

Lister Sinclair

Good evening. I'm Lister Sinclair and this is *Ideas* on prisons.

Prison rates vary enormously around the world. Per capita Japan keeps one-quarter of the prisoners Canada does and Canada, only one-quarter of the American number. These differences cannot be explained by variations in the amount of undesirable behaviour. They relate much more to differences in culture and policy. What our policy should be with regard to imprisonment is the subject of this special ten-part series by David Cayley. Tonight he examines arguments and options for reducing imprisonment. "Prison and Its Alternatives," Part Four by David Cayley.

David Cayley

In 1980, the State of California devoted 2 per cent of its budget to prisons. Today it's spending nearly 10 per cent. And a recent Rand Corporation study projects an unbelievable 18 per cent within six years. In Canada, the cost of imprisoning someone for a year exceeds the average annual income by 2 to 3 times, depending on the province. Prisons are an expensive institution, and very few jurisdictions in the world could afford to do what California has done. This is a fact from which Vivien Stern takes some comfort and encouragement. She's the executive director of a large British organization called NACRO, the National Association for the Care and Resettlement of Offenders, and also the director of a newer and smaller organization called Prison Reform International, founded in 1989 to lend international support to reform efforts in poor countries. Vivien Stern thinks that, because of the prohibitive financial and social costs of prisons, countries that can't afford them may lead the way in devising alternatives. One of the first projects that Prison Reform International supported was a scheme to help establish community service as an alternative to prison in Zimbabwe.

Vivien Stern

Zimbabwe has all the problems of a typical African country: overcrowded prisons, lots of people in prison because they couldn't find the money to pay a fine equivalent maybe of \$10, no other way of dealing with offenders and no tradition, since colonialism, of dealing with offenders other than by sending them to prison. But in terms of the development process, a prison is a monstrous waste of money, a creator of illness, a creator of dependent wives and children that the state is not

prepared to keep and a drain on development and on the country's resources.

The Zimbabweans were interested in finding another way, and leading people in the Zimbabwean criminal justice system worked with us and the European Union, who provide the money through us. There's now an extremely successful community-service scheme going in Zimbabwe, which has already diverted about 4,000 people from the prison system. The community-service scheme is a model for Africa, because it's very low in its use of resources, and it makes a very recognizable contribution to the benefit of the community by putting people to work in community organizations that have very little money. Organizations that look after disabled children or look after the elderly and have to run these services on a shoestring, can get free workers from the community-service scheme.

And it seems to have taken root very well in the African context, where prisons were, after all, imported by colonialists. They were not an African idea. They don't fit with the African idea of justice, which is very much based on restitution. Community service fits very well. And we're very hopeful that the model of community service that we've been able to support and work on with the Zimbabweans will be adopted in other African countries. The European Union is interested in seeing it replicated, and we're hopeful of getting the money to replicate it now in four neighbouring countries. So, the Zimbabweans, who've worked on this and have a very clear idea how to do it, will be able to go to countries around and help their colleagues there to set up similar schemes. And eventually it could become a major part of criminal justice systems in Africa. Many people would not go to prison who now go to prison, and the amount of suffering, death and poverty that could be saved by that development is measurable and substantial.

David Cayley

Vivien Stern sees great promise in the fact that prison is an institution with very shallow roots in African soil. Just how shallow, she says, was brought vividly home to her during a visit to a prison in the southern African state of Malawi.

Vivien Stern

I addressed a meeting of 900 prisoners, all sitting on the floor, discussing with me, with maybe three or four officials there. Nothing's locked. The wall is something

that even I, who am not athletic, could climb over. They all stay there more or less, and they don't riot, and they don't mutiny and they live more or less as the prison expects them to live. So, you have to ask yourself, Is this a prison in the conventional sense? Because these people stay there, and they obey the rules more or less. They protest ferociously about the appalling treatment, but they accept the legitimacy of what's being done to them. So, if you don't need security and if you don't need high walls and if you don't need to lock anything, why are they having what we would call a prison, in the first place? Clearly there's something wrong with the concept, something completely alien in the concept that enables you to have something called a prison but which has hardly any security and where any child could climb over the wall. If there is, in the African tradition, an acceptance of the legitimacy of punishment in that way, then the scope for a different form of punishment that's not based on the European, nineteenth-century idea of a prison is very, very promising, and we ought to be able to think of another way: Why aren't these people working in some way in their villages, in some way maintaining their families and making another form of restitution to whoever it was they stole from or whatever it was they did? Because clearly they're not a security risk in any sense that we understand, and they might as well be growing their own food rather than having the government struggling to feed them and failing to do so.

