological phenomenon, we may be sure that the explanation is false (1964: 104).

The distinction of "special offender" is a double-edged sword. On the one hand it might mean the distinction of individuals for specialized preferential treatment. On the other hand, it might mean the distinction of individuals for further penalty. In the case of the Native offender it means further penalty, as

TABLE 1

NUMBER AND PERCENTAGE OF MANDATORY SUPERVISION RELEASES WHICH HAVE RESULTED IN REVOCATION*

Year Of Release	Total Releases On Mandatory Supervision	Revoked Without New Offence	Revoked With New Offence
1970	3	0 (0.0)	1 (33.3)
1971	80	8 (10.0)	25 (31.3)
1972	871	103 (11.8)	227 (26.1)
1973	1,780	234 (13.1)	445 (25.0)
1974	2,382	251 (10.5)	616 (28.9)
1975	2,431	329 (13.5)	623 (25.6)
1976	2,555	520 (20.4)	594 (23.2)
1977	2,822	578 (20.5)	547 (19.4)
1978	2,913	551 (18.9)	454 (15.6)
1979[1]	2,524	465 (19.4)	369 (14.6)

*SOURCE: Adapted from Canada, Ministry of the Solicitor General, Report of The Working Group, Solicitor General's Study on Conditional Release, Table A-25, March 1981.

[1]It should be noted that many of the persons released in this year were still under supervision as of June 1980, and therefore revocation rates for this release year must not be taken as definitive.

Table 1 illustrates. Native offenders are more likely to be released under MS rather than parole.

Table 1 demonstrates the disproportionate negative outcomes for the first decade of Mandatory Supervision Cases. It also illustrates that during the first ten years of MS, the proportion of revocations owing to the commission of a new offence decreased; at the same time, the proportion of revocations where no new offence was committed increased to the point that more MS releasees were returned to prison for technical reasons, such as the violation of conditions of release, the violation of special conditions of release, or at the discretion of the parole supervisor. To some, the data might suggest that the Parole Services took a proactive approach, and returned the offenders to prison in time to prevent their inevitable transgression. Such an argument, however, fails to consider the racial composition of the group being returned. The fact is--and this is admitted by the Solicitor General's office--that group is disportionately Native. A more fruitful line of inquiry might be to investigate the way in which special conditions of release are applied differentially by race, and the way in which they serve to structure the failure of conditional release, resulting in harsher treatment for the Native offender.

Of course, it must be conceded that while the conditions imposed on parolees and MS releasees are generally experienced as oppressive, the majority of parolees manage to avoid a return to custody during the period of their parole, and roughly 40 percent of those out on mandatory supervision are not returned to custody before warrant-expiry (Ratner 1986b). But, some individuals appear to have more resources in coping with the vagaries of parole. Others, especially those who are without such resources, such as those among the over-

represented Native Indian population in federal penitentiaries and provincial gaols (Havemann, et al. 1984) seem less able to abide the release certificate "conditions and succumb with more regularity to the violations that result in their return to custody. The relative ability of Native and White offenders to comply with NPB requirements can be illustrated by a comparison of two individual cases: Ted, a thirty year old White male,[7] and Amos,[8] a twenty-eight year old Native Indian male.

TED: CASE STUDY ONE

Ted, who had no previous convictions by indictment, was arrested and convicted for committing an armed break-in. He was sent to Mission Penitentiary, a medium-security prison thirty miles from Vancouver. His three-year sentence was obtained following the claim in mitigation of insobriety. He did not regard himself to be an alcoholic and did not believe that he was drunk at the time he committed the offence. By accepting the "alcoholic" label, he identified himself as suffering from a problem for which he could "volunteer" to receive "help" both inside and then outside the prison. It was made clear to him by his legal counsel that his chances of obtaining parole would be significantly reduced if he merely confessed that he broke the law because he "screwed up." It was necessary to admit to a "problem" that identified a "cause" of his errant behaviour. Thus, the parole process began for Ted at the time of sentencing and carried on during his one-year stint in prison, where he accepted various institutional leadership positions in the AA programme, the JCs, and the John Howard Society. He succeeded in obtaining parole, which included his agreement to special conditions specifying abstinence from alcohol and non-prescribed drugs,

compliance with urinanalysis testing, and counselling at his parole officer's discretion. He was paroled to a Day-House in Surrey, BC, which required week-day sleep-in at the half-way house residence and attendance at two weekly AA meetings at the Day-House and two weekly meetings at an AA programme in Vancouver. During the week, Ted worked for his father's construction company in Vancouver. Between Friday and Sunday evening, he resided with his common-law wife and her four children. Ted resented the hardship of attending the four weekly AA meetings and being cast as a "role-model" for other alcoholic-offenders in the chapters he attended. He felt that the attendance/participation requirement placed him in continual jeopardy owing to the forced association with offenders, some of whom <u>were</u> genuine alcoholics, and he did not feel that the alcohol and drug rehabilitation programme could be taken seriously. Admissions of slip-ups (insobriety) at the AA meetings which are essential to the program could result in a return to custody. As a result, the meetings encouraged hypocrisy and interfered with his attempts to a normal family-life and work routine. The abstinence in his parole certificate inhibited normal socializing, since one drink, if discovered, could send him back to prison. Between the tight job, residential, and AA meetings schedules, and the occasional degrading urinalysis test procedures administered at the Day-House, Ted felt on the verge of "cracking" and he was not sure that he could last out the parole period. Nevertheless, the support of his common-law family and the steady employment that he obtained in his father's construction company saw him through to the point where he was discharged from the Day-House and at last word, he was residing with the woman he expected to marry at the termination of his parole.

