Some Issues in Sentencing of Aboriginal Offenders

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Defining the Problem

In recent years, the aim of Aboriginal self-government has been pushed with increasing vigour. The main motivation is, of course, the drive for self-determination that is common to all peoples. But there are some ancillary, but still important, reasons for the pursuit of Aboriginal justice systems.

In the criminal law context, the most striking feature of the imposition of the non-Aboriginal justice system upon Aboriginal Peoples is the extreme attention that is paid to them by that system. The best indicator of this over-concentration is the incarceration rate of Aboriginal offenders. The figures are shocking indeed, particularly in Saskatchewan: in 1989–90, 54 percent of those sentenced in Saskatchewan to penitentiary terms were of Aboriginal descent.¹ In the same year, about 66 percent of those sentenced in Saskatchewan to provincial correctional centres were Aboriginal people.² These incarceration rates occur in a province where Aboriginal people represent between 10 and 15 percent of the population.

Worse yet, the trend is toward even more over-representation in the jail system. The 1989–90 figures show an increase from the previous years.³ And in 1990–91, the proportion of provincial jail admissions constituted by Aboriginal people increased to 68 percent.⁴ Aboriginal men made up 65 percent of all male admissions, while 85 percent of female admissions to provincial jails were Aboriginal women.

Perhaps even more ominous is the proportion of custody admissions for young offenders. In 1990–91, Aboriginal youth constituted 72 percent of such admissions.⁵ It is well accepted that the age group most likely to be in conflict with the law consists of those under the age of 25. In 1987, 32 percent of all Saskatchewan residents were under 19. But in the same year, 54 percent of status Indians were under that age. The most comparable figure for Métis residents of Saskatchewan dates from 1986, when 40 percent were under the age of 15.⁶ It follows, therefore, that many more Indian and Métis people fall into the high-risk category.
This fact suggests that the trend to incarceration will continue, if not increase. To put it in perspective, we should keep in mind that the chance of a non-Aboriginal person in Saskatchewan going to jail is 1 in 250. On the other hand, a status Indian has a 1 in 10 chance and a non-status Indian a 1 in 25 chance. If the proportion of Aboriginal admissions to youth custody facilities is on the increase, given that those with a prior young offender record are more apt to receive sentences of imprisonment if convicted as adults, we can only expect the chances of incarceration for Aboriginal adults to increase unless drastic steps are taken.

In addition to these indicators, there are some other significant points to bear in mind:

1. Aboriginal accused persons are more likely to be denied bail. This in turn tends to increase the likelihood of incarceration upon conviction.
2. Aboriginal offenders are more likely to be committed to jail for non-payment of fines. Indeed, in Saskatchewan, for the fiscal year 1992–93, almost 75 percent of jail admissions for fine default were of Aboriginal descent.
3. On the whole and for several reasons, Aboriginal offenders are less likely to be sentenced to probation than non-Aboriginal offenders.
4. Although suggestions have been made that Aboriginal offenders are more likely to be jailed and for a longer period of time, once certain factors—such as the demographics of Aboriginal and non-Aboriginal people—are considered, there is evidence to contradict these assertions. For instance, in answer to the claim that Aboriginal people are more likely to be sentenced to jail, a claim that is really one of overt discrimination, some research has shown that the variance is explainable by legally relevant factors such as a prior criminal record. Likewise, there is some evidence that in fact Aboriginal offenders are sentenced to shorter terms of imprisonment than non-Aboriginal offenders.
5. In any event, the average sentence length of admissions to provincial correctional centres is very short. The national average is only about thirty days, while the Saskatchewan average is between three and four months. The Saskatchewan average is misleading since it does not include admissions for default of payment of fines. This is because such admissions are typically released rather quickly due to working off their unpaid fines through the Fine Option Program available in correctional centres. If fine defaulters were included, the average sentence to Saskatchewan correctional centres would undoubtedly be closer to the national average. The central point here is that many people are admitted to correctional centres with very short jail sentences.
From these points, some tentative conclusions can be drawn. It appears, for instance, that Aboriginal offenders may receive proportionately too many short jail sentences, in lieu of probation or fines, because of criteria that are presently considered legally relevant—prior record, employment status, educational level, etc. In a similar vein, it seems that too many Aboriginal offenders receiving fines are jailed for default of payment. On the other hand, the fact that a greater proportion of Aboriginal people are in the high-risk group (under age 25) may explain a great deal of the over-incarceration in other than discriminatory terms.

It is, therefore, imperative that whatever form changes to the criminal justice system take—and, in particular, what form Aboriginal justice systems take—there must be clear strategies to decrease the preponderance of Aboriginal people within the prison system. The destructive effects of jailing so many young people are felt by more than simply the offenders themselves. Entire generations of young people have a much greater chance of being jailed than of completing their education or of obtaining meaningful employment. The socioeconomic effects of that loss of productivity are profound.

But there is also the adverse impact on the families of offenders and upon the community and culture of Aboriginal Peoples more generally. In truth, the cycle of incarceration runs the risk, if it has not already done so, of replacing vibrant, self-sufficient and proud cultures with a new culture of dependence, despair and alienation. It may also be extremely counter-productive.

For instance, a relatively new criminology theory proposed by John Braithwaite posits that the most effective approach to crime is if offenders are shamed by the community but reintegrated into it.17 This contrasts with the present aims of sentencing in which a judge in an impersonal way attempts to instill fear of further punishment in an offender and in which the stigma of punishment sets the offender apart from the community in which s/he lives.

Braithwaite cites Japan as a society with a very low crime rate that might very well be due to offenders being “shamed” by the community but also accepted back into it. The approach that the theory takes is also rather akin to a parent censuring a child who accepts the shame but also is reassured that s/he remains a part of the family. To be sure, Japan is a far more homogeneous society than Canada. Nonetheless, Carol La Prairie has suggested that the theory has potentially great relevance to the development of strategies to deal with crime in Aboriginal communities.18 To persist with the present way of dealing with crime simply continues to contribute to the alienation of offenders and to the breakdown of the community because justice and sentences are dispensed by impersonal outsiders and jails
are located away from communities.

It seems to me, therefore, that the major problem with the criminal justice system is that it has become a powerful tool for the destruction of Aboriginal Peoples, their way of life and their culture, even if those effects have not been intended. In addition, the present system is a barrier to improvement.

THE CAUSES OF THE PROBLEM

The reasons for the problem of over-incarceration are many. Because I wish to concentrate on changes in the sentencing process, I will do no more than itemize some of the reasons that have been advanced.

Many of these reasons for the disproportionate incarceration rate of Aboriginal people are not related at all to the sentencing end of the process. Indeed, some, in particular the dire social and economic situations facing many Aboriginal people, are not even related specifically to the criminal justice system. Such matters as policing, prosecutorial discretion and cultural factors in the determination of guilt or innocence are, of course, matters that should be of concern. But my aim here is both more narrow and more modest. I want to concentrate on the sentencing process only, in an endeavour to propose certain changes that might help to reduce the terrible waste of human beings that presently occurs through our extremely high incarceration rate. But before turning to the sentencing process, it may be useful to itemize some of the causes that arguably contribute to the over-incarceration of Aboriginal people.

One factor often cited is the socioeconomic situation experienced by the Aboriginal people of this province. Indian and Métis people earn only about 50 to 60 percent of the provincial average income; unemployment rates are at least three to four times the provincial average and much worse than that in some communities, especially in northern Saskatchewan. There is obviously some correlation between poverty and unemployment, on the one hand, and the crime rate on the other, but we should not place too much emphasis on that factor. Quite obviously, not all poor people break the law, and crime is hardly unknown among those who are employed and well-off. Moreover, poverty alone could not explain why the incarceration rate for Aboriginal people is between four and six times the rate for non-Aboriginal people. Indeed, some work suggests that it is not poverty alone that leads to criminal behaviour, but idleness, lack of opportunities and options and the irrelevance of education in the face of very high unemployment.