David Cayley

To what extent would this also be true, in your view, of a British prison?

Vivien Stern

This would not be true of a British prison because the ideas of order and control and legitimacy are completely different. Very few people locked up in a British prison accept the legitimacy of what's done to them. They think that it was unfair, the trial was probably unfair, they got a harsher sentence than the person who was doing it with them; it was all the fault of their upbringing anyway; and rich people steal a lot of things and don't get into prison, it's only the poor who get into prison. There's a whole complex of ideas which make the British person in prison often feel that it's completely illegitimate that they're there and that their role is to try and get one up on the system. That's the normal culture of prisons as we know it, except in Africa, where there was no evidence that this was the way it worked at all and where there was a completely different set of relationships I observed

between the prisoner body and the staff body.

The staff felt a respect, if I can use that word, a respect for the prisoners and a deep shame at the way they had to keep them: the rags that they were wearing, the poor food, the lack of medicines, the disgusting huts that they were all sleeping in, with about 12 inches per body. There was a community of shame and of survival that bound the staff and the prisoners together in a way that you certainly wouldn't see in the West.

David Cayley

Vivien Stern's experiences in Malawi led her to wonder whether the habit of imprisonment, acquired during colonialism, might not be obscuring other and better possibilities. In the solidarity between staff and prisoners and in the vividness of their shame, she could see the outlines of older communal institutions of punishment and restitution. These institutions, in her view, will be easier to restore in Africa than in Western countries. In Africa, the cultural habits that would sustain alternatives remain vital. In Western countries, the prison has a deeper hold on the social imagination. But to her mind, this only lends cogency to Africa's example, because the times demand alternatives in Western countries as well.

Vivien Stern

We went through a phase where we tried to make prisons much more humane: large numbers of staff, relationships between staff and prisoners, a place which was therapeutic and educational and a place where the emphasis was on good relationships and human development. And there were, under that idea, some very humane prisons. Denmark, for example, springs to mind. The Netherlands went through a phase of very humane prisons.

I fear that phase is ending. With the pressures on expenditure, the lack of faith in helping human beings to be better, the temptation will be to use incarceration in what one has to call a concentration-camp model: Keep people locked up as cheaply as possible for as long as you feel they might do something nasty to someone else, which is why, I think, we need to think very quickly about another model. And that's why I'm very excited about what's happening in Africa.

David Cayley

A different model is also being pursued in parts of Latin America, and for many of the same reasons. Julita Lemgruber is a friend of Vivien Stern's and a colleague in Prison Reform International. She's also the former director

of the prison system in the Brazilian state of Rio de Janeiro. She was appointed to the position as a reformer, and during the time she directed Rio's 17 prisons, she was able to considerably reduce corruption and violence. There were eight murders in the prisons during her four-year tenure; there had been 79 during the previous four years. But in the end, she says, the experience only reinforced the view that she had formed many years before: that prison is an institution that just doesn't work.

Julita Lemgruber

When I was working toward my master's and I was studying this women's prison, I would go there. For a few months, I went there twice a week, sometimes three times a week, and I would sit there and talk to those women. If you go to prisons often for a certain period of time in your life, you don't have to study it to be convinced that that thing doesn't work. You see the suffering, you see how it just destroys families, it destroys personal histories. You don't have to theorize; you just have to live the day-by-day lives of those people who are there, who are telling you those stories of what happened to them because they went to prison. It's not because they committed a crime but because they went to prison.

So, after four years of all this fight, of all this—oh, I can do this, I can do that—I'm more than ever convinced that, no matter how much you work, no matter how much you change, prisons will always be the same. Even if you run a prison with all the money you can have, even if you offer everything you can think of, you will never change a person by depriving this person of their liberty. Only very violent people should be sent to prison. For all the others, I am more than ever convinced that there needs to be some other kind of punishment.

