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A STRUCTURE UNDER STRESS?

A Study of the Sentencing Process
and Decisions in a Lower Criminal Court

by

MAREK DEBICKI

(LL.B., LL.M., Warsaw)

A thesis submitted to the Faculty of
Graduate Studies and Research in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy
Department of Political Science

Carleton University

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A Study of the Sentencing
Process and Decisions in
a Lower Criminal Court"

submitted by Marek Debicki, LL.B., LL.M.

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ABSTRACT

A STRUCTURE UNDER STRESS?

A Study of the Sentencing Process and Decisions in a Lower Criminal Court

Initially, the literature on the operation of the courts in general and sentencing goals in particular, has been examined. The conclusions emerging from the review of the literature indicate a lack of certainty as to the goals of sentencing, and a notion that the courts are under stress which could potentially result in a crisis situation or at worse, in the collapse of the court system. Stress theory has been found useful as a framework within which to examine a political structure facing the possibility of a major crisis.

A case study of the sentencing process and decisions of the Winnipeg Magistrate's Court has been undertaken in order to assess whether the courts are indeed facing a potential crisis situation. This study is based on the analysis of 1197 cases, with data obtained through direct observation. After the identification of the major points on which the predictions of failure are based, the following elements were analysed: the relationship between the socio-economic status of the accused and the sentence, and the impact of legal representation on the sentence. Secondly, the major components of the trial were analysed in order to determine their impact on sentencing decisions. The data revealed differential treatment of a small magnitude of offenders depending on their socio-economic status. The analysis also

indicated that the presence of legal counsel in general does not necessarily benefit the defendant and the benefits accruing from representation by legal aid counsel are even more questionable. It was further established that the court selects and processes information with a high degree of consistency. The general conclusion emerging from the study is that the claims of crisis are exaggerated, and the court, to the contrary, appears to be a highly stable structure.

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CHAPTER I

THE LITERATURE

Introduction

Perhaps the most general observation emerging from a review of the literature on the courts is that criminal courts have very few (if any) friends.¹ Scholars, government bodies, the public and even the police forces are united in their attack on the criminal courts.² Paradoxically this critique is frequently based on diametrically opposing grounds (i.e. some argue that courts are too "lenient",³ others that they are too "harsh"⁴). This critique is of such an intensity that it deserves special attention. Some evaluations of Canadian lower criminal courts and in particular of the sentencing decisions of these courts sound extremely alarming. Such statements come from a variety of reputable sources including bodies which have been charged with the evaluation of the courts and/or sentencing. Perhaps the strongest critic of the lower criminal courts is the Law Reform Commission of Canada which has harshly criticized the courts in the numerous working papers and studies which have appeared under its name. In a reference to the current system of sentencing, the Law Reform Commission stated that "To allow it to continue undermines the legitimacy of the law itself."⁵ In the same working paper J. Hogarth states that strong

critique of the courts has created "a major crisis of confidence in the criminal justice system."⁶ Similarly, in "Studies on Diversion", the Law Reform Commission states that there is a "crisis in criminal justice".⁷ In many of the reports coming from such sources as the already mentioned Law Reform Commission of Canada and the Canadian Committee on Corrections, various Ministers of Justice call for "substantial improvements in sentencing."⁸ Such sentiments are echoed by various provincial evaluations of lower criminal courts. The Quebec Minister of Justice, Jerome Choquette, called for the "modernization of the procedure and the institutions of our legal system".⁹ The Alberta Board of Review stated with respect to the lower criminal courts that the "situation cries for correction"¹⁰ and described the number of cases handled per judge as an "impossible workload". The Alberta Provincial Judges Association has also stated that "there is a desperate need for changes".¹¹ In his monographic study of legal aid in Ontario, James Wilkins subscribes to the position that in lower criminal courts, "justice looks and acts its worst".¹² Such statements should be re-examined in the light of the mainstream literature on sentencing goals and practices of the lower criminal courts. By themselves these evaluations constitute evidence that the courts operate under a certain amount of stress, even if the extent of the problem is somewhat exaggerated and not sufficiently supported by empirical

evidence. If the courts are under severe stress as some authorities claim, then perhaps the judicial system as a whole is in a grave situation. That the courts are an important political institution is obvious. The notion of the "rule of law" is a fundamental concept in the Canadian political system. Courts are absolutely essential to the protection and continual reinforcement of our political tradition.

In order to assess the validity of the claims as to the stress which the courts experience, a historical overview of the literature will be presented and three areas of the literature will be examined in detail. The choice of the pertinent literature is based on the assumption that if there is evidence of stress or lack thereof, it should be readily visible in the areas in question. Following the presentation of an historical overview, the first area of the literature to be examined will consist of the literature dealing with the goals of sentencing. This examination will serve two purposes: first of all an attempt at an evaluation of the performance of the structure requires the determination of whether there are readily identifiable goals against which the performance of the courts can be measured; and secondly, a review of the studies of the goals of the sentencing process will provide an understanding of the various evaluations of the courts which emerge from this area of the literature. The degree to which the courts

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fulfill their objectives should provide evidence of the presence or absence of stress and the ability of the courts to cope with it. The second area of the literature to be discussed will be that studying the population subject to the judicial decision-making process, since many of the charges against the lower criminal courts are based on an analysis of the characteristics of those who appear before these courts. The critique emerging from this literature aims at the very heart of the concept of judicial impartiality, and generates much of the basic criticism of the courts. The consistency of the treatment of offenders should also be an excellent indicator of the presence or absence of stress and the degree to which the courts are capable of coping.

The third area of the literature to be investigated examines the court in the broader context of policies and structures dealing with law enforcement in general. This literature provides yet another critical perspective of the courts since it treats the judiciary as one of many structures, which allows for comparisons and therefore represents a departure from the traditional method which viewed the judiciary as a very distinct and separate structure which was strictly sui generis. This type of treatment of the court more closely approximates a systems approach, and should provide even greater evidence of stress on the basis of the analysis of the inputs and outputs of the judicial

decision-making process.

THE DEVELOPMENT OF THE LITERATURE

Although in recent years Canadian political scientists have become increasingly involved in the study of judicial behaviour, R.C. Snyder's statement characterizing American scholarship of the late 50's is applicable to the state of the discipline in this country today: "(A) paradox in political science is the lack of any systematic attention to the analysis of the decision-making behaviour of judges".¹³ Perhaps we find ourselves at a similar stage as that of American scholarship in 1959 when Shubert predicted that students of courts as a subdiscipline of political science "...may be standing at the threshold of a new era".¹⁴

Canadian political scientists look with envy at the volume and depth of the American literature in this field. Perhaps in no other area of political studies are Canadians so far behind the Americans.¹⁵ The subdiscipline south of the border even has its own journal which in its relatively short life has acquired well-deserved international recognition serving as a medium for scholars from all over the world.¹⁶

Historically, both the Canadian and U.S. Supreme Courts are the courts which have attracted most of the attention. There are studies of the U.S. Supreme Court ranging from historical overviews to detailed studies of the Court under the leadership of practically each and every

Chief Justice.¹⁷ Most of the Justices have been 'dissected' by several scholars and there are even monograph case studies of the recruitment patterns of individual justices.¹⁸ The range of techniques applied to study judges, groups of judges, particular courts or areas of decisions is impressive. These studies range all the way from descriptive historical analyses to increasingly sophisticated studies of the attitudes, behaviour and decisions of individuals or groups of justices. Among some of the techniques which have been utilized are the following; cluster block analysis, various game analyses, scalogram analysis, elite interaction models, role behaviour, coalition behaviour, socialization, psychoanalytical, and the most recent application of econometrics and non-linear summation optimization models.¹⁹ Many efforts attempt to build predictive models; however, so far with good results only in retrodictive predictions.

Canadian literature on courts, although rapidly increasing in recent years, is still at the stage at which the author of the most recent study of the Canadian Supreme Court can state with reference to the possibility of comprehensive treatment that "such a study may be impractical for anyone; it is certainly beyond my reach".²⁰ Another prominent student of the Canadian Supreme Court criticizes the unavailability of basic information about the courts.²¹ Despite the above reservations, it is equally true in Canada that the Supreme Court has been studied in far greater

detail than any other court. Even the standard textbooks on Canadian government predominantly refer, in their discussions of the judiciary, to the Canadian Supreme Court. The bibliographies of these textbooks almost exclusively point students to the literature on the Supreme Court.²²

The fact that most students of judicial behaviour have first turned their attention to the Supreme Courts is easy to understand. The Supreme Courts, both in Canada and the U.S., render their decisions in writing, these decisions are published, Justices are very prominent men and usually have been well known long before their appointment to the bench.²³ Furthermore, their decisions are widely discussed by other important actors in the political system (F. D. Roosevelt's battle with the U.S. Supreme Court or the "Padlock" cases can suffice as illustrations)²⁴ and are frequently brought to the attention of the public by the media. (Ms. A. Murdock of the Murdock vs. Murdock case has become known to readers of all major papers, viewers of T.V. stations and audiences at most university campuses etc.). Particularly in the case of the United States, the Supreme Court occupies a very special position in the political system and political culture to an extent unparalleled on a global scale. This is much less so in the case of the Canadian Supreme Court which has been referred to as the 'Quiet Court',²⁵ and is generally considered as much less prominent than the U.S.S.C.²⁶ It would be a subject for a

separate study but it is almost self-evident that the diffused notion of courts in general and an understanding of their modus operandi must be coloured by the high visibility and enormous literature on the Supreme Courts.

Gradually, the almost exclusive preoccupation with the highest courts has been extended to other courts. Not surprisingly, the ones which were first considered were those courts which are most comparable to the Supreme Courts - that is the highest courts in the provinces or states, which serve as courts of appeal. These courts are also often responsible for deciding broad policy issues and setting guidelines for lower courts. In the United States and Canada this is particularly true due to the federative system in which certain matters are under exclusive (or at least concurrent) jurisdiction of the provinces (states). Under a federal system the parallel between the highest court in the province and the Supreme Court is self-explanatory.

Perhaps as a delayed reaction to one of the trends in the discipline - away from almost exclusive preoccupation with elite behaviour and interaction - students of judicial behaviour are turning their attention to lower courts, and with minor exceptions are concentrating on the criminal courts. Although it is difficult to find information pertaining to the Supreme Court of Canada, the task is even more arduous in the case of lower criminal courts. These courts as a rule do not record the judicial reasons, evidence

and arguments of the parties involved,²⁷ and until very recently, did not compile any statistical data at all.²⁸

The judges in these courts are relatively unknown, and are rarely 'promoted' to higher courts.²⁹ Their individual decisions only in very exceptional cases have broader policy implications and only in rare circumstances find their way to the law reports. Due to the relative poverty of information about lower criminal courts, the study of these courts is more difficult than is the case with any other courts.

To date, there are basically three types of studies of the lower criminal courts; the normative, interpretive and empirical. The first group of studies discusses the courts in purely normative terms. The second group attempts to utilize pertinent official statistics (although most scholars tend to agree that such data is highly unreliable).³⁰ The third and most representative group contains studies which can generally be classified as "data finding expeditions".³¹ There is very little attempt at "theorizing" about courts or even at making cross comparisons from one jurisdiction to another.³² The "typical" study is based on a relatively small sample of decisions in one particular court and analyses one or a cluster of related variables.

There are some points of agreement among most of the students of criminal courts of first instance. Practically everybody is in agreement that these courts constitute "the backbone" of the judicial system since

they are courts of first and last instance in some 90-94% of all criminal cases.³³ Secondly, both government sources and scholarly estimates indicate that a vast (and increasing) number of decisions are rendered by lower criminal courts every year.³⁴ Finally, and most importantly, there seems to be an agreement as to the basic components of what could be referred to as the normative model of a criminal court in a democratic society. According to this model criminal courts operate:

- a) according to the rule of law;
- b) with presumption of innocence of the accused;
- c) providing procedural safeguards of b;
- d) providing structural safeguards of b;
- e) providing equal treatment both by law and actors involved in the decision-making process.³⁵

Although the emphasis varies from jurisdiction to jurisdiction, the basic components of the above model are present in all common law jurisdictions.³⁶ Thus in the Canadian variant of this model the emphasis is on crime control, whereas in the American variant, the emphasis is on due process.³⁷ This is illustrated by the existence of extensive legal instruments facilitating the work of the police and prosecution in Canada, and a greater emphasis on the protection of individual rights of the accused in American law.³⁸ Nevertheless, these differences are not so significant as to prohibit comparisons between Canadian and American findings, and in most studies of lower criminal courts, are virtually ignored.