Related to the socioeconomic factor is the suggestion that there is simply more crime among Aboriginal people than within the larger society. On the surface, this appears to be a racist suggestion. However, it is
usually accompanied by both the socioeconomic argument and the demo-
graphic reality that a much greater proportion of the Aboriginal popu-
lation is young and in the age group most prone to criminality. Susceptibil-
ity to alcohol abuse is often mentioned as well.

Indeed, some studies have concluded that these non-racial factors are
an explanation for the apparently greater incidence of criminality among
Aboriginal people. For instance, one study conducted in Saskatchewan
found a much higher offence rate on reserves than in either rural or urban
Saskatchewan. Perhaps more disturbing, the rate of violent offences on
reserves was found to be nearly three times the rate in other areas of the
province.\(^{21}\) Studies such as these have caused some commentators to sug-
gest that Aboriginal people may actually be under-represented in the jail
system if socioeconomic factors and demographics are taken into account.\(^{22}\)

I think, however, that some caution is warranted before accepting
these claims. First of all, the studies are relatively few in number. Second,
the results may well be answerable by some other factors. Studies in the
United States suggest that there is not significantly more criminality among
blacks and Hispanics than among whites, despite huge socioeconomic in-
equities.\(^{23}\) The apparent differences are more explainable by police conduct
than anything else—police use race as an indicator for patrols, arrests, de-
tentions, etc.\(^{24}\)

While we admittedly have the data cited above that appears to contra-
dict that finding, there are nevertheless some indications that policing is a
factor here as well. For instance, police in cities tend to patrol bars and
streets where Aboriginal people congregate, rather than the private clubs
frequented by white business people. I certainly know from my own expe-
rience as a legal aid lawyer in northern Saskatchewan that remote Abori-
ginal communities, in comparison with largely white communities, tend to
have more policing.

This does not necessarily indicate that the police are invariably racist
(although some are), since there is some empirical basis for the police view
that proportionately more Aboriginal people are involved in criminality.
But to operate patrols or to allocate police on the basis of that rather scant
empirical evidence can become a self-fulfilling prophecy: patrols in areas
frequented by the groups that they believe are involved in crimes will un-
doubtedly discover some criminality; when more police are assigned to
detachments where there is a high Aboriginal population, their added pres-
ence will most assuredly detect more criminal activity. For crime is every-
where and all of us, at some time in our lives, commit it, whether it is
“borrowing” our employer’s pen for use at home, driving while impaired,
use of soft drugs, etc. What differs is the detection rate and that is largely a
function of policing.
Consider, for instance, the provincial offence of being intoxicated in a public place. The police rarely arrest whites for being intoxicated in public. No wonder there is resentment on the part of Aboriginal people arrested simply for being intoxicated. This situation very often results in an Aboriginal person being charged with obstruction, resisting arrest or assaulting a peace officer. An almost inevitable consequence is incarceration, either as the immediate sentence upon conviction or upon default of payment of a fine. Yet the whole sequence of events is, at least to some extent, a product of policing criteria that include race as a factor and selective enforcement of the law.

It must be said that some northern communities have perhaps contributed to the problem themselves by actually requesting the establishment of an RCMP detachment in their communities. The result is an almost instant “crime wave,” since the police do their work by making arrests and laying charges, even if the same problems were dealt with by the community in other ways before the police were present. If true, this, of course, illustrates both that cultural values are not always universally held and that influences from the larger society have made their mark on the culture. Neo-colonialism, modernization and the media weaken shared values, leading to ambivalence about them and to greater individualism at the expense of respect for the community.

Rupert Ross describes, from his observations of the Cree and Ojibway in northwestern Ontario, some of the traditional ethics governing behaviour in those cultures. Whether the ethic of non-interference that he describes is also prevalent among the Cree and Dene of northern Saskatchewan might be worth exploration. The ethic is a cultural barrier to interfering in the decisions and behaviour of others. In the criminal context, it seems plausible that frequently Aboriginal people calling the police to intervene in a situation do not necessarily wish charges to be pressed but only that the police stop the behaviour, something the ethic of non-interference inhibits them from doing themselves. When I was a legal aid lawyer in the North, I noticed that frequently complainants were reluctant to testify against an accused once the matter came to trial. This may have been a product of the ethic of non-interference and the tendency to restore harmony by letting bygones be bygones. At the very least, different expectations on the part of the police and of Aboriginal people can have drastic consequences.

At the trial stage, there may also be hidden factors that contribute to the conviction of Aboriginal accused where, perhaps, a non-Aboriginal person might not be convicted. For instance, as Rupert Ross has pointed out, among the Cree and Ojibway people of northwestern Ontario, it is a sign of disrespect to look someone in the eye. Yet, in our society, one
means of determining the credibility of a person is whether or not s/he makes eye contact.

In a similar vein, especially where, as is the practice in this province, untrained interpreters are used in the criminal courts, linguistic problems can lead to crucial misunderstandings. I recall from my legal aid days being told that the Dene language does not make the same precise legal distinction between "rape" and "intercourse," something that is obviously important in a sexual assault case. Likewise, in Cree, it is apparently difficult to distinguish an accidental pushing from an intentional one—again, a vital difference in an assault trial. Yet both languages are very precise in their own cultural contexts. It is simply that our legal system is alien and difficult to describe in those languages.

There are also some other factors that might bear on the disproportionate rate of imprisonment and that are more directly related to the sentencing process. Some of these are presently seen as legally relevant criteria—prior criminal record, employment status, educational level, etc. I will discuss them in more detail below when proposing solutions. For now, however, some points can be made.

Prior criminal record as a factor can have an undue influence on the imprisonment rate for Aboriginal people due to the snowball effect of some of the factors listed above. If there are more young Aboriginal people, if they are disproportionately unemployed, idle and alienated, and if they are overly scrutinized by the police, it should not be surprising that frequently breaches of the law are detected and punished. Add to that the greater likelihood of being denied bail (which increases the chance of being jailed if convicted), the greater likelihood of fine default and the diminished likelihood of receiving probation, and there is a greater probability of imprisonment being imposed. Some of the same factors increase the chances of the same person re-offending and being detected once again. After that, every succeeding conviction is much more apt to be punished by imprisonment, thus creating a snowball effect: jail becomes virtually the only option, regardless of the seriousness of the offence.

Socioeconomic 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.

Although providing a “credit” to an accused who is employed, educated and stable does not necessarily mean that the lack of that credit for the converse situation is intended as punishment, the effect is the same. The person in the latter circumstances is prejudiced by her/his own sorry situation, which might well have been a major contributor to the criminal behaviour in the first place. There is a form of double punishment involved. Yet, the notion that positive factors such as these should mitigate the sentence is deeply embedded, with little reflection on its systemically adverse effects on those who do not have those advantages.

In some jurisdictions, it has been recognized that these seemingly neutral factors can disguise systemic discrimination. In Minnesota, for instance, where there are guidelines for the judiciary to follow in sentencing, the guidelines stipulate that certain factors do not justify departure from the guidelines because of the discriminatory effect. Such factors are race, sex, employment status and social factors such as educational level, living arrangements, length of residence and marital status. The Canadian Sentencing Commission has not recommended that such factors be excluded from consideration here, although it has proposed that they should not be used as aggravating features, but only as mitigating circumstances.

Admittedly, it may be difficult to remove consideration of such factors from the sentencing process, particularly from the subconscious minds of the judiciary. But we may be pursuing yet another legal fiction if we think that using positive attributes as mitigation does not lead in effect to punishment for other offenders not possessing those advantageous circumstances.

Another factor in the elevated incarceration rate is what I call the mindset of jail. Canada jails more people on a per capita basis than nearly every other industrialized country, with the exception of that bastion of freedom, the United States. When the incidence of violent crime is in the order of 10 percent nationally, and only about 7 percent in Saskatchewan, it is difficult to understand why this should be the case.