David Cayley

Other kinds of punishment are what Julita Lemgruber is working on today as an assistant to Rio's Secretary of Justice. One of the main alternatives she sees is community service. But she recognizes that because Brazil has no probation service and, therefore, no one to supervise community sentences, judges are often reluctant to impose them.

Julita Lemgruber

One of the things I want to do, during this next four years, is to try to set up a group of social workers to supervise community-service orders. I think this is something that we really need. To a certain extent, I have to agree that

judges sometimes are not very sure whether such orders are going to be carried out in the right way. But anyhow, there are some people that go to jail for such stupid things that even if the judge is not sure whether this person's going to get placed or not, it doesn't make that much difference. I had one woman in the women's prison that got three-years imprisonment—she was deprived of her liberty for three years because she stole disposable diapers from a supermarket, two packages of disposable diapers. And so when I go to these conferences, I add what she cost in those three years, and then I tell the people how much two packs of disposable diapers cost and I ask them what I asked in an article I wrote for the newspaper with the title: "How Much Would You Pay for Two Packs of Disposable Diapers?"

David Cayley

Absurd cases like this suggest that there is considerable scope for a reduction in prison numbers. Julita Lemgruber estimates that for Brazil as a whole, more than 50 per cent of those imprisoned are there for non-violent offences. Brazilian law, she says, already contemplates alternative sentences for these people, but the problem is changing the habits of those who administer criminal justice.

Julita Lemgruber

We want the judges to use the law that is at their disposal today, and they're not using it because they're not used to using it. There is not a culture of alternatives; there is the culture of the prison. We must change this culture. We must show them that other kinds of punishments are punishments also. Prison is not the only punishment.

David Cayley

There are many reasons for considering alternatives to imprisonment: Prisons are expensive, they stigmatize and disable their inmates, and they build habits and associations that foster crime rather than preventing it. These are sins of commission.

But imprisonment often involves sins of omission as well. One sees it when an offender comes out of prison after 15 years and the family or community he has hurt are still as angry as the day he went in. There has been no healing, no restitution, no forgiveness. What ought to have been done when an injury occurs has not been done. A prison sentence has been applied instead.

Norwegian criminologist Nils Christie dealt with this aspect of criminal justice in an influential article he wrote

in 1977 called "Conflicts as Property." He argued that the criminal justice machinery removes conflicts and injuries from the social sphere in which they have occurred, reconstitutes them as crime and then proceeds as if the state, rather the parties involved, had the paramount interest. The penal apparatus, he says, "steals the conflicts." These conflicts then remain unresolved, and the community is deprived of the good it might have had from resolving them.

Nils Christie

It is not obvious that the penal apparatus is a very efficient one. The penal law works in dichotomies: yes and no, guilty or not guilty. Then the state takes over: They put them into prison and that's it.

But, as we know from our daily life, we are more understanding when we are closer to people. We might hurt people, we might hurt the property of other people. Most of us would be happy to get compensation, not to look at these phenomena as crime at all but say, That was very silly behaviour. Why should I call in the police? I know the person. I might need some help from some official figures to bring us together so we could discuss how he or she could create a situation where I didn't need to be angry anymore and where I felt compensated and which might even create a base for some good vibration between us if we made it good again.

Most of us are rather sensitive, most of us like to come to agreements. Why should we abdicate all the time and leave it to the police to do these things? I ask why, but I know the answer: It is because in modern societies, we feel isolated, we don't really know the other people, so we don't dare to. So, this again shows the importance of trying to integrate neighbourhoods, making serious attempts to get people to know each other in their surroundings.

David Cayley

According to Nils Christie, we are less likely to assign those whom we actually know to the category of criminals and less likely call their mistakes crimes. In his view, recourse to criminal justice procedures increases as the sense of community decreases. Informal ways of settling differences fall into disuse, and habits of accommodation disappear when the problematic people we encounter are all strangers. As societies become more complex and more mobile, they turn increasingly to criminal justice systems for safety and security.

The trouble is, says Thomas Mathiesen, a prison-based criminal justice system offers us very little of either. Thomas Mathiesen is a colleague of Nils Christie's at the University of Oslo and an active member of the Norwegian Association for Prison Reform.