AMOS: CASE STUDY TWO

In contrast to Ted, a White man with familial supports, Amos, a financially bereft Native Indian had been sentenced to Matsqui, a medium-level security institution in BC, for assaultive behaviour under the influence of alcohol. He was released from the institution on mandatory supervision with an abstinence requirement, and he was assigned to the Allied Indian and Metis Society residence in Vancouver. His parole officer at the residence recommended that he attend AA meetings in Vancouver. Amos had the usual complaint that he was not an alcoholic, but had only been labelled so, and that he had reluctantly accepted the label in order to mitigate his court sentence and possibly qualify for parole. In addition to the special condition regarding abstinence, his parole officer instructed that he not return to his family in Prince Rupert since, as he described it, his daughter had been raped by one of the men on the reservation, and parole officials were afraid that he would seek revenge. He felt that being dropped into the urban setting of Vancouver was the equivalent of putting him on a deserted island. Although it was suggested that he go to AA meetings, no transportation or direction were provided. He was on a waiting list for a Native Education program in Vancouver, but he had no idea when he might be called. As an MS releasee, he felt that he was being watched all the time and this idea was reinforced by the fact that he had been stopped on the street by the police for what he felt was no apparent reason. When the police found out through their dispatcher that he was on mandatory supervision, they handcuffed him and put in overnight lock-up, informing him only that he was guilty of a parole violation. Although he was released the next day, the experience confirmed the suspicion that he was subject to endless surveillance. Without access to his

family and reservation, Amos felt a complete stranger in his present environs (notwithstanding the fact that it was an AIMS residence) and, without meaningful ways of occupying himself, he gradually turned to "popping pills" to help pass the time and check his own anxiety.

Amos's plight is not uncommon among Native Indian and Metis individuals released from prison. Association clauses cut them off from their families, and abstinence clauses cut them off from recreational activities with their friends. Community programs are sparse while empathetic Native counsellors and parole officers are few in number. For most, the path leads nowhere but back to prison because in order to gain acceptance back into the Native community, it is first necessary to display adjustment to White society, an adjustment that cannot be made with the meager resources provided. A stable life plan is out of reach without employment, and employment is unattainable without sufficient training and education. Such a dilemma is the material condition upon which the collapse into drugs, alcohol, and crime is structured. Within this context the "special conditions" of early release are unassimilable and their very existence is a catalyst for punishable violation. In this manner such conditions provide renewed impetus to the "revolving-door syndrome." The differential rates of Native and non-Native incarceration combined with the comparative lack of success among Native prisoners in obtaining parole or in avoiding a return to custody under mandatory supervision (Canfield and Drinnan 1981; Bisset 1982; and McCaskill 1985) are more easily understood by an analysis of the use and effect of special conditions. When everything is structured for failure and concretized on the parole certificate, who can be expected to succeed?

The points raised by these two cases were earlier illustrated by The Federation of Saskatchewan Indians in their brief to the Goldenberg Committee:

> . . . the Indian parolee was obliged to tailor his parole plan in order to meet supervision requirements regardless of whether or not his preference lay in returning to the reserve. With a move to the city often came a burden of general cultural adjustment, the stigma of being a criminal coupled with the pressures of prejudice and discrimination experienced because of his Indianness, and the culturally based problems in communication between himself and his non-Indian parole supervisor (1973: 20).

There is another aspect to differential parole access which comes into existence prior to the evaluation of the release plan by the NPB. That Natives are over-represented in the correctional process is beyond refute and evidence comes to us from many sources. This problem has been analyzed as being the product of institutionalised racism (Reasons 1977), the lack of special programs for Native offenders, and under-representation of Native workers within the correctional process (Boldt et al. 1983; McCaskill, 1985) less tolerance by police of Native violation than for non-Native violation (Griffiths and Yerbury 1984; Hylton 1982), and the insistence upon special conditions such as urban residence for Native offenders which lead to higher revocation rates (Bisset 1982; Ratner 1986b). The logic of parole legislation and practice is consistent with practice at all stages of criminal justice functioning. Thus, "even Natives who have never before been in a federal penitentiary have much less than half the chance of non-Natives in being released by parole" (Canfield and Drinnan 1981: 36), and the fact that a disproportionate number of Native releasees are required to reside in the cities despite their rural background "clearly confirms the major "intervention role" that the parole system plays in the urbanization of Native offenders" (McCaskill 1985: 113).