It may be that the Criminal Code, by specifying the punishment applicable to a particular offence in terms of a maximum sentence of imprisonment, influences judges to see jail as the standard punishment. Then, even if alternatives to incarceration are available, judges are prone to see those options as exceptional, rather than routine.

An offshoot may be that judges tend to see a new alternative disposition, not as a true alternative to jail, but as an additional control that might be placed on someone who was not a candidate for imprisonment in the first place. There is some indication, for instance, that community service orders are inserted as an additional condition of probation to ensure the
good conduct of someone who was already going to be placed on probation, rather than as a true alternative to incarceration.

As well, the range of alternatives is limited—in Canada, a judge may impose only absolute or conditional discharges, suspended sentences, fines, probation or jail, and, in some circumstances, a combination of the last three. The Criminal Code and the case law interpreting it have placed several more rather technical restrictions on what trial judges may do. A lack of community and administrative resources also inhibits the use of alternatives to jail. Finally, the standardizing effect of provincial courts of appeal has an impact.

What must happen, therefore, is a change in the psychology of sentencing practices. Judges must begin to think of jail as a last resort, of other options as serious alternatives to jail rather than as additional punishment for probationers, and they must begin to question whether a fine, and especially default time for non-payment, is appropriate in the circumstances. I know from discussions with individual judges that many rue the fact that they jail so many people. Nonetheless, the mindset for jailing is predominant and must change if the problem of over-incarceration, particularly of Aboriginal people, is to be solved. This will admittedly be difficult in a climate where the public has too often accepted the manufactured perception that crime, particularly violent crime, is out of control.

Finally, in the law of sentencing, provincial courts of appeal act as both the final appellate body on the quantum of sentence and the policymaking body. Courts of appeal established starting-point sentences for particular offences as guidelines for trial judges. Because of the doctrine of stare decisis, those guidelines become mandatory guidelines in the sense that a trial judge can only deviate from the starting point according to the presence of aggravating or mitigating factors. Otherwise, the sentence is very likely to be overturned on appeal on the ground of unexplained disparity with the sentences normally imposed in that jurisdiction for that offence. This policy is deeply entrenched in the practice of the Saskatchewan Court of Appeal.

This policy is a major constraint on innovation and creativity by trial judges. Moreover, the starting-point approach ignores both specific deterrence and rehabilitation as aims in the sentencing process. An accused who has committed, say, a robbery is virtually certain to receive a jail sentence, even if it is the first offence, the offender was only a minimal accomplice, no harm was caused, the offender is genuinely contrite, the offence was completely out of character and there is every prospect that there will be no repetition of the offence.

The usual reasons advanced for requiring relatively standardized sentences are general deterrence and preserving public confidence in the
administration of justice. Both aims are dependent upon a high degree of public knowledge of the sentencing system and of individual sentences being imposed; yet studies have shown that the public labours under some serious misperceptions about sentencing practice and receives very little information about individual cases. Unfortunately, little analysis is given to whether those aims are achieved through reducing sentence disparity or to whether those aims might be achieved through different sentencing practices. Still less thought is given to whether those aims are appropriate or achievable in the first place.

This is a pity, whether or not Aboriginal justice systems are established. So long as disparity is a major concern of the Court of Appeal, trial judges will be inhibited from true and unfettered decision-making about what sentence is fit in all the circumstances. Surely it is common sense that different punishments are felt differently and have differential effects on different individuals. Treating people in an identical fashion is not always treating them equally. Few would contest that a fine of $1,000 is much less punishment to a rich person than to an unemployed person. The emphasis on avoiding disparity is probably a factor in Canada’s unduly high rate of incarceration and consequently on the even higher rate of imprisonment of Aboriginal offenders. Moreover, it is a barrier to ameliorating the systemic discrimination of the present sentencing process.

It is also futile to pursue uniformity as a priority. After all, there is considerable variance from judge to judge in the typical sentence handed down for the same offence. Judge A may sentence a first offender on a .08 driving charge to a fine of $500; Judge B may impose a $700 fine in virtually identical circumstances, including the same breathalyzer readings. Not only are such variances unlikely to be appealed but it is doubtful that an appeal court would consider the variation exceptional. But is that not unexplained and unjustified disparity? Any lawyer who appears in criminal courts on a regular basis soon learns what the usual sentences imposed by particular judges are for certain offences. But it is the exceptional case that is appealed, not the run-of-the-mill variety.

Nevertheless, the concern about disparity persists and it is only natural to be pessimistic about change in this regard. The current political climate is heading the criminal justice system in the opposite direction, toward more severe punishment and more standardized sentences rather than toward creativity and innovation. An example is the despicable cry for increased sentences for young offenders that has been seized upon by the politicians as a campaign theme, all the while ignoring the fact that the Young Offenders Act has led to the wholesale warehousing of many more young people than ever occurred under the old Juvenile Delinquents Act. For instance, the number of young people in custody in British Columbia
doubled in the first five years after the proclamation of the *Young Offenders Act*\(^9\) and the same increase has been noted in Ontario.\(^{50}\) It is not unreasonable to suppose that the same trend prevails in Saskatchewan—and keep in mind that 72 percent of youths admitted to custody in this province are of Aboriginal descent.

Likewise, the two major commissions to study sentencing reform in recent years have focused on disparity as a central concern: the Canadian Sentencing Commission\(^51\) and the Daubney Committee.\(^{52}\) Thus, there is every likelihood that standardized sentencing will become even more entrenched.\(^53\) To look on the bright side, the continued failing of the present system might prove to be an impetus for the creation of Aboriginal justice systems.

As long, however, as emphasis is placed on avoiding disparity in sentencing, it will be extremely difficult for the present system to incorporate such developments as sentencing circles and alternative dispositions for offences where the starting point is a jail sentence. If jail is the mindset and we continue to assume that only jail can accomplish general deterrent and retributive aims, we will not embrace alternative dispositions or procedures that do not appear to us in our mindset to achieve those aims. In the discussion of proposals for change, I will discuss the possibilities afforded by sentencing circles and argue why dispositions arrived at in those processes can achieve those penological aims. In addition, I will argue that we should look beyond those aims to consider other, more fundamental, aims for the criminal justice system.

**Some Possible Solutions**

**Introduction**

In this section, I will propose some solutions and approaches to diminishing the over-representation of Aboriginal people in our prisons. Some of these changes might be best handled through legislative amendments, particularly if and when Aboriginal justice systems are brought into being by Aboriginal governments. Nonetheless, even if Aboriginal justice systems do not develop quickly, these changes could be made now by Parliament and provincial legislatures. Short of legislative change, however, there is much that the judiciary could do to reduce the jailing of Aboriginal people. And, if Aboriginal justice systems are established, the decision-making bodies in those systems could also consider implementing some of these changes. Indeed, to be successful in reversing the neo-colonialism presently imposed upon Aboriginal peoples, Aboriginal justice systems must confront over-incarceration as a high priority.

There is also an additional point to consider. It is impossible to predict
what form Aboriginal justice systems might take. Indeed, it is quite likely that dramatically different models will emerge, depending upon the particular Aboriginal community and nation involved. Whatever model is adopted, however, there is a very strong likelihood that there will be an appeal court. At least, for the purposes of my discussion, I am going to assume that there will be. I do not think that this is an unrealistic assumption.

As a starting point, Canada is committed to a regime of appeals from conviction and sentence by virtue of being a signatory to The International Covenant on Civil and Political Rights. Article 14(5) of the Covenant provides that a person convicted of a criminal offence must have a right to appeal both conviction and sentence to a higher tribunal. As well, a failure to have an appellate system would likely be challenged as violating equality rights under section 15 of the Charter or fundamental justice under section 7.

In addition, there are practical considerations that dictate that there should be an appellate system. The Aboriginal Justice Inquiry in Manitoba recognized such factors as economies of scale, the lack of personnel in small communities and the isolation of some communities. To this should be added the reality that in many small communities it may be difficult to avoid conflicts of interest or the apprehension of bias, hence the need to have an appellate body from outside that community.