Thomas Mathiesen

The prison system, actually, just makes the situation worse. We now have a situation where a huge number of people are alumni of the prisons and have been socialized into a criminal ideology in the prison. We know now that prison does not rehabilitate. On the contrary. We know that it doesn't function as a deterrent other than in a very marginal sense. And we know that it doesn't incapacitate other than in a very marginal sense. So, I mean, all of the arguments go against the prison.

And really the main argument would be that we would be better off without a prison system, especially considering that the prison system is extremely costly. I mean, it costs billions and billions. I don't know how many billions of dollars the Canadian or the American systems cost; but I know what the Norwegian system costs, and it costs a billion. It's enormous.

Think of what we could do with that money, spending it on three important things: first of all, on the offender side, using sensible kinds of alternatives, which exist: conflict resolution of a civil kind; community services; a whole string of treatment arrangements outside the context of the prison system. Using the money for that, think of what we could do with all of those billions of dollars for people in a sensible way, reducing crime.

The second pillar would be to use another third of the billion dollars on the victims. Today the victims don't get anything out of the system. What do they get? Nothing. Not money, not their health back—not anything. You could construct a whole new system, escalating compensation to the victim instead of escalating imprisonment to the offender; shifting the parameters completely, not focusing on the offender but focusing on the victim; and have a penal code—but it wouldn't be a penal code—setting out how much compensation each victim should have, with all of those billions.

Then the third part of those billions, I think, should go to communication with the public to explain all of this and to keep explaining it over many years. It would have to be a major cultural change obviously. But again with billions

of dollars, I can see how we could come relatively close to abolition without endangering anyone.

David Cayley

Thomas Mathiesen's use of the term "abolition" here is conscious. He's a prison abolitionist in the same sense that opponents of slavery were called abolitionists in the last century. The term can be a red flag, since it immediately raises the spectre of dangerous people at liberty. In fact, every abolitionist I've talked to recognizes that there are people who ought to be kept in custody, some temporarily, a few even permanently. What an abolitionist view challenges is the idea of imprisonment as the normal and expected response to wrongdoing. Custody of those thought dangerous is a very different thing than imprisonment as a routine form of punishment and as the ultimate signifier of social disapproval. It is the use of imprisonment for these mainly symbolic purposes that abolitionists are trying to eliminate.

Thomas Mathiesen recognizes, of course, that there is no immediate prospect of such an abolition, although he points out that in the past, established institutions have sometimes disappeared very suddenly and unexpectedly. In the meanwhile, he thinks, reformers should concentrate on putting a cap on prison numbers.

Thomas Mathiesen

I believe that what we can do today in a more concrete way is to work for a ceiling on the prison figures and say that above this number, you cannot go. Today we have close to 3,000 prisoners in Norway, 2,800. I've suggested the ceiling of 700. I think a ceiling for Canada or for the United States would have to be rather different, but the point would be to specify a ceiling.

And then you have to adjust the sentencing practices, the various paragraphs in the penal code and so on, to this ceiling. You will have to prioritize between types of inmates. I think, we have to begin in that end. If we begin in the other end of the spectrum, saying that we can develop alternatives first I think that will mean that we will not make any significant dent in the system. We have to begin by demanding a ceiling and then developing the alternatives as a consequence of that ceiling.

David Cayley

Unless the ceiling is established first, Thomas Mathiesen fears, alternatives will tend to become supplements to the system rather than real alternatives. His view is shared by

Jerry Miller, who was responsible for several major releases of prisoners in the United States in the 1970s. Today Jerry Miller heads the National Centre on Institutions and Alternatives and has just published a new book called Search and Destroy: African-American Males in the Criminal Justice System.

In 1969, he was appointed Commissioner of Youth for the Commonwealth of Massachusetts. At the time, the state had approximately a thousand juvenile offenders in custody. Four years later, there were 40. All the rest were in community-based programs. Miller had closed the state's ten juvenile correctional institutions, according to the same principle Thomas Mathiesen just stated: Limit the institution, and let that be the incentive to find alternatives. When researchers from Harvard did follow-up studies, they found no increase in juvenile crime, less repeat offending and a decline in the percentage of adult prisoners who were graduates of the juvenile correctional system. Jerry Miller went on to work in Pennsylvania, which then had a lot of juvenile offenders in an adult prison called Camp Hill.