As the legal literature then concentrates upon a tedious examination of every imaginable legal detail pertinent to the normative model, relying on judicial decisions as a basic source of information, and as the decisions studied are very rarely decisions of the lower courts, strictly legal scholarship contributes little (if at all) to the knowledge of the courts of first instance. G. Shubert aptly portrays this type of scholarship in the following statement: "For over two thousand years, the science of law has been a dull esoteric subject, with traditional logic its long suit and the syllogism its ace in the hole".³⁹ The field is therefore left to other scholars such as political scientists, criminologists, sociologists and lawyers who enter into the social sciences.

Furthermore, there is no definite agreement as to the focus of the research. The three types of studies (normative, interpretive and empirical) can alternatively be classified into four categories, (although in some instances there are overlaps) pending on the focus of the research. The first and by far the largest category examines lower criminal courts from the perspective of sentencing goals, attempting first to determine these goals and then to determine whether these goals are met, and if so how and to what degree. The second category examines the operation of the system, concentrating upon one or more specific elements such as the following; bail granting, the role of witnesses,

prosecutor, defense counsel, judge, defendant, etc. The third category of researchers attempts to find linkages between the courts and other structures. Finally, a small number of researchers attempt to acquire an understanding of the attitudinal dimension of judicial decisions.

THE STUDY OF THE GOALS OF SENTENCING

With reference to the first of the above-mentioned four categories, the study of the goals of sentencing is marked by confusion and overlaps in the literature, and even in the theories themselves. The following table will be used to facilitate the discussion of this subject:

Table 1-1

GOAL	RESEARCH STRATEGY	FOCUS ON
General Deterrence	Rate of Crime	Society
Individual Deterrence	Recidivism	Individual
Rehabilitation	Change of Behaviour	Individual (Class)
Retribution	Study of Physical-emotional benefits for society	Society
Equal Punishment	Study of quantifiable data i.e. Mass process	Social Justice (Equality)
Differential Punishment	Same as above plus peculiar attributes of each offender	Individual (Class)

General Deterrence

The general deterrence theory can perhaps best be defined as that theory which hypothesises that for each offender caught and/or punished, some other members of the general society are deterred from committing at least that same offence.⁴⁰ In theory, general deterrence is an admirable goal of the sentencing process. The major problem, however, is that it is almost impossible to empirically demonstrate the efficacy of this theory.⁴¹ John C. Ball suggests that the deterrent effect of a particular type of punishment is an empirical variable dependent upon the following factors: (a) social structure and value system under consideration; (b) population under consideration; (c) the type of law being upheld; (d) the form and magnitude of the prescribed penalty; (e) the certainty of apprehension and punishment; and (f) the individual's knowledge of the law as well as the prescribed punishment and his definition of the situation relative to these factors.⁴² It can be seen that to design an empirical study which would accurately determine these factors and the inter-relationships between them, is almost an impossibility. As Caldwell notes, any empirical studies which have been attempted have failed to isolate significant variables and as well have suffered from a lack of controlled observations.⁴³

Andenaes, another student of sentencing, argues that there are only two basic models of sentencing utilized in

the literature. The first model is based on the Benthamite notion of pain and pleasure as the chief motivations behind man's behaviour. Sentences should inflict pain which in turn will motivate people to avoid situations leading to crime. The alternative model which Andenaes discusses is the psychiatric or treatment model in which crime is viewed as a result of a lack of self control and the product of emotional instability in the individual offender. Andenaes argues that both the Benthamite model and the treatment model are wrong due to several factors: (1) the danger of generalization. Different offences have different motivations and therefore general deterrence may work well in some fields and not in others; (2) people react differently. Andenaes further suggests that society can be divided into three broad groups: (a) good citizens who don't need criminal law to keep them law-abiding; (b) criminals who fear the law but not enough to prevent them from breaking it; and (c) potential criminals who are deterred. (3) the moral effects of criminal law vary from individual to individual.⁴⁴

Hood and Sparks note that "(t)here has been a definite shift - at least on the level of official sentencing policy - away from a purely retributive or punitive approach" to a more "enlightened" approach and that as a result there has been an increased "demand for more (and more accurate) information about the offenders' backgrounds and personalities."⁴⁵

However, Hood and Sparks make the telling point that

"(w)ithout empirical research into the effectiveness of punishments and treatments, there is no way of knowing what information about offenders is relevant to the choice of sentence."⁴⁶ Given the problems and difficulties mentioned earlier in terms of doing research in the area of sentencing theory in general and general deterrence theory in particular, the several inconclusive studies which have been undertaken in an attempt to assess the deterrent effect have suffered, as Hood and Sparks point out, from the fact that they have largely dealt with capital and corporal punishment - seldom used measures which are only applied to very specific types of offences and offenders.⁴⁷ Finally, Hood and Sparks point out a further difficulty, namely the difficulty in defining what is meant by "success" and "failure".⁴⁸

Lest it be thought that we have succeeded in cataloguing all the difficulties, Grygier points out several further problems. Not only is there the problem of deciding what is an appropriate sentence, but even assuming, for example, that that has been decided in favour of a jail sentence, there is the further problem of deciding what length of jail sentence will be the most effective.⁴⁹ Equally difficult is the problem of predicting whether any particular sentence has a general deterrent effect.⁵⁰ Finally, the various parole boards can always enter the picture and substantially reduce the amount of time a man

actually does spend in jail.⁵¹ Grygier suggests that the greater use of new and improved prediction tables would at least remove some of the obsolescence from the current sentencing practices of the court.⁵²

In summary, we can do little better than to quote from Jobson who notes that in Canada, "retribution in sentencing is not dead",⁵³ but that it nevertheless should "be abandoned in favour of a utilitarian reductivist approach to the end that imprisonment might not be imposed unless it is likely to be more effective than other dispositions, having regard to cost of human dignity, in reducing the frequency of the given offence."⁵⁴ Judges are given a wide range and discretion of sentences from which to choose and there is in Canada no uniform set of sentencing principles to guide the magistrate in his selection. Thus, in Canada there is not only the problem of the wide range of sentences to choose from but also the discrepancy among the judges themselves in their sentencing philosophies, and as Jobson notes, "while some judges are frankly committed to rehabilitation, others recognize a role for rehabilitation only after satisfying the minimum requirements of retribution."⁵⁵ Yet one other difficulty in developing any uniformity within Canada is the reliance of the courts on precedence for guidance. As Jobson notes, in terms of sentencing this makes little sense at all, in that while the actual sentences of imprisonment which are handed down are far less than the statutory maximum set out by the Code, they are nevertheless punishments which are based on

the views of a previous social era on morality and justice, etc., views which today have changed and in some cases have even changed dramatically. Jobson suggests that only by asking what is the most effective sentence rather than what is the punishment deserved, will disparities in sentencing be reduced. He calls for the

enactment of sentencing principles designed to ensure that a Court shall not pass a sentence of imprisonment, unless, having regard to current correctional knowledge respecting efficacy of sentences and the character or condition of the accused, is of the opinion that imprisonment is necessary for the protection of the public. In arriving at such a determination the court should consider the likelihood of the accused committing a further serious offence within the next twelve months, and the likelihood of some alternative punishment seriously undermining the deterrent effect of Criminal Law.⁵⁶

As an alternative to imprisonment, Jobson suggests that fines should be retained as the primary sentence in the magistrates court for both rich and poor for the following reasons: (a) fines have a favourable reconviction rate when compared with imprisonment or probation and more importantly for this discussion, (b) the purposes of general and special deterrence may be effectively achieved through fines with a minimum of cost and unnecessary suffering.⁵⁷

An examination of the use of general deterrence theory as a goal of sentencing reveals the presence of a stress-inducing factor. This approach is frequently utilized to provide justification for sentencing decisions despite the lack of evidence to support the efficacy of the theory. However, the inconclusiveness of the literature and the

difficulties in comparing results (due to the variety of approaches and techniques utilized by individual scholars) have prevented this type of criticism from presenting a serious threat to the courts.

Individual Deterrence

The notion of individual deterrence is closely related to both general deterrence and rehabilitation. The stress in this approach is on ensuring (through an appropriate sentence) that the individual will not commit another offence:

to 'individualize' the sentence in the case of any specific offender means, first to differentiate him from other offenders in personality, character, sociocultural background, the motivation of his crime, and his particular potentialities for reform or recidivism, and secondly, to determine which among a range of punitive, corrective psychiatric and social measures, is best adapted to solve the specific set of problems presented by that offender in such a way as materially to reduce the probability of his committing crimes in the future. 58

Most of the problems regarding research in this area are those mentioned in the above section dealing with general deterrence. Rather than reiterate them here, the reader is advised to recall the studies undertaken by Hood, Caldwell, Andenaes, Hood and Sparks, and Grygier. An additional study which merits comment is that of L.T. Wilkins. Some of the conclusions Wilkins draws in his article "Criminology and Operational Research Approach" are rather interesting. Wilkins concludes that fines are more successful than probation or institutional treatment with first offenders, and that lengthy institutional sentences are no more successful than shorter alternatives.

However, his overall results show a lack of significant differences depending on the various treatments of offenders.⁵⁹

There is little consensus in the literature as to the deterrent effect of various sentences. Perhaps only in the case of fines is there some accord, in that Jobson's position is the most accepted although by no means unanimously. Most of the research is inconclusive, and a typical conclusion is that reached by Wilkins - one type of sentence (with the exception of fines in the case of first offenders) cannot really be shown to be any more effective than any other.⁶⁰

With the exception of the case of capital punishment, the notion of individual deterrence is subject to the same difficulties and lack of agreement which characterize general deterrence theory. Although there is some consensus that a very large percentage of offenders are not deterred by the sentences they receive, there is certainly no agreement as to the type of sentence likely to produce more effective results. The fragmented criticism resulting from the lack of agreement on the part of scholars presents far less of a threat to the courts than would a well-coordinated attack showing consensus regarding the preferred sentences. Under conditions where various types of sentences are viewed as equally "effective" or "ineffective" lower criminal court judges can rest assured that whatever the sentences they pass, they will be subject to somewhat similar comments. Thus the courts can anticipate the criticism and the literature itself offers a defense

against any and all change as it cannot select superior alternatives from among those available to the judges.

Rehabilitation

In this approach sentencing is viewed primarily as a process of re-education of the offender, which presumably takes place after the identification of the reasons for his deviations from the norms of acceptable behaviour. The rehabilitative ideal is subjected to a great deal of scorn and ridicule in the literature, probably because, as Menninger states; "the whole idea of punishment is so inextricably wrapped up with law, tradition, morality of various versions, childhood recollection, sentimental identifications, fear, resentment, and other emotions that it is extremely difficult to speak about it or write about it objectively".⁶¹ As has been noted, the overlap between these various theories is immense and for this reason the reader is referred to studies discussed earlier such as those of Andenaes; Grygier; and Jobson.

One of the Canadian contributions to this area is that of Cormier and his associates. In their article "Some Psychological Aspects of Sentencing" they note that if the aim of sentencing is rehabilitation then it is the man that must be sentenced and not his offence.⁶² While leaving to the legal profession the task of integrating the psychological and judicial aspects of sentencing, Cormier and his fellow associates have found from their research that while

it is generally accepted that a child is born into a social unit and that the most important and basic socialization occurs from birth to the age of 6 after which socialization can be carried on by schools, work, marriage, etc., some children were found to be incapable of absorbing and accepting a social code from their earliest years. An analysis of these children revealed an inability to develop an internal system of morality which would help them to obey the one imposed by society; this may be called a conscience, a sense of right and wrong. In addition to those children who appear to lack this altogether there are those who have it, but are unable to use it consistently. In adulthood this corresponds to the habitual offender as opposed to the incidental offender. The subscribers to this theory frequently are strongly opposed to imprisonment. Thus for example, N. Morris is strongly critical of prisons,

most such suffering is more than useless; it is harmful to us. It tends to increase the social immunization of those we punish beyond their social needs, and it is highly probable that we pay a penalty in increased recidivism and increased severity of the crimes committed by those who do return from such punishment to crime. Studies of the inmate culture have confirmed the alienating effect of the prison, its creation of a community of the self-identified as aggrieved. The inmate culture has high efficiency in communicating criminal and anti-conventional values in a situation ideal for their transmission and consolidation. The prison engenders more than social alienation; it fosters and confirms maladjustment. 63

For these reasons N. Morris concludes that the rehabilitative ideal is the one which should predominate in any sentencing policy. He adds the provisions, however, that (a) power over a criminal's life is not to be taken in excess of that which would be taken were his reform not considered as one of the purposes in sentencing; and that (b) all supposedly reformatory processes be subjected to a critical evaluation by empirical research methods.⁶⁴ While agreeing with this, one has to point out the many problems involved in designing research to accomplish such a task.⁶⁵ These difficulties, should not be interpreted as being insurmountable and as being excuses for avoiding dramatic changes in sentencing philosophy as a whole. As W.H. Pierce notes, "not until the public wants criminals treated and rehabilitated and not kept and punished will there be any pressure upon those in a position to do anything to make the necessary fundamental changes in our penal system".⁶⁶

Since there is very little pressure on the courts for change in this direction, the lack of decisions based on such an approach is not likely to produce stressful conditions. Furthermore, whatever rehabilitative tools are available, they are mainly found outside the jurisdiction of the courts. Therefore any criticism can easily be shifted elsewhere.