In any event, an appeal system is a simple matter of fairness and is not likely to be contentious for its own sake, even if the operations of an outside appellate court might run the risk of impeding the unique and traditional approaches that might be taken by Aboriginal justice systems at the original level.

With that basic assumption of an appellate court in mind, let me then turn to some specific areas where either judicial change or legislative amendment could make a significant difference.

The Mindset of Jail

There are several ways of dealing with this problem. The most obvious and glib to say is worth saying anyway to judges: stop doing it! In particular, since jail sentences are on average so short, we should be seriously questioning the point of sentencing to jail at all if the term is to be of short duration. When the average sentence in Saskatchewan is three to four months (and that excludes fine defaulters) and there are a variety of early-release schemes that result in offenders serving much less than the sentence imposed, what conceivable penological aim can be met by such sentences? I would suggest that judges consciously avoid sentences less than six months: if the offender and the offence do not warrant a sentence greater than that, impose some other disposition altogether.

To be sure, it is not so simple. The supervisory role of appeal courts
is a barrier if the concern about sentence disparity proves intractable. The
unconscious bias inherent in considering employment status, prior crimi-
nal record, educational level, family status and stability, etc., must become
consciously reflected upon and avoided if possible. The range of permissi-
ble alternatives needs to be expanded. But a refusal by a significant number
of judges to imprison unless it is absolutely essential to a valid penological
aim would have beneficial effects.

To do so might also cause judges to reconsider the aims of sentencing.
If, as studies show, general deterrence is best achieved by the certainty of
being charged, rather than by the severity of the punishment, should we be
so determined to achieve general deterrence in any given case? Might not
general deterrence be better achieved through the educative effect of the
entire criminal process? If the public does not learn about actual sentencing
practices, can either general deterrence or retribution (in the sense of re-
storing the rightful balance between the law-abiding and offenders) be
achieved? Might we not be better off, for example, to examine whether the
theory of shaming and reintegration holds better prospects for dealing
with crime?

Fines and Fine Default

A major component of the jail population is committed for default of pay-
ment of fines. This is so despite a fine-option program that has existed in
Saskatchewan for well over a decade. In 1992–93, about one-third of all jail
admissions in the province were for fine defaults. This is an incredibly
expensive and destructive way of enforcing the payment of fines. Obvi-
ously, some change is required.

A starting point might be to question whether fines are the appropri-
ate disposition in all such situations. Is it possible that judges who consider
an accused an unfit candidate for probation but not deserving of jail, in-
stead impose fines, not as an ideal solution but in default of any other
choice? Are they influenced by the existence of fine-option programs to
order fines more frequently than they might otherwise? If either of these is
so, there could be an especially adverse impact upon Aboriginal accused,
given that they are less likely to be sentenced to probation than non-Abo-
riginal accused.

Related to that is the quantum of fine imposed. A judge imposing a
fine is, according to the case law, required to determine the ability to pay
of the accused. But it is not clear that this is always done. For example, for
many provincial offences and for Criminal Code drinking and driving of-
fences, many judges have in mind a standard fine applicable to almost all
accused. There is little variance according to the ability to pay of the ac-
cused. Obviously, to fine an unemployed accused the same, or nearly the
same, as a well-to-do accused is to punish the former more heavily.

Added to that is the almost knee-jerk tendency to impose a default term of imprisonment for non-payment. Indeed, change in this area might be the most fruitful for reducing the jail population in general and the Aboriginal jail population in particular.

Imposing default imprisonment for non-payment of fines is a species of the mindset of jail. Judges do it almost by rote. One judge, Judge Kimball of the Nova Scotia Provincial Court, described it “as characteristic of the provincial court as ice is to hockey.” The power to impose default time is permissive, not mandatory, yet in the thousands of sentencing situations on which I have appeared as counsel or have observed, I have never seen a judge even question the practice, let alone refuse to order default time. As the same judge has put it, “To ignore the legitimate exercise of judicial discretion is an abuse of the judicial role.”

He added:

The integrity of a court that is involved in threatening citizens with jail because of debt is diminished by the practice. It is reminiscent of Dickens. That is not to say that fines should not be paid but that the process of collecting them should not involve the use of threats or the judiciary. The concept of imprisonment for debt in default of payment of a fine is primitive and unacceptable and it presupposes that an accused will not keep his promise to pay, ... To deny an accused the opportunity to keep his promise that he will pay a fine, by the discretionless imposition of a default order, is to presume an accused dishonest; it is to accuse him of something he has not done and it is to accuse him of something which he might not do.

Judge Kimball has proposed that judges should exercise their discretion in the same way as they exercise any other discretionary power. Instead of assuming that everyone receiving a fine is going to default on payment, judges should ask the accused when the fine can be paid. If the accused asks for time to pay the fine, unless the Crown makes a motion for default time, none should be imposed; after all, the accused has just indicated a willingness to pay by a certain date. The Crown must provide reasons in support of its motion. The accused or defence counsel should have an opportunity to rebut the Crown arguments and the judge should then arrive at a decision on judicial grounds with reasons for the decision.

An obvious objection to this procedure would be that many accused would not pay their fines and the Crown would be without recourse. Without trying the experiment, we do not know how prevalent wilful default would be. But the Crown would still have the option of enforcing the debt
by instituting civil proceedings. More to the point, perhaps, if the Crown’s worst fears came true, it would be a powerful impetus for legislative changes to remedy the problem of enforcement. There are several legislative amendments that could assist in dealing with the problem of fines and fine default.

The first and most obvious is to require an inquiry into means to pay a fine before it is imposed, something that has been required by the case law but that may not invariably be the practice. Moreover, the amount of a fine is not always adjusted to the person’s ability to pay. The Canadian Sentencing Commission has proposed that the amount of a fine be tied to the person’s income, perhaps in the same way as day-fines are levied in Sweden and several other countries. That option, or some variation, has considerable merit.

Second, the Code and relevant provincial legislation could be amended to require a hearing into the ordering of default time. In addition, as has been done for nearly sixty years in Britain, a hearing in the presence of the accused should be held prior to the issuance of a committal warrant. Not only would this reduce the numbers incarcerated for non-payment to those who are wilfully in default but it might be a requirement of fundamental justice under section 7 or of the commitment to equality under section 15 of the Charter.

It would also be worth considering requirements such as those contained in the Ontario Provincial Offences Act. Before a committal warrant may be issued in that province for default of payment of a fine imposed for a provincial offence, there must be evidence that all other reasonable methods have been tried and failed or would not likely result in payment in a reasonable time. This legislation has been interpreted in a progressive manner in Ontario to require that more than lip service be paid to these requirements.

Finally, there should be enforcement mechanisms other than default time. The Ontario legislation also allows the Crown to file an order for payment of a fine as a judgement in the Small Claims Court and then to enforce it as any other judgement might be by writ of execution or garnishment. This is presently permitted under section 720 of the Criminal Code for fines imposed on corporations. If extended to individuals, it would streamline the process to the extent that the Crown would not have to commence a separate civil action to enforce the fine. In addition, where a fine is levied in relation to, for example, a provincial driving offence, legislation could provide that a driver’s licence might not be issued until the fine was paid.

On the policy level, changes should be made to the fine-option program to make it of greater use. It seems ridiculous that offenders jailed for
fine default should immediately be placed in the fine-option program within the correctional facility in order to release them quickly, when an improved program outside the facility might have prevented the committal in the first place. Such barriers as transportation, child care for offenders with children, a lack of information about the program, or resources in the community to provide and supervise fine-option work should be minimized. One way might be in conjunction with hearings at the sentencing stage into the ability to pay: those with the ability to pay a fine might be restricted in their eligibility for the program to free up resources for those who need them.