Jerry Miller

When I was commissioner there, I was able to talk Governor Shapp into letting us put in place a project to remove some 400 kids from an adult prison. This followed a hanging of a 16 year old at the facility. It was either a suicide or a murder, and I don't think we've ever really known, although it went down as a suicide. The kid had been put there because his mother had found marijuana, a roach, in his athletic jacket, and instead of dealing with it within the family, she called the local police chief, who then suggested the kid be put in a detention centre to scare him. He was put there, whereupon a couple of weeks later, he escaped with an older kid, which made him a bona-fide delinquent, an escapee, whereupon he was sent to an adult prison. But in terms of his crime, his crime had to do with that marijuana cigarette.

We moved those kids out of there, and, in doing so, we developed individualized plans for each of them. It might involve a group home, it might involve a return home but with other kinds of supervision or it might involve community service. It might involve a treatment centre, it might involve outpatient drug treatment, depending on the kid and why he was there. And it worked really very well. We individualized the plans.

It was a good experiment, incidentally, in diagnosis,

because the same 400 kids had been diagnosed a year or so before I came to the state by a group of diagnosticians that the Probation Department and the Department of Corrections had hired. And they came to the conclusion that of the 400, 380 needed to be in secure settings, because they were truly dangerous. When we diagnosed the same group, our diagnosticians said only 40 needed to be in such a facility.

And you say, Well, what's the difference? Did you pay diagnosticians to give you a fixed diagnosis? No, we didn't. We had some marvellous, independent, well-credentialed psychiatrists, psychologists, social workers. But what we did with them is we paid for their time to come to a day-long training session, in which we discussed what we would like to do with these kids, and we said that if the diagnostician spent a lot of time with a kid and could come up with any kind of alternative plan—supervision, hiring someone to be on his arm 24 hours a day—you name it, anything they could come up with, we would pay for that kind of plan. So, that freed the diagnosticians.

Those, a year before, had only two options: either probation, which was inadequate supervision, or prison. There was nothing in between. And by offering all that spectrum of services—Outward Bound Programs, there was all sorts of things we had in there, probably 75 different kinds of programs—by offering the diagnosticians that array, that smorgasbord of options, and then guaranteeing them that we weren't going to put them at risk, that we would guarantee that we'd put the kids in one or another of the plans they devised, all the diagnoses changed. It just opened them all up. Diagnosis in the area of criminal justice is primarily determined by the risk at which diagnosticians think they are putting themselves, so they tend to be very, very conservative, unless it's their own kids or their neighbours kids. Then they can get pretty open and decent.

When we have a system as we have now in this country, which relies so much on imprisonment, it stultifies that whole field that deals with people. Everybody gets very narrow in their conceptions of what offenders are all about. If we had a system of a wide range of options, then our view of everybody in those options would change dramatically.

David Cayley

After his work in Pennsylvania, Jerry Miller founded the

National Centre on Institutions and Alternatives. He and his colleagues began going to court for individual clients with detailed sentencing plans of the kind they'd used in Pennsylvania. Judges very often proved receptive when they were offered well-worked-out alternatives to imprisonment. Miller estimates that his organization has now crafted more than 10,000 such sentences. The key, he says, is close supervision and individual attention.

Jerry Miller

You have to spend a lot of time. You can't just do it à la the criminal justice system or à la the bureaucratic process and follow a recipe: If you do such and such, you have so many hours of community service. It can't be that way. It got to be highly individualized, very well thought through and very well followed up upon administratively to ensure that everything takes place.

On the other hand, the follow-up should not itself be that tied to the criminal justice system. What we've found is a lot of the plans have to be negotiable later so that if a person doesn't show up, for example, for community service, you don't immediately call the cops and say, "Now you're going to jail." What you do is you go meet with the person. You say, "Why didn't you show up, or what's going on here?" And maybe you may have to renegotiate it, come up with something else or find out what's going on in the home or what's going on with the drinking or whatever that they're not showing up. You don't immediately run and bring in someone to violate them.