Retribution

The most famous exponent of the retribution theory is E. Durkheim who saw the positive function of both crime and a harsh response to the offence. According to Durkheim, both increase social cohesion and reinforce collective morality.⁶⁷ One has to note that there are several modern exponents of this view.⁶⁸ The theory of retribution is undoubtedly the oldest and unfortunately still the most prevalent sentencing theory; our criminal code is primarily modeled on this theory. It would serve no purpose to go through the literature on this philosophy, indeed much of it is commented on and criticized under the other sentencing theories. The author agrees with Jobson who states that retributive theory is "both shocking and degrading to democratic values and fundamental fairness."⁶⁹ In conclusion to the discussion of retribution theory, a statement by H.L.A. Hart is quite relevant: "The idea that we might punish offenders against a moral code, not to prevent harm or suffering or even the repetition of the offence but simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship".⁷⁰

This area produces or has the potential to produce highly stressful conditions, particularly in cases where public opinion perceives the judges to be overly lenient. The courts however are equipped to cope with such situations

very easily. Increasing the severity of the sentence assuages public opinion while placing virtually no demands in terms of additional expenditure of time and resources on the part of the judges.

Equal Punishment

Equal punishment as a goal of sentencing is based on a notion of social justice understood as meaning equality.⁷¹ The literature in this area frequently proceeds from a study of quantifiable data of aggregate sentencing decisions in regard to the mass process. Peter Russell has noted that "in a large measure public support for our judicial institution is based on a belief that they are impartial, and that their decisions are controlled by known rules of law".⁷² Unfortunately this belief appears to lack a foundation in reality. As a federal United States judge has commented,

Given the sure combination of substantially unbounded discretion and decision-makers unrestrained by shared professional standards, it is not astonishing that the commonplace worry in any discussion of sentencing concerns 'disparity'. The basis for worry is clear in the minds of those who hold this view. According to these critics, essentially similar people in significant numbers receive largely divergent sentences for identical crimes. This is explained in the following way: judges vary widely in their explicit views and "principles" affecting sentencing; they vary too, in the accidents of birth and biography generating the guilts, fears and the rages that affect almost all of us at times and in ways we often cannot know. The judge who reports that there is no surge of emotion when he imposes a stiff sentence is likely to be mistaken, unperceptive or a person of alarmingly low perceptiveness. It

is unnecessary, though not irrelevant, to frighten ourselves with the statistical probability and direct personal knowledge that some percentages of judges may be psychotic. It is disturbing enough that a charged encounter like the sentencing proceeding, while it is the greatest of legal matters, should turn so arbitrarily upon the variegated passions and prejudices of individual judges.⁷³

In the United States as early as 1956 in the case of Griffin vs. Illinois,⁷⁴ there has been a move to end the economic discrimination affecting the sentencing process. In Williams vs. Illinois,⁷⁵ the Supreme Court moved to extend the equal protection law to cover the imposition of criminal sanctions. In short, the Supreme Court has reminded judges and legislators that the poor are entitled to equal treatment in the imposition of punishment. The judiciary is aware of the problem and is attempting to cope with it in a rational manner as an interview with a Chief Magistrate indicates.

Question: "One of the sharpest criticisms of justice is discrepancy in sentencing. One man gets a suspended sentence. The next man gets 30 months, often depending on the whim of the particular magistrate. Do you have any ideas to develop more uniformity in sentencing?" Answer: "People talk about uniformity of sentencing but in my opinion uniformity of sentencing is neither possible nor is it desirable and I would prefer to see a uniformity of approach to the principles of sentencing as well as the principles of setting bail and along this line it is intended that we will hold a number of seminars dealing with these problems both on a regional basis and annually on a provincial basis so that guidelines can be drawn and magistrates, both the lay magistrate as well as the legally trained magistrates, can collectively agree on where these guidelines should be

approximated and how their discretion should be exercised and what principle should affect the exercise of their discretion."76

It has been argued that the failure to achieve complete uniformity of sentencing results from an attempt to individualize sentences. Baab and Ferguson cite several studies which have indicated that the individualization revealed in practice has reflected more clearly the differences in judges than in convicted offenders.⁷⁷ They also remind us that the criminal process is an integrated system and individual segments of it should not be studied in isolation, for if they are, a loss of perspective and insight results. Thus the sentencing process should be regarded in a very broad context.

The notion of equal punishment as a goal of sentencing provides an area where criticism is occasionally very severe, aiming at the heart of traditional norms and beliefs about the courts. At the same time it is relatively easy to verify the extent to which this approach is utilized. The courts show signs of adapting to the changes in cultural and legal norms in this area. The coping responses of the lower criminal courts are two-fold in nature. Firstly, there are indications of attempts on the parts of individual judges at greater uniformity in sentencing. Secondly, cases which reveal a lack of uniformity can be justified on the grounds that the "uniqueness" of the case in question has been taken into consideration.

Differential Punishment

The 'differential punishment' approach concentrates on the peculiar attributes of the offender. The focus is on individual justice as opposed to social justice. Cormier states that if the aim of sentencing is to rehabilitate, we must sentence the man, and not the offence.⁷⁸ There are several criticisms of differential punishment as a goal of sentencing. J.C. D'Esposito points to perhaps the most important area of concern, noting that individualized disposition as it exists today presents the possibility that a judge will abuse his discretion by imposing different sentences for the same offence without any justification.⁷⁹ Disparities in sentences for the same offence can only be justified if the rationale for these differences can be traced to some relevant characteristic or behavioural aspect of an accused which bears some relationship to the aims of a given sentencing policy. In the present system, however, it would appear that the wide range of statutory sentencing alternatives, a judge's unchecked discretion, and the peculiar characteristics of each trial judge would seem to be the determining factor in any given sentence handed down to an accused.

John Hogarth is particularly critical of the differential punishment theory.⁸⁰ He views the criminal justice system as being a compromise between existing values. In criticizing the Quimet Report, the report of the Canadian

Committee on Corrections, which advocated the utilization of harsher penalties, he states that that report has avoided coming to grips with the fact that criminal law does not protect society but rather certain interests in society which are predominantly middle class interests related to the use and enjoyment of property. In conclusion he states:

Within the framework of limited resources and limited knowledge, the courts cannot individualize, nor should they be encouraged to think they can, as this will lead to rank disparity in sentencing practices. The most that can be hoped for is a system of classifying offenders into groups, making an educated guess based on experience as to the type of sentence most suited for members of that group.⁸¹

Much the same comments are made by Glueck.

To "individualize" the sentence in a case of any specific offender means, first, to differentiate him from other offenders in personality, character, social-culture background, the motivations of his crime and his particular potentialities for reform, or recidivism, and secondly, to determine which, among a range of punitive, corrective psychiatric and social measures is best adopted to solve the individualized set of problems presented by that offender in such a way as materially to reduce the probability of his committing crimes in the future. When one pauses to reflect on all that this implies it becomes evident that to speak glibly about "individualization" is one thing and to be able to accomplish it is quite another. It is high time that reformers of the criminal law faced the facts that the feasibility of a reliable technique of individualization is crucial to the entire program of scientific administration of criminal justice. If, in fact, a reasonably sound individualization cannot be accomplished by the means at hand, then, despite the lofty aims of modern correctional philosophy, and regardless of the most elaborate investigations and case histories, the system will not work.⁸²

Glueck concludes by calling for courts to use predictive tables since this will at least give some partial rationale to the whole sentencing process.

Woolton puts all of the sentencing theories in a realistic perspective.

In the first place, these decisions are always of importance—often of overwhelming importance—to the individual concerned, and in the aggregate highly important also to the whole community; yet they are frequently made in a few moments...second, although in many cases the court has a very wide discretion in its choice of sentence, there are no explicit rules as to how that discretion should be exercised nor indeed any explicit principles determining the object of the whole exercise. Third, in many cases decisions as to sentence are made by wholly untrained amateurs—indeed it might be said that all such decisions are amateurishly made, in as much as the subject of penology has no place in the training of a judge...Fourth, sentences may be passed by a person who has had no first hand knowledge of what they imply—who have for instance no clear ideas as to how the regime prescribed by a sentence of corrective training differs from that followed in ordinary imprisonment. Fifth, the more serious the decision, the more likely it is to be made by one man alone rather than by a group in consultation. Sixth, whatever the object aimed at, no machinery exists by which the success or failure of particular decisions in reaching that objective may be assessed. In consequence it is impossible for anyone who passes sentences either to test his own performance or to learn from experience, and equally impossible to test the relevance of any information provided with the object of assisting the court to arrive at its decisions. It is then surprising that the choice between one sentence and another often seems to have remarkably little rationale?

From a Canadian perspective, by far the most important work in this area has been done by John Hogarth. In his study Sentencing As A Human Process, undertaken in Ontario, Hogarth found that nearly all of the magistrates under investigation (65 out of 71) believed that it was their role to prevent crime through sentencing, but that there were great differences in the way in which they aimed to achieve this purpose.⁸⁴ In terms of rating the various theories of sentencing, as a group magistrates tended to rate rehabilitation highest, followed by general deterrence, individual deterrence, incapacitation and punishment in that order. However, they varied widely in the relative merits given to each of these theories and there were, therefore, marked inconsistencies in the principles of sentencing revealed. Hogarth found that the magistrates tended to take up extreme positions on these doctrines rating them as either being "very important" or being of "little importance". As an explanation for this he suggests that the deterrence doctrines are sometimes in conflict with the other theories, particularly that of rehabilitation, and thus magistrates were forced to resolve the issue in the direction of one of these theories at the expense of the others. It is crucial to note that Hogarth found that a sizeable minority of magistrates (18 out of 71) considered punishment in the retributive sense to be of at least some importance. Hogarth also found that rehabilitation was negatively correlated with the other doctrines and that

the other theories were positively correlated with each other. These correlations were statistically significant, but low, indicating that it is not always inconsistent for magistrates to believe in reformation and at the same time give some weight to other goals. The positive correlation between all the theories excluding rehabilitation would suggest that some magistrates experience difficulty in discriminating between them. Hogarth comments that as a result of these findings those who have argued that deterrence and community protection are only disguised forms of retribution will find some empirical support for their views in his findings.⁸⁵

It should be noted that the above findings demonstrate how magistrates view these theories in terms of their importance as a doctrine, but not necessarily how they apply them, and in terms of their application the differences become significant.⁸⁶ Hogarth found great differences between magistrates' beliefs as to the effectiveness of different kinds of penal measures. About two out of three believe that probation is effective in preventing crime, but among these there are considerable differences as to whether this is achieved through supervision and control or through treatment, i.e., counselling and support. In terms of fines a slightly higher proportion of magistrates think that they are ineffective as a deterrent to the offender, while only about one in four feels that fines are either deterrents to

others or an appropriate punishment.

It is when we reach the area of prison sentences, however, that the attitudinal differences between magistrates become much more significant.⁸⁷ "Magistrates are considerably more confident about the efficacy of institutional measures, particularly as a deterrent to the offender. A significant group (30 out of 71) also feels that institutions are effective in treating offenders and most magistrates (61 out of 71) feel that institutions are effective on at least one count. While this area of magistrates' beliefs is marked by inconsistencies, it can be concluded that "the majority of magistrates believe in the efficacy of the penal measures they apply."⁸⁸ There is an obvious gap between the attitudes of the magistrates and "the depressing finding that has emerged from study after study...that, as far as can be determined, no one penal measure designed to prevent crime in individual offenders through reformation or deterrence is any more effective than any other."⁸⁹ Given this gap, why do magistrates believe in the effectiveness of the prison sentences they are handing out? Hogarth suggests that the answer is twofold; not only do the magistrates have to live with their decisions but, more importantly they are under enormous psychological pressure to believe that these penal measures are effective.

Serious doubts about the efficacy of penal measures would be debilitating to magistrates, as they must make decisions quickly and more importantly, they must give the appearance of certainty to them.⁹⁰

Hogarth further found that the majority of magistrates could remember personal experiences which led them to conclude that their penal sanctions were having an effect on the crime rate in the community. However, he also found that nearly all of these related to the "stamping out" of some sort of juvenile crime rate which as study after study has shown, follows seasonal and other patterns and is independent of any penal measures applied. Unfortunately, however, magistrates are "continually reinforced in their views that it is the penal measure that is responsible."⁹¹ Thus when a crime rate starts to increase once again magistrates tend to regard this as a result of their being too lenient, and a vicious circle is created as a result.