If significant steps were taken to deal with the two problems of short sentences and fine defaults, the jail population would be decreased significantly. In turn, this would greatly reduce the incarceration rate of Aboriginal people. But the reduction in the jail population might well have an additional benefit. If there is a deterrent effect at all from jail, to reserve that penalty for the most serious crimes would surely enhance that deterrent effect. At present, the stigma and denunciatory effect of jail are lost when so many are imprisoned; the result must be a weakening of the potential for deterrence to occur.

**Probation**

I have already mentioned that Aboriginal accused are less likely to receive probation than non-Aboriginal accused.74 Some of the reasons for this, no doubt, are the systemic forms of discrimination, such as providing a "credit" to those accused who have employment, education, a stable family life and the like, supposedly neutral factors that disguise inequity. Another reason may be the lack of resources in the particular community. Still another may be the overarching control exerted by courts of appeal on innovative approaches by judges.

There might also be an additional factor that is a subset of the mindset of jail. Once an offender has received probation once or twice but re-offended after the probation period was over, s/he may not be seen as a fit candidate for further probation. As the Manitoba Aboriginal Justice Inquiry has pointed out, the expectation that one term of probation should forever cure that offender is unrealistic.75 Instead, if the offender served out the probation order without breaching it, that is an indication that probation was beneficial to that offender. Seen in that light, probation might be a feasible option notwithstanding recidivism.

Sufficient community resources, particularly Aboriginal probation staff or cross-cultural training for non-Aboriginal staff, are badly needed. But there is nothing earthshaking about proposing that such resources be provided. It is true that they are expensive—but then jail is even more ex-
pensive. It is only a matter of political will, but it does make economic sense, too.

A priority for the existing criminal justice system (and almost certainly for Aboriginal justice systems) is the training and hiring of Aboriginal correctional staff. It has been demonstrated that where Aboriginal probation officers are in place, there is a much higher success rate with Aboriginal probationers. For example, the Dakota Ojibway Probation Service has the best success rate in Manitoba—92 percent success versus 45 percent for other units with high Aboriginal caseloads. Some of the reasons for this greater success should be obvious: more culturally sensitive programs, delivery in Aboriginal languages, better advocacy for needed services, more knowledge about the most appropriate services and less willingness to breach for mere technicalities. It should be added that these same advantages would accrue to fine-option programs run by Aboriginal employees.

It may be more difficult to convince judges (and lawyers and the public) to quit considering factors personal to the accused that may disguise systemic discrimination. But the effort should be made to at least downplay these factors, for example, not to assume that an unemployed person will not have her/his life disrupted by jail or that the fact of unemployment tells the court enough about the person to reject alternatives to jail. Further study is warranted to decide whether it is feasible to eliminate consideration of these factors altogether or at least to place some restrictions on the use that can be made of them. In the meantime, it would be desirable if judges could question in every case whether those factors are and should be crucial in the determination of the appropriate sentence.

Much has been written elsewhere about greater resort to alternatives to jail. I do not intend to add to that discussion except in two respects. First, judges could be much more creative than they already are in designing sentences and, in particular, in fashioning conditions in probation orders. The Criminal Code merely requires that the condition be related to ensuring the good conduct of the accused and to prevent further criminality. It is true that supervisory control is exercised by courts of appeal but there is nonetheless considerable scope for innovation in the conditions imposed, at least for offenders not condemned to jail by starting-point sentences.

For instance, I am aware of conditions in probation orders that required an offender to go out on a trapline with an elder, that required an offender to repair the window he had broken while wearing a sign indicating why he was doing so, that prevented an extremely abusive male offender from co-habiting with a female and that prevented an offender from attending his home community for a period of time. Not all of these might withstand scrutiny on appeal, but the judges who imposed them should at least receive credit for attempting to avoid jail sentences.
More frequent use of restitution clauses and community service-order clauses would also help to reduce the jail population, provided, however, that they are imposed on offenders who would otherwise have gone to jail, not as simply another control placed upon a person who was already a candidate for probation. Indeed, that is often the drawback to so-called alternative sanctions, that they cease to be alternatives to jail and become routine punishment for probationers.

**The Concern About Disparity**

My reason for returning to this topic is to introduce the next topic: sentencing circles and other innovative procedures and alternatives to jail. The fate of those rediscovered procedures hangs in the balance as long as courts of appeal are overly concerned about the uniformity of sentences in their jurisdiction. Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.

It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.

Moreover, if the studies are accurate that purport to show that Aboriginal offenders receive shorter terms of imprisonment than non-Aboriginal offenders and that, after accounting for socioeconomic and demographic factors, Aboriginal people might even be under-represented in our jail system, we have already embarked upon a kind of affirmative action program. What must be recognized, then, is that it has been a dismal failure if the measure of success is reduced incarceration of Aboriginal people. What then? Do we simply abandon the enterprise, unconscious though it appears to have been, or do we do it properly?

In the next two sections on sentencing circles and then affirmative action in sentencing, I advocate that we embrace innovation and diversity in our sentencing system. Not only might we achieve greater success at dealing with the problem discussed in this paper, but we might learn better approaches to dealing with crime more generally. It is an experiment worth conducting.
Sentencing Circles

In recent years, beginning in Canada’s two territories, we have seen the rejuvenation of procedures and, to some extent, dispositions traditionally practised by some Aboriginal Peoples in this country. The best known of these is the sentencing circle, in which a group of respected elders participates with a judge in the sentencing process.

There have been, to date, two different types of sentencing circles. The first is perhaps more traditional and certainly plays a more substantive role in the sentencing process. Two examples of this type are *R. v. P.(J.A.)* and *R. v. Naqitarvik*. The former concerned a member of the Tlingit First Nation at Teslin, Yukon, convicted of some serious sexual offences; while the latter involved an Inuit man in Arctic Bay, Northwest Territories, convicted of a sexual assault on his cousin. Although there are some differences in the way the two communities operated their circles, both were essentially healing and counselling circles in which the aim of the community was to reintegrate the offender back into the community after he had made an admission of responsibility and had sought forgiveness. In *Naqitarvik*, the accused made a public apology to the victim as well. Both of the accused actually devised their own sentencing plans and, to some extent, implemented the sentencing plans eventually arrived at by the usual court system.

Because the sentencing circles so far conducted in Saskatchewan have been of the second type discussed below, namely a variation in the usual sentencing procedure, *Naqitarvik* and *P.(J.A.)* may not seem to be of so much immediate relevance here. However, it is noteworthy that the traditional healing and counselling, combined with shows of contrition and forgiveness, are very much in tune with the “shaming” and reintegration theory espoused by Braithwaite. It is also noteworthy that the two communities involved, Teslin and Arctic Bay, were described by both trial judges as having made tremendous improvements in reducing their crime rates.

Unfortunately, *Naqitarvik* also reveals a sobering aspect to the hopefulness that these approaches engender. At trial, the judge had conducted a sentencing hearing that lasted twelve hours, during which the operations of the Inumarit Committee, the counselling body, were described in great detail. The accused had been subjected to persistent counselling and had made a public apology to the victim. She had also participated in the sentencing hearing. In the end, the trial judge, relying on the success of the Inumarit Committee in reducing the crime rate in Arctic Bay, imposed a ninety-day intermittent sentence plus two years’ probation, including a hundred hours of community service work. But the Crown appealed, and
a majority of the Northwest Territories Court of Appeal\textsuperscript{90} increased the sentence to eighteen months imprisonment.