But they have to be well thought through, they have to be highly individualized so that it is geared to each person's personal history, to their strengths, to their interests, to their abilities so that you enhance the chances of success. And that takes time. We should spend much more of our time in devising these at the sentencing level. If we spent anything like the amount of money we spent in imprisonment at the point of devising individualized alternative sentences, we'd have a very successful system, because one could in fact individualize.

That's another irony that, with the information storage capacity we now have with the advent of computers and whatever, we still rely on the old meataxe of these categories. There's no reason we couldn't store enough information and deal with a wide array of life experiences in an individual's life around which we could fashion sentences more likely to work.

David Cayley

Is there a rule of thumb, a central principle in this in terms of devising alternative? You've talked about individualization. Does it also have to do with the availability of someone who can really attend to that person?

Jerry Miller

Yes, it does. And very often you can find volunteers. Sometimes you can contract with agencies for that. You need continuity. And you need a person who can arbitrate and negotiate that system and be around for an extended period of time. Because even learning self-discipline is still a matter of relationship. It's not a matter of imposed discipline, which is what prisons give. They impose it, but when the person walks out the door, there's no one going to be standing there, threatening them. So, it comes from a relationship. The Latin *disciplina*, comes from *discipulus*, the word for a disciple of a revered person, who you so rever that you want to be like them, and, therefore, you learn to internalize control, you learn to internalize discipline. Reliance on prisons does precisely the opposite. It prepares people to function in totalitarian societies or dependent societies, where everything is pre-ordained and set out and on schedule and you'd just better adhere to everything you're told to adhere to. Now, that is not a preparation for a citizen in a democracy. The other is far better. So, you try to build that into the alternative plans.

And there's no reason that can't be done. I mean, we're paying in this country an average of \$25,000 a year now for the average inmate. For juveniles, we're paying an average of 60- to \$70,000 a year for them to be in reform schools that do nothing but make people worse. Well, my gosh, if I were given 60,000 for a delinquent youngster in my family, I could do very, very well. I proposed in Massachusetts at one point that they just give us some money, and we would commandeer a very large sailboat, and we would go overseas, get the problem out of the community, have an intensely rewarding and interesting experience and it would cost less than putting ten kids in a reform school.

David Cayley

Jerry Miller has devoted a good deal of his career to rescuing young people from prisons: closing reform schools in Massachusetts, getting kids out of adult prisons in Pennsylvania and pioneering non-custodial sentencing plans. Through this work, he has shown again and again

that addressing most juvenile crime in the community reduces the likelihood that kids will re-offend without endangering public safety.

It's a lesson that Canada has been slow to learn. Judge Heino Lilles of the Yukon Territorial Court is one of Canada's recognized experts in this area, with three books to his credit on children and young offenders law. He says that contrary to the widespread perception that our Young Offenders Act is too lenient, we actually have one of the harshest systems of juvenile justice in the Western world.

Judge Heino Lilles

In Canada, 34 per cent of young people who are adjudicated in court end up with custodial dispositions. Thirty-four per cent. Does that figure surprise you? It should. It's much higher than the corresponding figure for adults and much higher than any corresponding figure for youth courts in any Westernized society that I'm aware of. We like to think of the American system as being a very harsh penal system. And indeed, if you look at overall incarceration rates comparing the American states to Canada, we see incarceration rates in the States overall, for adults and young offenders, being about three times the Canadian rate; however, when we focus just on young offenders, we see a startling reversal in those statistics. The rate of custody use for young offenders in Canada is twice as high as that in the United States. Indeed, it's slightly more than twice as high. So, the myth or the view, rather, that the Young Offenders Act is soft on young offenders is false, particularly if one views incarceration as the measure of that softness.

David Cayley

Why do we incarcerate so many young people?

Judge Heino Lilles

Well, that's a very good question, and I suppose as a judge, I must take some responsibility for that. One reason why our incarceration rates are so high is that there's an unrealistic expectation of our punitive youth court model. We think that punishment reduces crime. We think the more severe the punishment, the greater the reduction. That is a myth, it's not true. Our adversarial, punitive justice system is, in fact, incapable of producing what we expect of it in terms of crime reduction. So, that's reason No. 1.