In terms of measuring the relationship between the magistrates' penal philosophies and the confidence in different kinds of penal measures, the following results were obtained: Magistrates who believe in the effectiveness of probation have relatively high reformation scores and relatively low general deterrence, individual deterrence, and punishment scores. Magistrates believing in the effectiveness of fines have relatively low reformation scores and relatively high general and individual deterrence scores. Magistrates believing in the effectiveness of institutional measures have relatively high reformation scores, while those believing in the effectiveness of parole have high scores on both the reformation and individual deterrence scales and low scores on the

punishment scale. The most important fact which emerges is that belief in reformation is associated with belief in the efficacy of most penal measures, including institutional measures.⁹² Hogarth suggests that the explanation for the last belief lies in an attempt on the part of the magistrate to bring congruence between his own liberal ideas and a harsh prison system, and that to resolve this conflict these magistrates view prisons as treatment centres.

Hogarth also found that the majority of magistrates (70%) were guided in choosing between various sentencing alternatives by a number of strongly held attitudes toward imprisonment and various types of offences.⁹³ The results indicate

that for most magistrates the primary factor which operates in favour of imprisonment is the nature and the seriousness of the offence. Presumptions become operative only if the magistrate considers the offence to be particularly serious, and since differences exist among magistrates concerning the seriousness of similar offences, variation in sentencing practice is bound to occur.⁹⁴

Hogarth further found that the use of these presumptions was closely associated with the particular penal philosophy of the magistrate. Those who were in favour of imprisonment for specific offences were likely to have low reformation and high general deterrence and retribution scores; while those who only use imprisonment in high risk cases were likely to have high reformation and low deterrence scores.⁹⁵

Not surprisingly the same analysis applies for

probation and fines. "In terms of probation the most restrictive policy is associated with high retribution scores, and intermediate policy with high general deterrence and incapacitation scores, and a liberal policy with high reformation scores."⁹⁶

As Hogarth comments "throughout, we see decision-making rules organized around the conflict between belief in reformation and belief in all or any of the other doctrines. The pattern is highly consistent...it seems that justice is a very personal thing."⁹⁷ It is not surprising that Hogarth found that magistrates as a group preferred individual or familial explanations to socio-economic explanations as to the causes of crime. Hogarth summarizes his results in the following manner;

First, enormous variation exists among magistrates in the way in which they go about making sentencing decisions. This variation is noticeable in every aspect of penal philosophy studies. Magistrates differ widely in their purposes, their views as to the effectiveness of different kinds of sentences, the ways in which conflict between the offenders needs and community protection is resolved, the amount of informational support they have for their views, and the kind of situation in which they experience difficulty in sentencing.⁹⁸

In terms of both their beliefs and their sentencing behaviour, "magistrates appear to be inconsistent with each other but consistent within themselves."⁹⁹ The gap between attitudes and behaviour seems to be satisfactorily resolved, in a manner allowing the magistrates to perform successfully and

at the same time to hold attitudes which cannot be translated into actions -

... while the majority of magistrates have images of themselves as being oriented toward the offender and his treatment, the actual decision-making rules applied would appear to be more closely associated with the offence and community protection. It was interesting to note a shift in emphasis from the offender to the offence as the question became more specific and more closely related to actual practice. 100

Hence the personal conscience and concern for the individual on the part of the magistrate retreat into the background, and 'community protection' and a concern for humanity in general (preserving the status quo) become foremost when making sentencing decisions. Unfortunately, this general approach to sentencing does not result in the reduction of crime.

From the above discussion, it becomes obvious on the basis of evidence derived from empirical studies of sentencing theories that no particular theory can be demonstrated to be superior to any other. Even those researchers who find some evidence supporting a particular sentencing theory are usually careful to point out that their evidence is not conclusive, and furthermore, they usually find in their own research, evidence contradicting their hypotheses.

Therefore one has to classify both the statements made by legislative bodies and the frequent insistence of the judiciary on a particular function of sentencing as ideological in

nature, rather than based on sound knowledge. As there is currently no sound sentencing theory available, it seems reasonable to presume that until there is, those involved will continue to justify their activities on normative grounds. One can look with skepticism at the whole process of sentencing, since the actors involved in the process, as the above-mentioned studies demonstrate, cannot possibly meet their objectives. One can look with reasonable doubt upon the outcome of a sentencing process which is based upon such tenuous foundations. As the objectives of sentencing themselves are not clear, a satisfactory measurement of the successfulness of sentencing policy is hard to find. It suffices to say at this point that there is not even any agreement as to what would permit the evaluation of a particular approach as successful, with perhaps the extreme case of individual deterrence through capital punishment. At the same time it is hard to disagree with Hogarth who states that "The law and the norms and variables associated with it, demand above all else that the judicial decisions be certain in their application, uniform and consistent."¹⁰¹ One of the best illustrations of such difficulties can be found in the discussion of the "real" versus the "apprehended" rate of crime presented in the latter part of this chapter. The author's own preference is for the development of measures which would evaluate the relationship between sentences and

the increase or decrease in the real rate of crime. Perhaps Maureen Mileski is on the right track in viewing the sentencing process and the activities of the court as the functioning of bureaucratic machinery in which the process becomes an end in itself.¹⁰²

THE STUDY OF THE OPERATION OF THE JUDICIAL SYSTEM

The second research focus is on the operation of the judicial system, either in its entirety or focussing upon particular elements, such as specific actors, aspects of the process, or finally the outputs.

Among the actors most commonly studied are the judges and defendants, although there are some studies focussing on prosecutors, the defense counsel, expert witnesses or even minor officials. Particular findings and claims will be discussed in later chapters. This section will concern itself with some of the most frequent conclusions of the literature in this area.

Population

Most of these studies have as their central focus the population of those who are the subjects of judicial decisions, (i.e. the defendants) and less frequently those rendering the decisions (i.e. the judges).

A significant group of researchers concentrates on analysing the treatment of individuals committing identical, or similar, offences. These studies are designed to test whether there is individualization or uniformity in sentencing.

In so-designed studies the amount of information about the population, and in particular its socio-economic characteristics, may be minimal. The major advantage of this approach is that a high degree of precision is possible. The main shortcoming is that it ignores the mass process; it cannot generate any source of explanation as to the causes of the observed disparities. Criticism of this type of approach is well-stated by Newman and also by Ohlin and Remington.¹⁰³

A similar technique is that of utilizing the intellectual apparatus of the psychology of deviant behaviour and its related fields.¹⁰⁴ Researchers adopting this orientation relate the individual behavioural characteristics of the accused to his criminal behaviour. A. Storey and G. Sainty state the theory behind this technique most forcefully: "The present question then, is not one of an environment-inheritance one, but rather one of personality difference between the delinquent and non-delinquent".¹⁰⁵

This type of study is valuable within the scope of this enquiry, for it provides a better understanding of the psychological causes of criminal behaviour and how each magistrate defines each case appearing before him, his stand on the issues and problems commonly met in the courtroom, his relationship to others, and his purpose(s) in sentencing. On the basis of the available evidence, however, one can be almost certain that this type of research cannot provide a model which will explain the totality of the sentencing process.

Finally, there is an increasing body of literature treating judicial decision-making as a social process.¹⁰⁶ Such studies include in their analyses the socio-economic characteristics of the accused. The main tenet of this approach is that, to a significant degree, the sentencing process can be explained through the analysis of the group characteristics of those accused and sentenced. One has to note that there is a basic disagreement as to the relationship between social class and criminal behaviour. Some scholars argue that criminal behaviour is negatively related to the socio-economic status of the criminal; others see a very strong positive relationship.¹⁰⁷ The arguments utilized on both sides range from purely procedural and definitional to disagreement as to the population which should be studied in order to support either proposition. In this latter debate the positions range from that of treating only those brought before the courts, to the posture that all those committing criminal acts (but not necessarily detected or apprehended) should be included in the criminal population.¹⁰⁸ Bytheway and May provide the most forceful critique of this approach: "The real rate of crime is a chimera; it proceeds from a false premise regarding the nature of the phenomenon."¹⁰⁹

Socio-Economic Variables

Many studies either concentrate on specific socio-economic variables or at least treat them separately.

a) Sex

Knowledge as to the relationship between sex, criminality and sentencing, is very fragmented and the analysis superficial. For example, as recently as 1971 a study of Canadian criminal justice conducted by the Canadian Civil Liberties Association disregards this variable altogether.¹¹⁰ This appears to be due to two major factors: (1) The overwhelming over-representation of males among the accused makes statistically meaningful and valid comparisons difficult; (2) The heightened awareness of the status of women in our society is of recent origin.

Empirical studies tend to indicate that males are more likely to be apprehended, found guilty and sentenced more severely.¹¹¹ Explanations for this phenomenon most frequently tend to be of a psychological nature. Some authors look for the source of this discrepancy in judicial attitudes or in female personality traits.¹¹² However, these explanations lack hard evidence and are a matter of speculation and assumption rather than a rigorous examination of the problem.

More specifically, some studies report that women are more likely to be found not guilty than males.¹¹³ Females are less likely to commit indictable offences, less likely to be found guilty, and if found guilty, will more likely receive a suspended sentence or a probationary sentence.¹¹⁴ Generally speaking, their sentences are more likely to be

lighter than those of males. The sentencing ratio between females and males is lower in large urban centres than in rural communities,¹¹⁵ and it is also lower in those areas of the city having a higher crime rate.¹¹⁶ Baab reports that there is a popular belief that women are given to crimes of passion.¹¹⁷ Pollock provides some evidence that there is no crime which may be termed specifically female.¹¹⁸

As our society becomes more sensitive to the socio-economic and political status of women, it is reasonable to assume that our information and understanding of sex differentiation in the sentencing process will increase significantly. One can also speculate that the discrepancy between apprehension and the difference in the severity of sentence between the sexes may well decrease with the passage of time. Thus at the present time the sex variable is a good, but obviously insufficient predictor of criminality.

b) Age

One of the most surprising aspects of the literature is the lack of emphasis on the interpretation of the age factor in relation to the population before the court. Canadian and American findings on this matter are congruent. The age group between 18 and 24 years constitutes the vast majority of those appearing before the courts in jurisdictions so far apart as Canada on the one hand and Poland and the U.S.S.R. on the other.

Most studies which analyse this variable note that

there are no marked differences in sentences that can be related to age: the homogeneity of the population makes this finding not unexpected and of small utility.¹¹⁹ It would appear, however, that there is a relationship between the age at which the first offence is committed and the probability of re-conviction -- the lower the age at which the first offence is committed, the higher the probability of re-conviction. (For greater detail see the chapter on recidivism). Younger offenders are more likely to receive the vast majority of lighter sentences.¹²⁰

c) Marital Status

The relationship between marital status and sentencing is vague. Empirical studies on sentencing tend in the main to report a significant over-representation of single people. This can perhaps be at least partially explained as a function of age and the high rates of unemployment within this age bracket and social group. In the literature one finds indications that divorced people tend to possess a higher crime rate in comparison with those who are either single or married.¹²¹ Married offenders appear to be more likely to receive a probationary sentence and are less likely to violate parole than other groups.¹²² Baab's findings, however, indicate that though single persons are treated more severely than married persons, divorced and separated people are treated less severely than those who are married.¹²³ In applying the above results to Canada,

one must keep in mind the differences between Canadian and American criminal legislation which carry different penalties for similar offences.

d) Ethnicity

The term "ethnicity" rather than "race" is utilized in agreement with D. Castberg's statement that: "Race refers to biological unity, a condition that is rarely found in groups that are victims of prejudice and discrimination."¹²⁴ Ethnicity on the other hand, refers to: "Characteristics of groups that may be, in different proportions, physical, cultural, language, religious, or ideological in character."¹²⁵

Ethnicity is discussed in many studies on sentencing, and most of them point out the over-representation of certain ethnic groups among those apprehended and sentenced. The treatment of these disparities varies, however. Some researchers concentrate on disparities in sentencing,¹²⁶ while others concentrate on different perceptions of the administration of justice by different ethnic groups.¹²⁷ In Canada the only two groups which have received some specific attention are the Native People and Italian immigrants. These studies are at the best inconclusive although they point to the indisputable fact of the disproportionate (to population) rate of incarceration among the Native people in Canada, concluding however, that the Natives do not receive harsher sentences than non Indians.¹²⁸ As Andrew Overly states:

There are few objective studies of sentencing discriminations. Not all of the studies, for example, recognize that the economic status of the defendant, the lawyer he obtains, the effect of his prior criminal record and other factors, add considerably to the complexity of testing hypotheses on relationships between race and sentencing.¹²⁹