The Court of Appeal has been criticized elsewhere\textsuperscript{91} and there is little point in repeating that criticism. But the Court was influenced by its emphasis on a starting-point approach to sentencing in major sexual assault cases. It must be said that no one should consider sexual assault undeserving of a fit penalty. The personal security and bodily integrity of women should certainly not be sacrificed to other goals in the sentencing process. However, the Court seemed unwilling to accept that the trial judgement added to the punishment that the offender had already received from the Inumarit Committee and that the combination might equate to the standard sentence. The Court also seemed unwilling to question whether the aims of sentencing could be achieved in any other way than imprisonment. Finally, the Court rejected the notion of the Inumarit Committee as a traditional form of punishment because one of its members had training in counselling and the Committee did not use the ultimate sanction of banishment from the community. As Michael Jackson has stated, the latter denies to any culture the ability to change in response to influences from the larger society.\textsuperscript{92}

It is the concern about deviation from the normal starting-point sentence, however, that is of concern in the Saskatchewan context. Sentencing circles are a new phenomenon in Saskatchewan. As far as I am aware, they have been conducted with some regularity by the northern Provincial Court Judges Fafard, Moxley and Huculak, and on one occasion by a Queen’s Bench Judge, Milliken J., in an urban setting. The sentencing circles used so far in this province have not incorporated traditional forms of sentencing. They have been, instead, “process” circles and probably have drawn on the experience elsewhere. A very good example of this latter type of sentencing circle is \textit{R. v. Moses}.\textsuperscript{93}

Although there is, as might be expected, some variation from place to place, there are some common features to these types of modern sentencing circles. First of all, they are really a hybrid of the traditional form of Aboriginal community justice and our criminal justice system. The judge retains the final authority to impose the sentence. What changes is the process by which that sentencing is arrived at. In principle at least, sentencing circles are a variation in procedure, not necessarily a change in the substance of sentencing.

Indeed, the typical approach is that the sentencing judge still obtains sentencing submissions from the Crown and defence in the usual way, then indicates her or his likely sentence if a sentencing circle were not being held, then the session begins. If there are disputes on factual matters, they are resolved in the usual way by the calling of evidence, examination and
cross-examination and findings of fact by the judge. Then, through discussion around the circle, respected members of the community, the victim, the police, the accused, the family of the accused, Crown and defence counsel, and the judge try to jointly arrive at a decision that is acceptable to all. This is essentially the process that was followed in Moses and in the Saskatchewan cases with which I am familiar. Indeed, in R. v. Morin, Milliken J. expressly followed the approach taken in Moses.

One point, therefore, should be made at the outset. The latter type of sentencing circle is not a substantial deviation from the normal sentencing hearing process. The ambience of the room is different, more people speak and in a less formal setting, but the normal court procedures and safeguards are followed. In the more typical sentencing hearing, the trial judge has a wide discretion about the evidence and information that may be received. Sentencing circles simply replicate that process in a more informal way.

In addition, it is arguable that the victim is better represented than in the normal hearing. Section 735(1.2) of the Criminal Code requires that victim-impact statements be in writing and filed with the court. Although section 735(1.3) permits oral evidence, the norm is more apt to be only the written victim-impact statement. Sentencing circles, therefore, in addition to their other advantages in the sentencing process, provide more involvement for the victim.

The advantages of a sentencing circle process are listed in Moses. In addition to a more comfortable physical setting, the dynamics of the decision-making process are modified in several positive respects:

1. The monopoly of professionals is reduced.
2. Lay participation is encouraged.
3. Information flow is increased.
4. There is a creative search for new options.
5. The sharing of responsibility for the decision is promoted.
6. The participation of the accused is encouraged.
7. Victims are involved in the process.
8. A more constructive environment is created.
9. There is greater understanding of the limitations of the justice system.
10. It extends the focus of the criminal justice system.
11. There is greater mobilization of community resources.
12. There is an opportunity to merge the values of Aboriginal Nations and the larger society.

The last should be of particular concern to us, not just to reduce the incarceration level of Aboriginal offenders but to find new ways of dealing with crime throughout our society.
Unfortunately, there is a tendency in some quarters to view this species of sentencing circle as automatically giving rise to more lenient sentences. The Court of Appeal approach in *Naqitarvik* can be applied to the more preliminary question of whether to engage in the process at all. This, in fact, is what occurred at trial in *R. v. Cheekinew*, where Grotsky J. rejected an application to hold a sentencing circle by an accused convicted of aggravated assault. He held that "at the very least" the offender should be eligible for a suspended sentence, or an intermittent sentence or a short term of imprisonment accompanied by probation. Indeed, he went further to state that where a penitentiary term (two years or more) is thought by a trial judge to be appropriate, there should be no resort to a sentencing circle. As well, the offender must be genuinely contrite and be supported by his/her own community, which is willing to provide supervision and support and take responsibility. Finally, the offender should be sincere in reforming with the help of the community.

Sad to say, these restrictions put the cart before the horse. It is only during the process itself that it can be learned whether the offender is remorseful and motivated to change, whether the community is willing to provide the necessary support and, perhaps most fundamentally, what is the appropriate sentence for this offender. There is also the assumption that every sentencing circle process is going to lead to a non-custodial sentence or at least to a much shorter term of imprisonment than would otherwise be the case. Grotsky J. also expressed reluctance on account of Cheekinew's residence in an urban setting, Saskatoon.

*Morin* also took place in Saskatoon. Like Cheekinew, Morin has a lengthy criminal record and the offence was also serious, in this case a robbery of a gas station. In contrast, however, Milliken J. acceded to the application for a sentencing circle. The Crown opposed the application and asked for a sentence of eight to twelve years imprisonment. In the end, the consensus of the group, other than the prosecutor, was for an eighteen-month prison sentence followed by a year of probation with several conditions. Milliken J. departed from the consensus to the extent of lengthening the probation order to eighteen months and modifying some of the probation conditions. One of the conditions requires Morin to be on intensive probation conditions, including electronic monitoring, for any period of time short of eighteen months that he was not imprisoned. Less intensive probation conditions apply in the period following that.

The Crown has appealed *Morin* and the defence has appealed *Cheekinew*. Therefore, the Saskatchewan Court of Appeal is presented with the opportunity to pass judgement on the concept of sentencing circles, their availability in an urban setting, the procedures to be followed, and the ultimate disposition. The concern that I have raised about uniformity
of sentences will no doubt be a major factor in the Court’s decisions in these cases. The recent decision in *R. v. McLeod*, where the Court upheld a suspended sentence for drug trafficking that included electronic monitoring for an accused with a lengthy criminal record, gives some cause for optimism. Although reiterating the concern to avoid disparity of sentences, Vancise J. A. stressed the need to consider alternatives to imprisonment in at least some situations that have heretofore had starting-point jail sentences. This is a positive development that might tip the scales in favour of sentencing circles.

What is at stake, of course, is not just the process, but the expansion of sentencing circles in this province into actually providing part of the punishment, as was done in *Naqitarvik* and *P.J.A.*. The present approach of placing some responsibility upon the community to supervise and counsel the offender is a big improvement. But a bigger improvement yet will be if communities themselves develop strategies for dealing with crime and offenders, and if the courts will have the wisdom and strength to permit those strategies to work in order to assess their viability. In the process, we might learn some valuable lessons about dealing with crime that could be portable to the larger society. There is, for instance, no reason in principle why sentencing circles and community dispositions could not be attempted in non-Aboriginal communities.

The northern sentencing circles and approaches may be better able to justify themselves by recourse to tradition than their southern and urban counterparts but the best justification is success. We can only find success if we are willing to experiment.

**Affirmative Action in Sentencing**

At the outset of this paper, I cited several indicators of Aboriginal over-representation in jails. Those figures themselves should suggest that strong ameliorative measures are required to deal with a serious injustice in our society. Whether or not the demographics and socioeconomic factors account for the disproportionate incarceration rates for Aboriginal people, it is clear that something must be done. The measures discussed above would undoubtedly help if adopted. But it must be noted that most of those proposals deal with the more general problem of Canada’s very high imprisonment rate, rather than with Aboriginal people in particular. Even the discussion on sentencing circles concluded with the thought that experimentation with alternate forms of sentencing and sentencing procedures might be of benefit to the non-Aboriginal community as well.