When it doesn't do the job that we expect it to do, it doesn't reduce crime, everyone falls into line and demands

that we get tougher on youth. And while we do that, we have no appreciation at all that we already have one of the toughest youth justice systems in the world. Indeed, you have only to look at our own system for a clear, practical demonstration of the fact that getting tough on crime by way of increasing jail sentences and doing nothing else just does not work to reduce crime.

Other reasons for high incarceration rates: I think we need to recognize when we talk about the justice system that that's a misnomer; the justice system isn't a system at all. It consists of a number of independent agencies—police, Crown attorneys, probation, judges, corrections—who operate totally independently. They have different contradictory objectives. There's no single game plan. There's no mission statement. They have different bosses, political bosses. They don't work together. We end up working against each other. When you have that kind of disparity, you usually end up at the lowest common denominator. When you have a bunch of wheels in a machine working out of synch, change and improvement is almost impossible. I think that's one of the major reasons for our high incarceration rates.

Another reason is that the Young Offenders Act articulates contradictory goals. There's no clear direction in the Young Offenders Act for those people working in the justice system.

I think another reason is that we attempt to process too many youth through the formal justice system. We insist on treating the low-level property offender, who is unlikely to offend again, in exactly the same manner as the youth who commits a violent crime. As a result, we don't have the resources left to do a proper job with either category of offender. We've spread ourselves too thin.

I think also, by maintaining a high level of incarceration, we introduce more and more youth to the criminal justice system. Rather than helping their families deal with a difficult youth, we kick them out of school, put them in jail and make sure they don't get a job. This approach breeds more crime.

David Cayley

Canada's Young Offenders Act came into effect in 1984 as a replacement for the outmoded Juvenile Delinquents Act. Section 3 of the Act contains a statement of eight principles that are supposed to guide judges in their interpretation of the law. These principles include both

punishment and rehabilitation. Heino Lilles says that they are inconsistent and incoherent, and he finds this inconsistency reflected in the wide variation in sentencing practices that now exist across Canada. Some variation, he says, would be understandable and even desirable, but the current degree of difference can only indicate that as a national community, we suffer from badly crossed public purposes.

Judge Heino Lilles

If you look in northern communities, you find incarceration rates that are three to four times that of other provinces. Alberta will use incarceration at a rate two to three times higher than, for example, Prince Edward Island.

You see similar variation in the number of transfers to adult court, which is a very significant decision made in youth court—that is, when a young person commits a very, very serious offence, usually a homicide, the question is whether or not the young person should be transferred to adult court to be dealt with as an adult or left in youth court—I suppose this is the real test of Section 3 of the Young Offenders Act, The Declaration of Principles. Ontario and Quebec transfer together a handful of young offenders on an annual basis, although the majority of Canada's population is found in those two provinces. The great bulk, the great majority, of young offenders are transferred to adult court in the western provinces, Alberta and British Columbia. So, there's an example and, I think, a dramatic example of the inconsistencies that we find in the practice of the Young Offenders Act. In part, that flows from the contradictory aims of the Young Offenders Act.

David Cayley

Judge Lilles believes that Canada ought to be looking at alternatives to the way we currently deal with young offenders. And he thinks that numbers of methods which have already proven their superiority in other places are available to us. Between 1994 and 1995, he spent a year's sabbatical leave at the Faculty of Law of the University of New South Wales in Australia. There he studied some of the ways in which New Zealand and Australia currently divert juveniles out of the criminal courts. One of the most promising, he found, was police cautioning.

Judge Heino Lilles

Police cautioning is a process whereby the police will deal with the young person and his family without laying

formal charges. And they do this in the majority of cases that come to their attention in Australia, New Zealand and the UK. What it involves is the young person and his family members, his parents, being called to the police station. A senior police officer trained in young offender matters sits down and talks to the young person and the family and may spend something like 30 minutes talking to them at the police station. The discussion highlights the personal consequences to the young person of continuing offending. No charges are laid, no court process is initiated. The paperwork that is normally generated is avoided.

And I should tell you that anywhere from 50 to 70 per cent of young offenders who are apprehended by the police and who admit their responsibility are cautioned out of the system in this way. This happens in Australia, New Zealand and the United Kingdom. Fifty to 70 per cent of young people are cautioned out of the system by the police.