Baab and Ferguson correctly summarize most of the findings in this area: "Variations in the race of the offender have no impact on the predicted sentence severity."¹³⁰ Some of the studies of the crime rate of blacks in the United States, even while pointing to their over-representation in terms of numbers of arrests and commitments to prison, point out at the same time that: "The extent to which the crime rate of Negroes exceeds the crime rate of whites varies with social conditions. In some conditions the rate for Negroes is not as far in excess of the rate for whites as it is in other conditions, and in still other conditions, the rate for Negroes is lower than the rate for whites."¹³¹ E. Green comes to a similar conclusion on different grounds tracing the variations in sentencing according to the race of the offender from differences in the Negro sub-culture.¹³² Several studies of judicial attitudes also support the contention that: "There seems to be little difference in the findings based on race at the level of the entire court."¹³³

The best summary is perhaps that of Lampert:

The processes whereby areas of crime are created are not random. Clearly, if crime is a factor of certain areas and is local in character, the status of the population in those areas will be reflected in the statistics. The processes whereby certain

groups come to live in certain neighborhoods are not random. The processes reflect the variations in the wealth, status, and the power of the various groups. Comparative rates of crime between classes and between ethnic groups, can only be meaningful in relation to those variations and when crime is related to those processes. Crime can only be understood in relation to the sociology of an urban society. 134

e) Education

Surprisingly, the recent literature on the subject provides no information or analysis as to the education of the people appearing before the courts. Even those studies which concentrate on the socio-economic status of the accused do not mention the education variable. Still more surprising is the fact that some of the literature dealing with the perceptions and attitudes of different groups in society toward the organs of enforcement and/or the courts does not correlate these attitudes with the education of the population which it studies. The methodological approach taken by John Hogarth merits attention. In his study of magistrates, Hogarth gives the educational background of both the magistrates and their families, and from that background extrapolates certain elements.

One should take into consideration the educational dimension. The studies of political culture and political socialization allow one to hypothesize that the interdependence between education and criminal behaviour requires further study in order to determine the precise connection, if any, between the possible lack of perceptions of legal

norms and acceptable behaviour or alienation, and the probability of committing various offences.¹³⁵ Secondly, it can also be hypothesized that low education is part of the socialization process in which there is no room for legal representation before the court. The studies of Hogarth, Carter and Wilkins indicate that judges and probation officers attach relatively high importance to the educational level of the accused in their decision-making process, a factor which adds to the importance of this variable.¹³⁶

f) Religion

This variable is practically never discussed in the literature. John Hogarth provides a notable exception in showing that there is a positive relationship between the religious affiliation of the magistrate and his attitude toward sentencing.¹³⁷

g) Affluence, employment and occupation

The common wisdom frequently assumes that: "...In the daily occupation of the criminal courts, liberty is purchased; if you have cash in your pocket you walk out a free man; if you are poor and without means, you go to jail."¹³⁸ The empirical evidence is both confusing and contentious, and is by no means proven or even shared by most of the researchers. The degree of judicial recognition of the burden of poverty varies from one jurisdiction to another. Perhaps the United States Supreme Court with the decision in Griffin vs. Illinois¹³⁹ can be considered as a leader in this field.

The corner-stone laid by Griffin in providing indigents with additional economic means of defending their rights has been carried further by subsequent decisions.¹⁴⁰ In 1970 the United States Supreme Court applied Griffin's precedent to economic discrimination affecting the sentencing phase of the criminal process in dealing with the conversion of fines into imprisonment.¹⁴¹

K.B. Jobson observes that under the Canadian Bill of Rights: "The distinctions based on wealth will also seem to be suspect under the equality before the law clause."¹⁴² Jobson seems to assume that in future, Canadian courts will recognize the same principles as those of the United States Supreme Court in dealing with people of low socio-economic status, utilizing the protections guaranteed by the Canadian Bill of Rights and the notions derived from the 'Cruel and Unusual Punishment Doctrine'.

The majority of the findings related to ethnicity are also applicable to the socio-economic variable, since most scholars are in agreement that: "There is a high relationship between social status and ethnicity, and because the ethnic groups can be ranked as to social status, it is possible to use the concept of social distance when discussing the relationship between the various actors in a judicial process."¹⁴³ Although there are still some studies of sentencing practices which totally disregard the socio-economic variable,¹⁴⁴ by far the majority of the studies

include an analysis of the relationship between this variable, and apprehension, sentencing, and severity of sentence.

Generally it has been reported that those who have been sentenced are of lower socio-economic status; however, there are a few studies which go beyond this general statement.

Atkinson and Newman note that the unemployed accused are more likely to be found guilty and less likely to have charges against them dropped, than those who are employed.¹⁴⁵

Phillips and Voity found that unemployed persons are more frequently accused and that a conviction requires somewhat less evidence.¹⁴⁶

They go on to state that the 18 to 19 age group had the highest unemployment of any age group, and within this group unemployment is higher for non-whites than it is for whites.¹⁴⁷

The authors hypothesize that there is a trade-off between the policies that control crime and those which affect the generation of crime. Finally, they suggest that 98% of the variations in arrest rates in the 18 to 19 age group can be explained by changes in their economic opportunities.¹⁴⁸

Not surprisingly, Carter and Wilkins in their work note that judges and probation officers rate employment, occupation and related areas among the top ten factors in considering sentencing alternatives.¹⁴⁹

One rarely finds studies which attempt to define the relationship between socio-economic deprivation and severity of sentencing. R. Hood, in his study of London magistrates' courts, notes that those courts which use pro-

bation more frequently did not place much, if any, weight on such factors as unemployment, and that the same was true when comparing probation and conditional discharges.¹⁵⁰

However, different courts imprisoning the same proportion of offenders more likely jailed those who exhibited unsteady work habits. This evidence was, however, not at all conclusive.¹⁵¹

The second thrust of the literature relates socio-economic status to personality and behavioural characteristics, as being a possible explanation for the different rates of crime among different groups. The Gluecks note that a significant percent of the families of delinquents were often on welfare and that 60% were in marginal circumstances.¹⁵²

D. Cressey is a typical representative of this literature as is shown by the following statement: "United States official statistics indicate that the largest proportion of criminal population comes from the working class, and there is also some evidence that the crime rate of a working class person exceeds the crime rate of other persons."¹⁵³ Box

and Ford, however, suggest that several fallacies are contained in such an argument.¹⁵⁴ They note that many studies

are based on official statistics whose reliability is questionable. Secondly, they point out that such studies do not deal with the real rate of crime, but rather the crime reported by the official organs such as the police.

Their main argument can be stated as follows:

No wonder then, that statistics...on crime so consistently show an over-representation of low class persons. For what they show is plausibly an artifact of differential visibility and reportage of offences, police deployment routines, and recipes for apprehending and sifting suspects, and not necessarily a real difference between the behaviours of the social classes, so far as criminality is concerned.¹⁵⁵

Box and Ford conclude by saying:

A review of the studies which have been made seeking independent evidence relating to the hypothesis that social class is negatively related to criminal behaviour, cannot be simply summarized. Given the ambiguities, errors, irrelevancies, lack of validation and contradictions of these studies, it would not be reasonable to conclude that the data they reveal either unequivocally support or refute the hypothesis.¹⁵⁶

Thus, why people behave as they do, and when such behaviour is regarded as criminal, are two ~~separate~~ problems requiring different types of explanations, and compounding the two can serve only to produce confusion. Similarly, J. Hagan, in evaluating some of the major studies in this area concludes that there is very little evidence (and that which exists usually results from lack of proper controls) of discrimination on the grounds of sex, age, occupation, affluence or any other non-legal variable. (He particularly points out that most studies fail to control for the previous record of the accused.)¹⁵⁷

The final area that has been occasionally examined is the difference between the socio-economic characteristics of the magistrates and those of the people with whom they are dealing. As part of the search for explanations of

sentencing decisions, John Hogarth states: "One of the myths that many Canadians like to perpetuate is that their society has no classes."¹⁵⁸ Hogarth notes that a magistrate's experience and his current life activities were, and are, restricted to social intercourse with small segments of society, and that it is much more likely that a magistrate will reflect and enforce the standards he has learned within his prejudicial experience. Hogarth finds that the magistrates whom he studied come from stable, successful Protestant families, and more than half come from business or professional families. The remainder had fathers who were in the skilled wage earning class. There was only one magistrate whose father was in the unskilled wage earning category. Overrepresentation of the professional category becomes even more pronounced within the magistrates' generation since one half of the brothers and brothers-in-law of magistrates are professional people, as compared with slightly more than one twelfth of the labor force. Together with the business category, over three quarters of their contemporaries are in the top 15% of the labor force. Not one of their family members was in the unskilled wage earning category, and only 14% were in the skilled wage earning category. This can be compared to the rate for the general population of 24 to 34 percent. Thus, magistrates are of a different culture and of a radically different socio-economic background than those who are sentenced.

Hogarth, in his evaluation of the information that magistrates consider relevant to the problem of sentencing, found that they consider the background and employment record of the accused to be essential. The importance placed on such factors is not unique simply to magistrates; it appears from Jacobs' study in the United States, that members of the various social classes found in American society also place emphasis on these factors.¹⁵⁹ It should also be noted that several studies have clearly shown the extent of discrimination against former criminals in terms of jobs and general re-integration into society.¹⁶⁰

Other Actors

There is an increasing number of articles and monographs devoted specifically to prosecutors, the defense counsel, witnesses and finally judges.¹⁶¹ Of specific interest are those pertaining to the defense counsel and judges. Unfortunately, most of these studies are limited in scope and do not allow for generalizations. Furthermore the necessary controls are seldom applied, thus the conclusions drawn are at best tenuous. It is generally accepted that there is a significant degree of variance between the sentencing behaviour of judges, even in the same courtroom, and that these differences become even more marked when one compares judges across provinces.¹⁶² Similar findings have emerged in the United States. Since most studies rarely control for such obvious factors as the previous record of

the accused and the gravity of the offences in question, their validity is questionable. When looking at studies pertaining to legal representation, one finds an even greater deficiency. The typical study provides the reader with information as to who is represented or as to the type of legal representation characteristic of a variety of offences and offenders. The crucial question as to the variance in judicial decisions depending on the presence and quality of the legal representation is rarely asked.¹⁶³ So far the author has been able to trace only three Canadian studies pertaining to this issue. James L. Wilkins, in his monographic study Legal Aid in the Criminal Courts provides an understanding of the Ontario legal aid plan and answers several important questions such as "who is the legal aid client?" and "what are the effects of representation by legal aid counsel?". Wilkins finds that the legal aid client enters guilty pleas and is found guilty more frequently. His explanation for this finding, although not conclusive, points out that legal aid clients are frequently charged with more serious offences and generally face more counts.¹⁶⁴ Another study which provides an important evaluation of the use of legal representation is that of Robert G. Hann, "Decision-Making in the Canadian Criminal Court System: A Systems Analysis" based on data collected in provincial courts in Toronto. Hann concludes that "...legal representation was a significant factor only in the decision to request additional

remands.¹⁶⁵ There is also a very limited evaluation of legal representation in J. MacKaay's study entitled "The Paths of Justice", although this study does not satisfactorily answer the question as to the basic impact of the counsel on the sentence.¹⁶⁶ It is still commonly assumed however, that by definition, legal counsel contributes to lower sentences or verdicts of innocence.

The Judicial Process

Some studies attempt an overview of the whole process with a heavy emphasis on outputs. This type of analysis uses techniques ranging from descriptive studies of sentencing to attempts at an assessment of the degrees of success of various sentences. (These studies will be discussed in later chapters, as most of the findings and conclusions pertain to sentences.) Such studies occasionally lead to attempts at putting new "labels" on courts. The observation that the courts witness a clash between two cultures, the professional middle class versus the poor and uneducated, leads some to the conclusion that the court system is nothing more than a mechanism of social control over the poor, and that its major function is the protection of the monopoly of the elites over power and property.¹⁶⁷ Others view the courts as bureaucratic institutions with speed and efficiency as primary goals.¹⁶⁸

THE COURT IN RELATION TO OTHER STRUCTURES

Increasingly, the students of courts are recognizing the inter-relationships between the courts and other structures

such as the police force and correctional institutions. In his latest article "Dismantling the System", K. Jobson advocates the broadest possible approach to sentencing decisions, which he views as a joint product of several structures, including the police, courts and correctional institutions; the combination of which he aptly labels "the justice industry."¹⁶⁹ Another example of the 'expansionist' view of courts is found in the work of S.S. Nagel who combines the study of judicial decisions with the study of expenditures on crime prevention policies in various jurisdictions. His conclusions are that such expenditures are more effective than any manipulations of sentencing policies.¹⁷⁰ Although similar studies are scarce, the above-mentioned studies are a very promising development in the literature. One can expect an increasing number of studies in this direction in the future.