We suggest that the differential arrest rates combined with pre-sentence reporting provide the basis upon which parole considerations are introduced at the beginning of the correctional process, not at the end. In this way special attention becomes focussed on the Native offender, and the cultural deficit logic introduced at this stage is reinforced at the stage of assessment for parole. The result of such treatment is two fold. Native offenders become over-represented in the correctional process and the conception of special forms of criminality requiring special treatment is established. Secondly, a lower full-parole rate combined with more special conditions for MS develop as strategies for treating these specialized individual circumstances. Although the assessments are individualized, they are applied uniformly and result in structured discrimination. So, differential success on parole application and termination, in part, is a product of earlier treatment within the correctional process, and as such may be viewed as yet another means by which the dominant ideology is enforced.

CONCLUSIONS

The history of parole legislation in Canada is the history of confusion. Legislators and practitioners alike have confused the concepts of clemency and parole, retribution and rehabilitation, good conduct remission and conditional release. The logic underlying the development of parole legislation has been negated and re-negated, while the principles of parole implementation have served only to further obfuscate correctional policy and systematically negate the motivation for good conduct in Canadian prisons. From the royal prerogative of mercy to Bills C-67 and C-68, prisoners have been subject to political processes which ignore research findings while promoting correctional ideologies.

Correctional ideologies do not undergo significant change while the system of power based upon class domination remains unaltered. It is within this web of unequal power relations that cultural hegemony is enforced, and it is the indigenous people of Canada who suffer disproportionately, in this case from de facto discriminatory application of the parole process.

A review of the various studies undertaken by committees charged with the task of recommending reform has illustrated the ideological trends upon which correctionalist practice has evolved and has demonstrated inconsistencies bordering on contradictory legislation and practice. A review of the available statistical information has illustrated that Native offenders are bearing the brunt of these inconsistencies, as they do in other areas where cultural subordination translates into individual deviancy. That the correctional process is becoming more repressive is illustrated by the logic of correctional reform in Canada. That the increasing use of special conditions in the parole process is likely to work to the greater disadvantage of Native offenders is suggested by the available self-reports and statistical data.

The historical trends described in our analysis suggest that the increased usage of special conditions of release, and the new powers vested in the NPB to refuse MS, can only serve to the further detriment of the Native offender. More Native offenders are likely to have yet more "conditions" attached to their releases, making their return to custody inevitable, and more Native offenders are likely to be deemed unacceptable for release under MS altogether.

Evidence to support this prediction is already beginning to emerge. According to the NPB, Prairies Region, sixty-one percent of those prisoners in penitentiaries located in the Prairies Region who have been referred to the

Board for hearings under Bill C-67 are Native.[9] While Native peoples represent only 2.04 percent of the Canadian population,[10] they constitute almost one third of the prison population on the Prairies and are almost twice that proportion again among those who are referred for detention under Bill C-67. It seems that at each stage of severity of treatment, Native prisoners are increasingly over-represented. Senator Earl Hastings, a self-appointed watchdog of the prison system, carried out his own investigation into the detention of prisoners under Bill C-67. After visiting all but two of the detainees, he concluded that:

> The sad part is most of them are Native boys with no knowledge [of] what is going on or the evidence against them.[11]

Ironically, the unexamined commitment by correctional authorities to the dominant ideology prevents them from understanding their own actions as part of the panoply of racism in this country.

NOTES

[1]Vancouver Sun, July 25, 1986.

[2]Information received from The National Parole Board, Prairies Region.

[3]As Ratner (1986b) argues, "fewer inmates identified by correctional officials as potentially dangerous are actually being detained and denied Mandatory Supervision (29 of 115 thus far--Globe and Mail October 4 1984) than would be expected according to estimates offered by the Government. . . ." Such data gives substance to the notion of a moral panic being created by exaggerated accounts of the number of dangerous offenders due for release.

[4]Ratner 1986b argues that "Class society, characterized as it is by fundamentally unequal social relations, entails in Gramscian terms hegemony armed with coercion. Corrections is one of the repressive discourses for achieving that hegemony." p. 210.

[5]Due to the nature of cultural domination in our class society we use the term "Dominant White Hegemony" to emphasize that ideological hegemony is not only class based but also entails a conception of cultural superiority.

[6]R.V. Moore. In upholding the decision in this case by the Ontario Court of Appeal on Feb. 21, 1983, The Supreme Court of Canada ruled in its decision of May 17, 1983 "that the National Parole Board lacked the power to revoke the mandatory supervision of an inmate for conduct occurring prior to the release of the inmate." National Reporter, Vol. 52, 1984: 258.

[7]The interviews with Ted were conducted by Ratner during the early Winter months of 1986.

[8]Interviewed by Ratner, March 1986

[9]Information received from The National Parole Board, Prairies Region.

[10]According to the 1981 Census Data as reported in Thatcher (1986). See his discussion of the problematic nature of under-reporting on Census forms.

[11]Cited in the Vancouver Sun, Jan. 15, 1987. Article entitled: "Large Number of Detainees Rapped"

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