David Cayley

And in Canada, this does not happen?

Judge Heino Lilles

This does not happen.

David Cayley

Does it happen informally?

Judge Heino Lilles

No, the police here do not even engage in informal warnings anymore with young people. That's a personal conclusion. I've seen no data to suggest that people do that. Police in most instances, in nearly 100 per cent of the cases, will lay charges. They'll end up giving a warning only in those cases where, in my experience, they really don't have the evidence to lay a charge. But where they do have evidence to lay a charge and the young person admits responsibility, the police will lay a charge and they have done their duty.

We do have diversion programs, which do the same thing at a later stage in the process, usually after a charge is laid, and we try to divert the young person away from the court process. In total, we divert about 15 per cent of young people from the court process using that approach. Now, compare that to 50 to 70 per cent of young people who are diverted away at the very front end in Australia, New Zealand and the United Kingdom.

This has been going on in Australia for over 15 years, and they find a couple of things: They find that 85 per cent of those young people who are cautioned out of the system don't come to the attention of the police again. So, it's very effective not only in terms of crime prevention, but it's also cost effective from a financial point of view. And after 15 years of this very high rate of diversion of kids away from the formal justice system, we find that the best indicators of youthful crime rates in Australia compared to Canada show a rate about half to two-thirds of ours, even though Australian society is very, very similar to Canadian society.

David Cayley

Police cautioning is based on the sober recognition that criminal justice processing often increases the likelihood of kids re-offending rather than reducing it. The same philosophy lies behind New Zealand's Children, Young Persons and Their Families Act passed in 1989. The Act allows juvenile offenders who admit guilt to be dealt with outside the court system by what is called a Family Group Conference. The conference is convened within three weeks of the offence and includes everyone who feels concern in the case, from the police to the friends and family of both victim and offender. Everyone gets a say about what the events in question have meant to them, even if it takes several days, and then the Conference is required to reach a settlement which is satisfactory to all concerned. The family of the offender is encouraged to take the lead in proposing a solution. Settlements may involve apology, restitution, personal service to the victim or community service. Judge Lilles has studied the results and found that through this more personal, less formal procedure, New Zealand has drastically reduced both its costs and the number of youths in custody.

Judge Heino Lilles

In New Zealand one year after the Family Group Conference system was brought into place, out of every 100 offenders, only 10 appeared in youth court. Seventy-five were warned and diverted by the police or cautioned out of the system. Fifteen went to the Family Group Conference. Of the ten that appeared in youth court, five were sent back to the Family Group Conference. Only five were subject to youth court orders, and only two were subject to custodial orders. That's two out of the hundred. Again that compares to 34 per cent in Canada.

After several years of operation in New Zealand, they've reduced the number of youth in custody by 75 per cent.

They reduced their custodial costs by \$113-million. That's just the custodial costs. Keep in mind that they've also saved an incredible amount of money in court processing costs; and, if you consider the time that police sit in court waiting for their case to be called, that also reflects a significant dollar cost to us here. All of that has been saved in addition to the corrections costs that I've referred to. New Zealand is a very small country. A saving of \$113-million in one year—this is a 1993 result—is significant, indeed.

David Cayley

Family Group Conferencing has allowed New Zealand to do more with less, improving justice while reducing costs, objectives we are often told are incompatible. In Canada, the House of Commons Justice Committee is currently holding public hearings on the Young Offenders Act. Judge Lilles thinks that the examples of Australia and New Zealand, countries culturally similar to Canada, show what we could do with a little courage and imagination. But first, he says, our political leaders will have to be willing to defy some of the Canadian public's cherished illusions.

Judge Heino Lilles

We know absolutely unequivocally that, contrary to public belief and expectations, the youth criminal justice system cannot cure delinquency; it does not help dysfunctional families; it does not make our streets safe; it does not make our adolescents walk, talk and dress like adults. We have lots of experiential evidence within Canada and the States, and we have lots of research evidence that establishes beyond a reasonable doubt that increasing penalties and making transfers to adult court easier does not reduce offending. What it does is it creates an illusion of action. It may be good politics but it's very poor public policy.