Conclusions

The literature surveyed in this chapter indicates that there is no consensus about the goals of sentencing and that the empirical evidence supporting the various stated goals is weak and contradictory. The main body of the literature on the lower criminal court, although it contains many criticisms of the operation and decisions of the lower criminal courts in Canada and elsewhere, does not venture into any real prognosis for the future of the courts. On the other hand, it has been noted that some very authoritative sources have diagnosed the courts as being in a state of crisis and have predicted uncertainty regarding the future of the courts. The most important conclusion reached by many critics is that the judicial system does not meet its objectives. Many profound criticisms of the lower criminal courts emerge from this literature. In the extreme cases these criticisms present the courts with a very pessimistic prognosis for the future. Perhaps some of these claims which constitute a most pessimistic and threatening warning to the courts should be reiterated here.. As the Law Reform Commission states, "at the present there is confusion and controversy about the function of courts and the criminal law."¹⁷¹ One of the researchers for the Law Reform Commission makes this point in an even stronger way: "most of what we officially do about the acts we call crime and the people we call criminals is worse than ridiculous"¹⁷² and J.D. Morton provides a more potent criticism, defining the criminal

law process as "what can only succeed if it fails."¹⁷³

Although these statements represent an extreme view, they are indicative of the need for further investigation of the problem. Conclusions of this nature are reached through an examination of the outputs of the courts, the process by which these outputs are produced, and finally by looking at the people who are the subjects of the decision-making process.

Members of society are not deterred from committing offences, the same individuals appear time and time again before the courts, rather than being rehabilitated and even the retributive aims are not satisfied (or are not perceived as being met by large segments of the society). Increasingly the old and dignified structure - The Court - is being referred to as "the revolving door".¹⁷⁴ This confusion and lack of direction is reinforced by the fact that "there are no guides to sentencing in the Criminal Code except the limitations set on the punishment that can be ordered for the particular offence, and the individual judge is left to establish his own philosophy of sentencing as best he can".¹⁷⁵ This task is more than impossible since all of the sentencing theories are lacking in empirical evidence. The Criminal Court is then a structure which has to define its own goals without being properly equipped to do so.¹⁷⁶ The Courts lack mechanisms of self-assessment and tools for future policy making (other than the reliance on past decisions).¹⁷⁷

In the U.S. the judiciary is less reluctant to take into consideration the findings of social scientists. The old proverb that justice is blind is also crumbling and is no longer accepted even as an allegory. It is claimed on behalf of the blacks, the Indians, the poor and the unrepresented that "due process" is not for them. At the extreme it is argued that "due process" no longer can be served under conditions of "overcrowded courts, justice delayed and manipulated, plea bargains that allow defendants with clever lawyers to plead guilty to minor offences they did not commit and thus avoid convictions for serious crimes they did."¹⁷⁸

Another fundamental critique of the courts comes from those who share to some extent the Marxist analysis of law and legal institutions (although without necessarily accepting the philosophy or the heritage) as manifestations of the basic property relationships. Justice Hartt stated that "traditionally the criminal law and its enforcement machinery have been principally directed toward interests related to the economic, proprietary and purported moral values expressed by the dominant group."¹⁷⁹ The Law Reform Commission of Canada expressed similar sentiments in its overview of the sentencing policies of the Canadian Criminal Courts - "we usually send persons to prison not because of crimes of violence, but because of convictions for property offences, offences against the public order or other offences

not involving violence to the person".¹⁸⁰

Another source of basic criticism of the courts emerges from the studies inquiring into the level of outputs. Some studies conclude that in the very near future (or at the present) courts will be simply incapable of dealing with the volume of "business". The increasing caseload (without a corresponding increase in facilities, manpower and other resources) has a negative impact on the quality of decisions, both in procedural and substantive terms. The effect of this has led to the usage of the term "Assembly-Line Justice" in reference to the judicial process, which of necessity makes a mockery out of the normative model of the court.¹⁸¹

K. Jobson summarizes most of these notions in stating that courts have no capacity to; a) reform criminals; b) deter persons; c) prevent crime, and finally, d) to deliver justice fairly.¹⁸²

These fundamental criticisms are of such gravity that their authors feel justified in making alarming statements about the future of the criminal courts. The force of such statements is even greater since they increasingly come from organizations or people within the system and in some way officially responsible for the assessment and/or administration of justice. The statement that "there is little in the process which is likely to instill respect for the system of criminal justice in defendants, witnesses and observers" becomes even more demeaning when its author is

the Minister of Justice.¹⁸³ The conclusions that courts are under stress which could potentially lead to a state of crisis¹⁸⁴ can be found in the reports of the Federal Law Reform Commission, the Commission of Inquiry into the Non-Medical Use of Drugs, several provincial Commissions, the Canadian Committee on Corrections, the President's Commission on Law Enforcement and Administration of Justice as well as in studies by scholars both in Canada and the U.S. In the extreme view "ordinary" policy changes and adjustments cannot help the courts. There are calls for serious "systematic efforts",¹⁸⁵ total reorganization or "massive overhaul"¹⁸⁶ of the courts, criminal law, sentencing practice, and theory. Such language leaves very little doubt that in the minds of their authors, there is some question as to the ability of the courts to cope with the stress which they are under.

It seems that these criticisms lose much of their possible impact as they do not have a cumulative effect. As the review of the literature indicates, there is such a degree of disagreement as to the goals and the methods of measurement of their fulfillment that the total impact of the various demands becomes somewhat weakened and counter-productive. The necessity of further investigation into the ability of the courts to adapt to changing demands is thus clearly evident.

1. i.e. The Law Reform Commission of Canada in its paper on sentencing does not cite even one study or report evaluating Courts positively. Information Canada, Studies on Sentencing, Working Paper No. 3, 1974.
2. See i.e. Reports of the Law Reform Commission of Canada on Dispositions and Sentences in toto.

Also reports of the President's Commission on Law Enforcement and Administration of Justice, in particular "Task Force Report: The Courts", (Washington, D.C.: U.S. Government Printing Office, 1967).

Also J. Turner, "Justice for the Poor: The Courts, The Poor and the Administration of Justice", Canadian Journal of Corrections, Vol. 12, 1970, p. 1. For scholarly literature criticizing the courts see chapter one.

3. That position has been held consistently by various police forces, most recently it has been stated by Chief N. Stewart - President of the Canadian Association of Police Chiefs in a television interview on September 17, 1978.

See also, Maclean's, "Law and Order on the March", Maclean's, October 2nd, 1978, pp. 26-28.

Also, P. Koza and A.N. Doob, "Police Attitudes Towards The Bail Reform Act", Criminal Law Quarterly, Vol. 19, 1976-77, p. 403. Gallup polls consistently show increasing demands for reintroduction of capital punishment and harsher sentences.

See i.e., E. Doleshal, "Rate and Length of Imprisonment", Crime and Delinquency, Vol. 23, no. 1, January, 1977, p. 31.

4. See i.e. The Law Reform Commission of Canada, "A Report on Dispositions and Sentences in the Criminal Process, Guidelines", (Information Canada: The Law Reform Commission of Canada, 1976).

Also, I. Waller and J. Chan, "Prison Use: A Canadian and International Comparison", Criminal Law Quarterly, Vol. 17, no. 3.

Also, K. Jobson, "Imprisonment", Ottawa Law Review, Vol. 4, 1970-71.

5. See The Law Reform Commission of Canada, "Studies on Sentencing". Working Paper no. 3, Information Canada, 1974, p. 12.
6. J. Hogarth, op.cit. p. 37.
7. See The Law Reform Commission of Canada. "Studies on Diversion." Information Canada, 1963, p. 99.
8. The Government of Canada, Department of Justice, "The Criminal in Canadian Society". Information Canada, Ottawa, 1973, p. 28.
9. Hon. J. Choquette, QC. "Justice Today", published by the Ministry of Justice, p. 4.
10. Alberta Board of Review. Mr Justice W.J.C. Kirby, Chairman. "Administration of Justice in the Provincial Courts of Alberta." Report no. 2, p.1.
11. Found in ibid., p. 7.
12. J. Wilkins, Legal Aid in the Criminal Courts, p. 4. Toronto: University of Toronto Press, 1975.
13. R.C. Snyder, "A Decision-Making Approach to the Study of Political Phenomena" in R. Young, ed., Approaches to the Study of Politics, (Evanston: Northwestern University Press, 1958), p. 13.
14. G.A. Schubert, Quantitative Analysis of Judicial Behaviour, (Glencoe, Illinois: The Free Press, 1959), p. 8.
15. A good indicator of the state of the subdiscipline can be found in an examination of the standard textbooks on Canadian Government which discussing courts concentrate almost entirely on the Supreme Court of Canada and very rarely refer to Canadian studies both in footnotes and bibliography.

See i.e. R. Dawson MacGregor, The Government of Canada. revises by N. Ward, ed., (Toronto: University of Toronto Press, 1966).

M.S. Whittington and R.J. Van Loon, Canadian Political System, (Toronto: McGraw-Hill, 1976).

J.R. Mallory, The Structure of Canadian Government, (Toronto: The Macmillan Co. of Canada, 1971).

For review of Canadian literature on courts see M. Debicki in Bellamy, D.J., Pammett, J.H., and

Rowat, D.C., Provincial Political Systems, (Toronto: Methuen, 1976).

16. Law and Society Review.

17. Review of even the general literature on the U.S. courts is beyond the scope of this study therefore positions cited in this footnote are examples only:

P.A. Freund, Gen. ed., History of the Supreme Court of the U.S., Vol. I-IX., (New York: The Macmillan Co., 1971).

The Supreme Court Review, Vol. I, 1960-1977.
Published by the Law School, the University of Chicago, (Chicago: The University of Chicago Press, 1977).

L. Friedman and F.L. Israel, eds., The Justices of The United States Supreme Court, Their Lives and Major Opinions, Vol. I-IV., (New York and London: Chelsea House Publishers in association with R.R. Bowker, 1969).

R.G. McCloskey, The Modern Supreme Court, (Cambridge, Massachusetts: Harvard University Press, 1972).

P.A. Freund, ed., Constitutional Law and Other Problems, Vol. I-II, (Boston: Little, Brown and Co., 1973).

C.H. Pritchett, The American Court, (New York: McGraw-Hill, 1959).

P.E. Jackson, Dissent in the Supreme Court a Chronology, (Norma, Oklahoma: The University of Oklahoma Press, 1969).

R.K. Faulkner, The Jurisprudence of John Marshall, (Princeton, New Jersey: Princeton University Press, 1968).

G.T. Dume, Justice Joseph Story and the Rise of the Supreme Court, (New York: Simon and Schuster, 1970).

J.W. Howard, Jr., Mr. Justice Murphy; A Political Biography, (Princeton, New Jersey: Princeton University Press, 1969).

V. Countrymen, The Judicial Record of Justice William O. Douglas, (Cambridge, Massachusetts: Harvard University Press).

A. Lief, Representative Opinions of Mr. Justice Holmes, arranged with Introductory Notes, (New York: The Vanguard Press, 1931).

J.D. Weaver, Warren: The Man, The Court, The Era, (Boston, New York, Toronto: Little, Brown & Co., 1967).

A.M. Bickel, Politics and the Warren Court. (New York: Harper & Row, 1965).

18. D. Danelski, A Supreme Court Justice Is Appointed, (New York: Random House, 1964).

19. For bibliographies of this type of literature see i.e.,

S.S. Nagel, The Legal Process From a Behavioural Perspective, (Homewood, Illinois: The Dorsey Press, 1969).

S.S. Nagel and M.G. Neef, Legal Policy Analysis, (Lexington, Massachusetts: Lexington Books, 1977).

For the best bibliography of Canadian Studies see,

J. Hogarth, Sentencing As A Human Process, (Toronto: University of Toronto Press, 1971).

Also,

M. Friedland, Detention Before Trial, (Toronto: University of Toronto Press, 1976).

Law and Society Review also provide us each year with extensive bibliography.

20. P. Weiler, In The Last Resort, A Critical Study of The Supreme Court of Canada, (Toronto: Carswell/Methuen, 1974, p. VII.

This study has the most comprehensive bibliography of the literature on Canadian Supreme Court. Similar sentiment is expressed by A.M. Linden who states that "...there has been astonishingly little research into Canadian judiciary and how it functions" in A.M. Linden, ed., The Canadian Judiciary, published by Osgood Hall Law School, (Toronto: York University, 1976), p. IX.