But there is a distinct possibility that even if implemented wholeheartedly, those measures might not be enough to reduce the Aboriginal incarceration rate (and the incarceration of non-Aboriginals) to significantly
lower levels. The difficulty is that many Aboriginal communities have been so affected by the treatment accorded them throughout Canadian history that modest reforms may not be sufficient. For instance, as more comes to light about the maltreatment of children in Indian residential schools and the cycle of sexual and physical abuse that is repeated by the abused onto others, we may discover that we must insist upon positive discrimination in favour of Aboriginal people in the sentencing process in order to heal their communities. Likewise, the cultural dislocation that has occurred as a result of the influences of the wage economy, the media, urbanization and the reduced opportunities to pursue traditional livelihoods may not be overcome through simple reforms. More drastic action may be required.

Undoubtedly, the notion of affirmative action in sentencing will be controversial. I suspect the idea that all offenders committing the same offence should receive the same or nearly the same penalty is deeply ingrained. The law-and-order mentality that commands us to get tough with crime also leads us in the opposite direction from healing and reintegration. But if we are serious about dealing with our social ills, if we are serious about our commitment to justice for Aboriginal people and if we are serious about true equality, we should accept the concept of special measures for Aboriginal offenders. After all, the larger society must bear a large portion of the responsibility for the plight in which Aboriginal people find themselves.

Section 15(2) of the Charter endorses “any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.” In addition, section 27 commands us to interpret the Charter in a manner that respects the multicultural heritage of Canada. In combination, both provide the authority to embark on an affirmative action sentencing program, specifically designed to reduce the over-incarceration of Aboriginal people.

It would be desirable, of course, if the political will were there to have such a scheme implemented by legislation. But that may not occur. As an alternative, it is open to the Canadian judiciary to develop such a plan. It has been held that “law” includes the common law, so it is clear that such a program would have the force of law. Given that provincial courts of appeal are in general the court of last resort on quantum of sentence and are also in a better position to appreciate the situation within their own provinces, it would be logical for that level of court to devise and supervise such a program. Of course, when Aboriginal justice systems are established, the corresponding appeal structure might assume the same task.

From a purely legal perspective, such a scheme would hold a good chance of being upheld if challenged. There have been few cases concerning section 15(2) thus far. It was held in Apsit v. Manitoba Human Rights Com-
mission,105 in striking down a plan giving preferred rights to Aboriginal people in the production and harvesting of wild rice, that the form of ameliorative action must be related to the cause of the disadvantage. Since a lack of harvesting rights to wild rice was not the cause of the impoverished condition of Aboriginal people in Manitoba, the plan was struck down even though it had received an exemption from the Human Rights Commission.

In the case of a sentencing affirmative action plan, however, that difficulty would be much easier to overcome. The data I have cited at the beginning of this article demonstrate a great deal of disadvantage to Aboriginal people throughout the criminal justice system. At least some of that disadvantage can be attributed to the sentencing process itself. Moreover, the Apsit approach is rather narrow; once the Supreme Court has had the opportunity to give thorough consideration to section 15(2), there is cause to suppose that the test will be broader for the endorsement of affirmative action programs.

From a policy and political perspective, the route may be more difficult. But if such a program were accompanied by a comprehensive re-evaluation of the aims of sentencing by the legislative body or judicial body devising such a scheme, the public might be persuaded that the chance was worth taking. Moving toward a conciliatory model of criminal justice, perhaps along the lines suggested by Braithwaite, would be a risky venture but if there were early indications of success, the ride would become smoother. The attraction of having a much more cost-effective justice system might help in that regard. As well, the prospect of finding new approaches for dealing with offenders throughout society might be of assistance in warding off the predictable backlash. In the end, however, there is no doubt that to propose and implement such a measure would require courage and commitment. In this respect at least, judges are better placed than politicians since they do not have to cater to the lowest common denominator among the electorate.

**Conclusion**

It must always be borne in mind that the problems confronting Aboriginal people in this country are deep-seated and complex. There is, in the end, a limit to what the criminal justice system can do to solve those problems. The sentencing process is itself only a part, though an extremely important part, of the criminal justice system. Whether change to the sentencing system takes the course of reform or the more revolutionary courses of entirely new aims and/or affirmative action, we must keep its role in perspective. Accompanying overhaul of the sentencing system must be changes in policing, corrections, prosecutions and the trial process. The push for separate
Aboriginal justice systems will also be a passenger, if not the driver, on that journey. Nevertheless, some major steps in improving the sentencing system could have a great impact as we confront the immediate problem of incarcerating far too many Aboriginal people. In conclusion, I hope that some of the proposals made here prompt discussion and that a few of them might be attempted.

NOTES


2 Ibid., Table 11.

3 J. Harding, Y. Kly and D. MacDonald, *Overcoming Systemic Discrimination Against Aboriginal People in Saskatchewan: Brief to the Indian Justice Review Committee and the Metis Justice Review Committee* (Regina: Prairie Justice Research, 1992), 2–5. The authors indicate that the dramatic increase in the proportion of admissions to provincial jails by Aboriginal people is explained as a product of urbanization, cultural conflict, alcohol and substance abuse, demographics and forced assimilation. They consider, however, that these explanations are not the real cause, which, in their view, is systemic discrimination.

4 Judge P. Linn, chair. *Report of the Saskatchewan Metis Justice Review Committee* (Regina: Government of Saskatchewan, 1992), 10. The same data are provided in another study by the same (except for Aboriginal) committee members that was completed at the same time: *Report of the Saskatchewan Indian Justice Review Committee* (Regina: Government of Saskatchewan, 1992), 7.

5 Ibid., 7.

6 *Metis Justice Review Committee*, 6, 8. See note 4 above.


9 Ibid., 109.

10 Related to me by Garth King, Executive Assistant to Dick Till, Executive Director Corrections, Corrections & Justice Services, Saskatchewan Justice, in a phone conversation on September 10, 1993. In that year, of 6889 jail admissions, nearly one-third, or 2292, were for fine default. Of the fine defaulters, 1714 were classified by themselves as being of Aboriginal descent. The proportion of jail admissions for fine default has declined slightly from about 38 percent in 1990–91: *Metis Justice Review Committee*, 10. See note 4 above. It is not clear whether the decrease is due to conscious effort by the judiciary and fine-options personnel or whether it is due to other dispositions becoming more popular. If the latter, it might be an insidious
development since the jail population has been increasing during the same period.

11 Among the reasons are some systemic barriers (offenders with positive educational and employment backgrounds are considered better candidates for probation; since Aboriginal people are disproportionately poor, unemployed and undereducated, they are less likely to be considered for probation on these grounds) and, in rural and northern areas, the lack of probation services and supervision.

12 James Hathaway, “Native Canadians and the Criminal Justice System: A Critical Examination of the Native Courtworker Program,” Saskatchewan Law Review 49 (1984–85): 230. According to the Report of the Saskatchewan Metis Justice Review Committee, 11, see note 4 above, in 1990–91, 58 percent of probationers, 41 percent of the restitution case load (and restitution is most often imposed by means of a condition in a probation order) and 39 percent of community service order participants (again imposed via a probation condition) were Aboriginal. This confirms Hathaway’s assertion, since, other things being equal, one would expect that the proportion of probationers who are Aboriginal would be the same as the proportion of jail admissions—68 percent.


15 Manitoba Aboriginal Justice Inquiry, 392. See note 8 above.

16 Related to the author by Richard Till, Executive Director Corrections, Corrections and Justice Services, Saskatchewan Justice, in a telephone conversation on September 8, 1993.


18 La Prairie, “Aboriginal Crime and Justice.” See note 17 above.

19 Criminal Justice Statistics, Correctional Services, Tables 11 and 30 and surrounding text. See notes 1 and 2 above.


22 For example, La Prairie, “The Role of Sentencing,” 430. See note 14 above. La Prairie also cites a study conducted in British Columbia that concluded that the age distribution of the Aboriginal population was an explanation


26 Swett, “Cultural Bias,” see note 24 above, found that the stereotypes used by the police to devote more resources to policing minority groups also caused the minority group members to react—to develop their own stereotype of police as bigoted bullies. It seems plausible to think that Aboriginal people have, in many instances, developed the same attitudes here. Obviously, mutual distrust between the police and Aboriginal people is a crucial factor in the incarceration of the latter.


29 Ibid., 42.


31 This is an example that was given by Fafard P. C. J. and reported in the *Report of the Saskatchewan Metis Justice Review Committee*, 43. See note 4 above.


34 Ibid., 323.

35 Like the principle that a plea of guilty is mitigating but insisting on a trial should not be seen as an aggravating factor. I am not suggesting there is no distinction (there is, because going to trial is simply the exercise of legal and constitutional rights) but that the effect is surely to punish someone more severely for not pleading guilty.

36 *Manitoba Justice Inquiry*, 392. See note 8 above.


39 Ibid., 422-23.


41 For example, it has been held that a judge may impose two of jail, a fine and probation, but not all three: *R. v. Blacquiere* (1975), 24 C.C.C. (2d) 168 (Ont. C.A.). Also, in order to impose a fine for offences carrying a maximum
penalty of more than five years imprisonment, a judge must also impose another punishment, typically one day in jail served by the accused's presence in court: *Code*, s. 718(2).

The Supreme Court of Canada theoretically has the power to consider appeals dealing with the quantum of sentence but has consistently refused to do so unless the legality of the sentence or a legal principle is involved: *R. v. Gardiner* (1982), 30 C.R. (3d) 289 (S.C.C.).


The latter is really an aspect of retribution in the sense that the public is reassured that an offender has received his or her just desserts for having broken the law and that they are not disadvantaged by virtue of having obeyed the law.


Sentencing Commission, *Sentencing Reform*, chap. 4, especially p. 96, see note 33 above, where it is indicated from one survey over 70 percent of the dispositions reported in the media were of imprisonment, whereas fines were reported only 9 percent of the time despite being the most frequent sentence.


Sentencing Commission, *Sentencing Reform*. See note 33. The focus on disparity pervades the report, but pp. 71–77 illustrate the emphasis on disparity.


There are some individual judges who have not jumped onto this particular bandwagon. In Saskatchewan, Fafard P. C. J. is, and has been for some time, quite innovative, despite the limitation of being a trial judge subject to appeal. In the Saskatchewan Court of Appeal, Vancise J. A. has shown a willingness to embrace innovation; see his dissenting judgement in *McGinn*, see note 43 above, and his recent judgement in *R. v. McLeod* (1993), 81 C.C.C.(3d) 83 (Sask. C.A.). Another judge prepared not to be a fetishist toward uniformity is Wood J. A. of the British Columbia Court of Appeal: *R. v. Sweeney* (1992), 71 C.C.C.(3d) 82 and *R. v. Preston* (1990), 47 B.C.L.R.(2d) 273.


Except perhaps the aim of denouncing the behaviour through the sentencing ritual. Even this is highly suspect when so few individual sentences are reported in the media and so few of the public actually attend court.


Braithwaite, *Crime, Shame and Reintegration*. See note 17 above. For an assessment of some of the projects being undertaken in Canada that attempt to reinstitute more traditional healing approaches, see: Rupert Ross, “Dueling Paradigms? Western Criminal Justice versus Aboriginal Community Healing” in this book.

See note 10 above.

See note 12 above.


Kimball, “Judicial Discretion,” 468. See note 63 above.

Ibid., 470.

This is done now, but for a different purpose: to determine the length of time the accused will be given to pay the fine: *Criminal Code*, s. 718(5)(b).


*Money Payments (Justices Procedure) Act*, 1935 (U.K.), c. 46. Under our *Criminal Code*, only those between the ages of 16 and 21 are entitled to an inquiry into their ability to pay prior to the issuance of a committal warrant: s. 718(10). Even for that group, there is no requirement for a hearing in the presence of the accused. S. 718(10) was held in *R. v. Hebb* (1989), 69 C.R.(3d) 1 (N.S.S.C.) to violate s. 15 equality rights under the Charter because it discriminates on the basis of age.

This has been recommended by the *Manitoba Aboriginal Justice Inquiry*, 426–27, and the Sentencing Commission, *Sentencing Reform*, 384. See notes 8 and 33 above. Unfortunately, no action has been taken. It is also surprising that the Saskatchewan Métis and Indian justice review committees did not make any recommendations in relation to this problem.


*Provincial Offences Act*, R.S.O. 1980, c. 400, s. 70(3).

*R. v. Hill* (1990), 60 C.C.C.(3d) 400 (Ont. Ct. (Gen. Div.)).

See note 12 above.
Aboriginal Justice Inquiry of Manitoba, 412. See note 8 above.

In Manitoba, 5½ times as much money is spent on jails as on other forms of sentences: Manitoba Aboriginal Justice Inquiry, 396. See note 8 above. I do not have the comparable data for Saskatchewan.

Strategies to Reduce the Over-_Incarceration of Aboriginal People in Canada: A Research Consultation. (Regina: Prairie Justice Research, 1990), app. 3, 3.

The last-mentioned benefit is extremely important. According to the Manitoba Métis Federation brief to the Manitoba Aboriginal Justice Inquiry, in Saskatchewan in the period 1980–82, 73.7 percent of all bail or probation violators sentenced to jail were Aboriginal people: Manitoba Métis Federation, Research and Analysis of the Impact of the Justice System on the Metis (1989), 12.

Criminal Code, s. 737(2)(h).

Imposed in conjunction with a jail sentence for a serious assault upon a woman. The jail sentence would have been much longer but for the innovative probation condition.

The latter condition was imposed in R. v. Malboeuf (1982), 68 C.C.C.(2d) 544 (Sask. C.A.) but quashed by the Court of Appeal. The Court, however, did leave room for banishment orders in certain circumstances.

A caution that has been noted by both of the major studies into sentencing. See: Sentencing Commission, Sentencing Reform, 367–71, note 33 above; Daubney Committee Report, 84–85, note 52 above.


La Prairie, “The Role of Sentencing.” See note 14 above.

I use the term “rejuvenation” because it is accepted that because of the effects of government policy and colonialism, many First Nations have had difficulty resurrecting such systems in their original form. The process of reconstructing such traditions is described in Jane Dickson-Gilmore, “Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems,” Canadian Journal of Criminology 34 (1992): 479.


Braithwaite, Crime, Shame and Reintegration. See note 17 above. See also: Ross, “Duelling Paradigms?” note 59 above. From his discussion of various Aboriginal justice projects currently under way in Canada, it would seem that traditional Aboriginal criminology was very similar to the theory now being espoused by Braithwaite.

The Alberta Court of Appeal in disguise.

For example, Jackson, “Locking up Natives,” 260–73 and Manitoba Aboriginal Justice Inquiry, 400–01. See notes 54 and 8 above.

Jackson, “Locking up Natives,” 265. See note 54 above.


R. v. Morin (1994) 1 C.N.L.R. 150. The case is on appeal to the Saskatchewan Court of Appeal.

R. v. Cheekinew (1993), 80 C.C.C.(3d) 143 (Sask. Q.B.). The case has been appealed to the Court of Appeal.

Ibid., 149. The emphasis is contained in the judgement.

During the sentencing circle hearing, however, the Crown sought a sentence in the seven- to nine-year range.

The concern of the circle was that he must be under strict controls for eighteen months. However, the prison sentence would be automatically reduced by one-third due to statutory release: Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 127. Under s. 120, he would also be eligible for parole after one-third of the sentence. Thus, the intensive probation conditions would cover any period of the sentence reduced by statutory release or parole.

See note 53 above.

Indeed, over the dissent of Vancise J. A., the court in McGinn, see note 53 above, had confirmed that drug trafficking and possession for the purpose of trafficking should, absent exceptional circumstances, be punishable by imprisonment.


I am not neglecting ss. 25 and 35, which deal with Aboriginal and treaty rights. Those provisions, however, are more relevant to the right of Aboriginal Peoples to self-government, including the establishment of their own justice systems.