21. P. Russell, "Judicial Power in Canada's Political Culture", M.L. Friedland, ed., Courts and Trials: A Multi-disciplinary Approach, (Toronto: University of Toronto Press, 1975).

22. See footnote 3. Among some of the most important studies of the Canadian Supreme Court are:

P. Russell, "The Supreme Court of Canada as a Bilingual and Bicultural Institution", a study written for the B & B Commission, 1969.

P. Weiler, op.cit., C. Cheffins, "The Quiet Court in an Unquiet Country", Ottawa Law Journal, 1966, p. 259.

P. Russell, "The Jurisdiction of the Supreme Court of Canada", Ottawa Law Journal, 1968.

P. Weiler, "Two Models of Judicial Decision-Making", Canadian Bar Review, Vol. 46, 1968, p. 406.

Laskins' Canadian Constitutional Law, fourth edition, (Revised and edited by A.S. Abel, The Carswell Co. Ltd., 1975).

A. Barbeau, Le Droit Constitutionnel: Canadien Lois, Documents et Jugements Divers, fourth edition,

P. Russell, "Judicial Power in Canada's Political Culture", op.cit., A.M. Linden, ed., op.cit.

23. See i.e. John Porter, The Vertical Mosaic: An Analysis of Social Class and Power in Canada, (Toronto: University of Toronto Press, 1965), pp. 415-517.

Also, D.C. Olsen, "State Elite in Canadian Society", unpublished Ph.D. thesis, Carleton University, 1978.

24. For a discussion of the controversy between F.D. Roosevelt and the Supreme Court see i.e. C.H. Pritchett, The Roosevelt Court: A Study In Judicial Politics and Values, 1937-47. (New York: Macmillan, 1949).

For discussion of the "Padlock" cases see i.e. F.R. Scott, Civil Liberties and Canadian Federalism, (Toronto: University of Toronto Press, 1959).

25. C. Cheffins, op.cit.

26. See i.e. in P. Russell, "Judicial Power in Canada's Political Culture", op.cit.

27. Such a record is constructed only if there is an appeal.

28. Even at the present statistical data about provincial courts is scare and fragmentary.

See i.e. "Guidelines, Dispositions and Sentences in The Criminal Law Process", Law Reform Commission, Information Canada, 1976, p. 52.

29. Provincial Court Judges are appointed by the L. Governor in Council.

30. Among Canadian scholars raising the problem of reliable information on sentencing we find M. Friedland op.cit., J. Hogarth, op.cit., P. Russell, op.cit., K. Jobson, op.cit.

See also, A. Normandeau, "Canadian Criminal Statistics - Not Again!", C.J.C.C., Vol. 12, no. 3, 1970, p. 198 and the literature cited in this article.

Also B.A. Grossman, The Prosecutor, (Toronto: University of Toronto Press, 1969).

Similar conclusions have been reached in the U.S. See i.e. "Report of the Presidents' Commission on Law Enforcement and Administration of Justice, 1967", pp. 20-27.

L.B. Schwartz in "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects", Law and Contemporary Problems, Vol. XLI, Winter 1977, no. 1, which referred to the present system of statistics as "as scandal", p. 59.

31. See i.e. M. Mileski, "An Observational Study in A Lower Criminal Court", Law and Society Review, Vol. 6, 1970-71, pp. 473-476.

Also, J.J. Teeven, "Deterrent Effect of Punishment Subjective Measures", C.J.C.C., Vol. 18, no. 2, April, 1976.

32. See i.e. M. Friedland, Detention Before Trial, (Toronto: University of Toronto Press, 1976).

R. Hood, Sentencing in Magistrate Courts, (London: Stewart and Sons, 1962).

L. Radzinowicz and N.E. Wolfgang, eds., Crime and Justice, (New York: Basic Books, 1971).

33. This figure comes from practically every Canadian and U.S. study. See i.e. A. Normandeau, op.cit.
34. See i.e. R. Manzer, Canada: A Socio-Political Report, (Toronto: McGraw-Hill Ryerson Ltd., 1974).
35. For discussion see K. Jobson, "Fines", McGill Law Journal, Vol. 16, 1970.

Also S. Glueck, "The Sentencing Problem", Federal Probation, Vol. 20, 1956.

36. For general discussion of the subject see H.L.A. Hart, The Concept of Law, (Oxford: Clarendon Press, 1961).

R. Pound, Jurisprudence, (St. Paul's, Minn.: West Pub. Co., 1959).

G. Schubert, Judicial Behaviour, (Chicago: Rand McNally and Co., 1974).

W. Friedman, Law and Social Change in Great Britain, (London: Stevens and Son, 1951).

B.N. Cardozo, The Nature of the Judicial Process, (New Haven: Yale University Press, 1921).

L. Orfield, Criminal Process from Arrest to Appeal, (New York: Univeristy Press, 1947).

D. Fellman, The Defendant's Rights, (New York: Reinhart and Co., 1958).

For Canadian literature see i.e.:

S.A. Cohen, Due Process of Law: The Canadian System of Criminal Justice, (Toronto: The Carswell Co. Ltd., 1977). This book also contains an extensive review of the Canadian literature on the due process.

E. McWhiney, ed., The Civil Law and Common Law in Canada, (Toronto: The Carswell Co. Ltd., 1955), in particular pp. 284-300.

G. Parker, An Introduction to Criminal Law, (Toronto: Methuen, 1977).

D.A. Schmeiser, Criminal Law, Cases and Comments, (Toronto: Butterworths, 1973), in particular chapter 1.

M.L. Friedland, Cases and Materials on Criminal Law and Procedure, (Toronto: University of Toronto Press, 1970), Third Edition.

37. J.S. Leon, "Rights, Fairness and Effectiveness in Canada and the U.S.: Counsel and Client in the Criminal Process", Criminal Law Quarterly, Vol. 20, no. 1, 1977, p. 29.

38. J.S. Leon, op.cit.

See also, "The Task Force on Policing in Ontario: Reports to the Solicitor General", Queen's Printer, 1974.

39. G. Schubert, "Behavioural Jurisprudence", Law and Society, Vol. II, no. 3, 1968, p. 407.

40. For a good summary of the deterrence theory and literature on this subject see J.J. Teeven, Jr., "Deterrent Effects of Punishment: The Canadian Case", Journal of Corrections, Vol. 14, 1972, p. 68.

Also, "Do Prisons Deter?", Working Paper No. 1, The Law Reform Commission of Canada, 1974.

41. R.G. Wood, "Some Research Results and Problems", in L. Radzinowicz and N.E. Wolfgang, eds., Crime and Justice, Vol. 3, (New York: Basic Books Inc., 1971), p. 159.

See D.F. Cousineau and J.E. Veevers, "Incarceration as A Response to Crime: The Utilization of Canadian Prisons", Canadian Journal of Corrections, Vol. 14, 1970, pp. 15-16, 27.

42. J.C. Ball, "Some Deterrence Concepts in Criminology and Law", Journal of Criminal Law, Criminology and Police Science, Vol. 40, 1965-66, pp. 347-348.

43. R.G. Caldwell, "The Deterrent Influence of Corporal Punishment Upon Prisoners Who Have Been Whipped", American Sociological Review, Vol. 9, no. 2, April, 1944, pp. 172 & 177.

For a description of the problems in designing research testing the deterrence theory see J.J. Teeven, op.cit., p. 72. His study indicates that it is the certainty of the punishment rather than the severity which might have a deterring effect. However, the author admits himself that his interpretation is "purely speculative", p. 79.

44. J. Andenaes, "Does Punishment Deter Crime", Criminal Law Quarterly, Vol. II, 1968-69, p. 176.
 45. R. Hood and R. Sparks, Key Issues in Criminology, (New York: McGraw-Hill, 1970), p. 171.
 46. Ibid., p. 171. In addition it could be stated that this fact applies equally to all theories of sentencing.
 47. For a summary of such studies as well as a discussion of general deterrence see N. Walker, Crime and Punishment in Great Britain, revised edition (Edinburgh: University Press, 1968), pp. 237-243.
 48. R. Hood and R. Sparks, op.cit., pp. 175-177.
 49. T. Grygier, "Probation or Imprisonment: A Statistical Recipe for Judicial Decisions", Chitty's Law Journal, Vol. 19, Feb. 1971, p. 57.
 50. Ibid., p. 57.
 51. Ibid., p. 57.
 52. Ibid., p. 63.
- For economical analysis of the deterrent effect of law enforcement on criminal activity see L. Phillips and H.L. Voity, "Economical Analysis of Deterrence", Journal of Criminal Law, Criminology and Police Science, Vol. 63, no. 3, 1972, p. 300.
53. K. Jobson, "Imprisonment", Ottawa Law Review, Vol. 4, 1970-71, p. 454.
 54. Ibid., p. 422.
 55. Ibid., p. 455.
 56. Ibid., p. 457.
 57. K. Jobson, "Fines", McGill Law Journal, Vol. 16, 1970, no. 633, p. 675.
 58. S. Glueck, "Predictive Devices and the Individualization of Justice", Law and Contemporary Problems, no. 23, 1958, p. 461.
 59. L.T. Wilkins, "Criminology: An Operational Research Approach", in A.T. Welford, ed., Society Problems: A Method of Study, (New York: Basic Books, 1962), p. 180.

60. See i.e. P.J. Cook, "Punishment and Crime: A Critique of Current Findings", Law and Contemporary Problems, Vol. 42, 1977, p. 164.

Also, H. Zeisel, "Methodological Problems in Studies of Sentencing", Law and Society Review, Vol. 3, no. 4, 1969, p. 621.

C.R. Jeffery, "Criminal Behaviour and Learning Theory", Journal of Criminal Law, Criminology and Police Science, Vol. 56, no. 3, 1965.

D.F. Cousineau and J.E. Veevers, "Incarceration as a Response to Crime: The Utilization of Canadian Prisons", Canadian Journal of Criminology and Corrections, Vol. 14, no. 1, 1972, p. 32.

S. Spitzer, "Punishment and Social Organization: A Study on the Control of Crime", Law and Society Review, Vol. 9, no. 4, 1975, p. 613.

W.J. Bowers, "Severity of Formal Sanctions as a Deterrent to Deviant Behaviour", Law and Society Review, Vol. 5, no. 1, 1970, p. 21.

61. K. Menninger, "The Criminal Law System", Nebraska Law Review, Vol. 45, 1966.

62. D.F. Cormier and Associates, "Some Psychological Aspects of Sentencing", Canadian Journal of Corrections, Vol. 3, no. 4, 1966.

63. N. Morris, "Impediments to Penal Reform", University of Chicago Law Review, Vol. 33, 1965-66, p. 629.

64. N. Morris, ibid., p. 630.

65. See D.F. Cousineau and J.E. Veevers, op.cit., pp. 25-26.

Also, N. Walker, op.cit., pp. 242-260.

66. W.H. Pierce, "Reintegration of the Offender Into The Community: New Resources and Perspectives", Canadian Journal of Corrections, Vol. 12, 1970, p. 466.

67. See E. Durkheim, The Rules of Sociological Method, (Glencoe: Free Press, 1938).

Also, E. Durkheim, The Division of Labour in Society, (Glencoe: Free Press, 1960).

68. For modern exposition of this theory see i.e. S. Box, Deviance, Reality and Society, (London: Holt, Reinhart and Winston, 1971).

G.H. Mead, "The Psychology of Punitive Justice", American Journal of Sociology, Vol. XXIII, no. 5, 1918, p. 591.

Also, S. Spitzer, op.cit.

69. K. Jobson makes this comment in "Imprisonment", op.cit., and also in "Fines", op.cit., p. 633.

In addition, N. Walker, op.cit., pp. 235-236, and D.F. Veevers, op.cit., pp. 26-27.

70. H.L.A. Hart, Law, Liberty and Morality, (London: Oxford University Press, 1963), pp. 65-66.

71. See K. Jobson, "Fines", op.cit.

72. P. Russell, "How Do Judges Decide: Ideology Versus Science", The Canadian Forum, April 6, 1972.

73. N.E. Frankel, "Lawlessness and Sentencing", University of Cincinnati Law Review, Vol. 41, 1972, pp. 7-8.

See also, A. Somit, J. Tanenhaus and W. Wilke, "Aspects of Judicial Sentencing Behaviour", University of Pittsburgh Law Review, 1959-60, p. 613.

R. Hood, Sentencing in Magistrates Court, (London: Stewart and Sons, 1962), particularly chapter 4.

M. Mileski, "Courtroom Encounters: An Observation Study of the Lower Criminal Court", Law and Society Review, Vol. 6, 1970-71, p. 473.

74. 251, U.S., 12.

75. 399, U.S., 235.

76. Manitoba Bar News, Vol. 36, 1968, p. 277.

77. G.W. Baab and W.R. Ferguson, Jr., "Texas Sentencing Practices: A Statistical Study", Texas Law Review, Vol. 45, 1966-67.

78. D.M. Cormier et.al., op.cit., p. 67.

See also, Canadian Civil Liberties Association.

"Due Process Safeguards and Canadian Criminal Justice: A One Month Inquiry", Canadian Civil Liberties Association, 1971.

79. J.C. D'Esposito, "Sentencing Disparity: Causes and Cures", Journal of Criminal Law, Criminology and Police Science, Vol. 16, 1969, p. 182.

80. J. Hogarth, "Criminal Justice, The Criminal Court and Sentencing", Canadian Journal of Corrections, Vol. 12, 1970, p. 186 & 193.

See also, W.T. Downs, "Wanted A Balanced System of Justice", Crime and Delinquency, Vol. 15, no. 2, April, 1969.

81. J. Hogarth, op.cit., p. 192.

82. S. Glueck, "The Sentencing Problem", Federal Probation, Vol. 20, 1956, pp. 15-16.

83. W. Woolton, Crime and the Criminal Law, (London: Stewart and Sons, 1963); p. 91.

84. J. Hogarth, Sentencing As A Human Process, (Toronto: University of Toronto Press, 1971), p. 70. This study also contains excellent bibliography of Canadian literature.

85. J. Hogarth, op.cit., p. 72.

86. J. Hogarth, op.cit., see table on page 73.

87. J. Hogarth, op.cit., see table on page 74.

88. J. Hogarth, op.cit., p. 74.

89. J. Hogarth, op.cit., pp. 74-75.

90. See J. Hogarth, op.cit., p. 75.

91. See J. Hogarth, op.cit., p. 75.

92. See J. Hogarth, op.cit., pp. 76-77.

93. See J. Hogarth, op.cit., p. 77.

94. See J. Hogarth, op.cit., p. 78.

95. See J. Hogarth, op.cit., pp. 80-81.

96. See J. Hogarth, op.cit., p. 83.

97. See J. Hogarth, op.cit., p. 82.
98. See J. Hogarth, op.cit., p. 91.
99. See J. Hogarth, op.cit., p. 91.
100. See J. Hogarth, op.cit., p. 75.
101. See J. Hogarth, op.cit., p. 91.
102. M. Mileski, "Courtroom Encounters: An Observation Study of the Lower Criminal Court", op.cit.
103. D.J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, (Boston: Little, Brown and Company, 1966), p. 12.

A. Ohlin and W. Remington, "Sentencing Structures: Its Effects Upon Systems For The Administration of Criminal Justice", Law and Contemporary Problems, no. 23, 1958, p. 495.

104. B.M. Cormier and Associates, "Psychological Aspects of Sentencing", Canadian Journal of Corrections, Vol. 3-4, 1962-63, pp. 66-84.

See also, C.F. Jeffrey, "Criminal Behaviour and Learning Theory", Journal of Criminal Law, Criminology and Police Science, Vol. 56, 1965, p. 294.

A.G. Storey and G.E. Sainty, "Personality Characteristics of Prisoners Compared with Non-Prisoners", Canadian Journal of Corrections, Vol. 9, 1968, pp. 306-312.

E.H. Sutherland and D.R. Cressey, Principles of Criminology, (5th ed., 1960) is perhaps the classical work in this area.

105. A.G. Storey and G.E. Sainty, op.cit., p. 306.
106. See i.e. J.E. Carlin and J. Howard, "Legal Representation and Calss Justice", U.C.L.A. Law Review, Vol. 12, 1965, pp. 381-431.

See also, D.N. Atkinson and D.A. Newman, "Judicial Attitudes and Defendant Attributes: Some Consequences for Municipal Court Decision-Making", Journal of Public Law, Vol. 19, Fall 1969, pp. 69-84.

D.H. Oaks and W. Lehman, "The Criminal Process of Cook County and The Indigent Defendant", University of Illinois Law Reform, 1966, pp. 719-730.

107. S. Box and J. Ford, "The Facts Don't Fit: On The Relationship Between Social Class and Criminal Behaviour", The Sociological Review, Vol. 19, no. 1, Feb. 1971, pp. 31-52.

Contra - see W.R. Bytheway and D.R. May, "On Fitting the 'Facts' of Social Class and Criminal Behaviour: A Rejoinder to Box and Ford", The Sociological Review, Vol. 19, no. 4, Nov. 1971, pp. 585-607.

108. See i.e. W.G. Skogan, "Dimensions of the Dark Figure of Unreported Crime", Crime and Delinquency, Vol. 23, no. 1, Jan. 1977, p. 41.
109. W.R. Bytheway and D.R. May, op.cit., p. 601.
110. Due Process Safeguards and Canadian Criminal Justice, Canadian Civil Liberties Education Trust, Toronto, Ontario, October, 1971.
111. D. Cressey, "The Correlates of Crime", in G.M. Sykes and T.E. Drabek, eds., Law and the Lawless, (New York: Random House, 1969), pp. 194-196.
- Also, E. Green, "Sentencing Practices of Criminal Court Judges", in R. Quinney ed., Crime and Justice in Society, (Boston: Little, Brown and Co., 1969), p. 434.
112. D.N. Atkinson and D.A. Newman, op.cit.
113. D. Cressey, "Crime", in Merton and Nisbit, eds., Contemporary Social Problems, 3rd ed., (New York: Harcourt, 1971).
114. G.W. Baab and W.R. Ferguson, Jr., op.cit., pp. 496-497.
- See also, S.S. Nagel, The Legal Process From A Behavioural Perspective, (Homewood, Illinois: The Dorsey Press, 1969).
115. D. Cressey, op.cit., p. 195.
116. Ibid., p. 196.
117. G.W. Baab and W.R. Ferguson, Jr., supra note 12.
118. O. Pollock, The Criminality of Women, (New York: A.S. Barnes, 1961), pp. 89-90.
119. Ibid., p. 495.

See also, E. Green, op.cit., pp. 434-435.

120. G.W. Baab and W.R. Ferguson, Jr.; op.cit., pp. 494-495.

R. Molin, "The Courts for Handling Youth", N.P.P.A.J., Vol. 2, 1956, p. 123.

S. Rubin, "The Sentencing of Youthful Offenders", N.P.P.A.J., Vol. 2, 1956, pp. 142, 144-146.

C. Cressey, op.cit., p. 194.

121. E.H. Sutherland and D.R. Cressey, "Probation Versus Imprisonment", in L. Radzinowicz and N.E. Wolfgang, op.cit., p. 228.

Also, G.W. Baab and W.R. Ferguson, Jr., *supra* note 12, at p. 495.

122. D.V. Babst and J.W. Mannering, "Probation Versus Imprisonment", in L. Radzinowicz and N.E. Wolfgang, op.cit., p. 495.

Also G.W. Baab and W.R. Ferguson, Jr., op.cit., p. 495.

123. G.W. Baab and W.R. Ferguson, Jr., op.cit., p. 495.

124. A.D. Castberg, "The Ethnic Factor in Criminal Sentencing", The Western Political Quarterly, Vol. 24, no. 3, Sept. 1971, p. 425.

125. G. Allport, The Nature of Prejudice, (Garden City: Doubleday, 1958).

126. See studies noted in footnote 90 also A.D. Castberg, op.cit.

127. See i.e. H. Jacob, "Black and White Perceptions of Justice in the City", Law and Society Review, Vol. 6, no. 1, 1971.

128. See R.M. Bienvenue and A.H. Latif, "Arrest, Disposition and Recidivism: A Comparison of Indians and Whites", Canadian Journal of Criminology and Corrections, Vol. 16, no. 1, January, 1974.

Also, D.A. Schmeiser, "The Native Offender and The Law", Information Canada, Law Reform Commission of Canada, 1974.

F.X. Ribordy, "Conflict de Culture et Criminalite des Migrant Italiens", Canadian Journal of

Criminology and Corrections, Vol. 13, no. 1, 1971,
p. 24.

129. A. Overly in U.S. Presidential Commission on Law, op.cit.
130. G.W. Baab and W.R. Ferguson, Jr., op.cit., p. 497.
131. D. Cressey, op.cit., p. 192.
132. E. Green, "Inter and Intra Racial Crime Relative to Sentencing", Journal of Criminal Law, Criminology and Police Science, 1964, p. 359.
133. See i.e. D.N. Atkinson and D. Newman, "Judicial Attitudes and Defendant Attributes: Some Consequences for Municipal Court Decision-Making", Journal of Public Law, Vol. 19, Fall 1969, p. 75.
134. J.R. Lampert, Crime, Police and Race Relations, (London: Oxford University Press, 1970).
135. See i.e. G.A. Almond and S. Verba, The Civic Culture, (Boston: Little, Brown and Co., 1965), pp. 344-354, 315-324 and Chapter 9.
136. See i.e. R.H. Carter and L.T. Wilkins, "Some Factors in Sentencing Policy", Journal of Criminal Law, Criminology and Police Science, 1967, no. 58, see table p. 509.
137. See J. Hogarth, op.cit., p. 57.
138. K.B. Jobson, "Fines", op.cit., p. 633.
139. 351, U.S., 12, 1956.
140. See i.e. Smith v. Bennett, 365 U.S. 708 C(1961).
141. Williams v. Illinois 399 U.S. 236 (1970).
See also, P.M. Wald, "Poverty and Criminal Justice", in L. Radzinowicz and N.E. Wolfgang, op.cit., Vol. 2.
People v. Saffore, 218 N E (2nd) 686.
Case cited in Jobson, op.cit.
142. K.B. Jobson, op.cit., p. 672.
143. A.D. Castberg, op.cit., pp. 427-428.
144. See G.W. Baab and W.R. Ferguson, op.cit., pp. 480-481.

145. D.N. Atkinson and D.A. Newman, op.cit., pp. 76-77.
146. L. Phillips and H.L. Voity, Jr., "An Economic Analysis of the Deterrent Effect of Law Enforcement on Criminal Activity", Journal of Criminal Law, Criminology and Police Science, Vol. 53, 1972, pp. 330-342.
147. Ibid., p. 332.
148. Ibid., p. 333.
149. R.M. Carter and L.T. Wilkins, op.cit., p. 509, table 8.
150. R. Hood, Sentencing in Magistrates Court, op.cit., p. 89.
151. Ibid., p. 98 and 119.
152. S. Glueck and E.T. Glueck, Five Hundred Criminal Careers, (New York: Basic Books, 1939), p. 307.
153. D. Cressey, op.cit., p. 201.
154. S. Box and J. Ford, op.cit.
155. Ibid., p. 37.
156. Ibid., p. 44.
157. J. Hagan, "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint", Law and Society Review, Vol. 8, no. 1, 1973, p. 357.
158. J. Hogarth, op.cit., p. 52.
159. H. Jacobs, "Black and White Perceptions of Justice in The City", Law and Society Review, Vol. 6, 1971-72, p. 69.
160. S. Melichercik, "Employment problems of Former Offenders", National Probation and Parole Association Journal, Vol. 1, January, 1956, p. 43.

See also V. Portnoy, "Employment of Former Criminals", Cornell Law Review, Vol. 55, 1969, p. 306.
161. See i.e. B.A. Grossman, The Prosecutor, (Toronto: University of Toronto Press, 1969).

Also, B. Alschuler, "The Defense Attorney's Role in Plea Bargaining", Yale Law Journal, 1179/1975, no. 84.

J.S. Leon, op.cit.

B. Donnelly, "Right to Counsel", The Criminal Law Quarterly, 1968-69, no. 18.

162. See R. Manzer, op.cit.

163. See i.e. M.L. Friedland, Access to Justice, (Toronto: University of Toronto Press, 1976).

164. See J.L. Wilkins, op.cit., chapter VII and in particular p. 146.

Also, W.S. Tarnopolsky, The Canadian Bill of Rights, McClelland and Stewart Ltd., second edition, 1975, in particular Chapter VII.

165. R.G. Hann, "Decision Making in the Canadian Criminal Court System: A Systems Analysis". Centre of Criminology. Toronto: University of Toronto, 1973, p. 453.

166. E. MacKaay, "The Paths of Justice. A Study of the Operation of the Criminal Courts in Montreal". Montreal: Groupe De Recherche en Jurimetrie Faculte de Droit Universite de Montreal, Montreal, 1976. See in particular Section C. This study does not dismiss the relationship between legal representation and the severity of the sentence.

167. For review of this type of literature see i.e. M. Galenter, "Why the 'Haves' Come Out Ahead", Law and Society Review, Vol. 9, no. 1, 1974.

168. For review see A.S. Blumberg, The Criminal Court: An Organizational Analysis, (Ann Arbor, Michigan: University Microfilms Inc., unpublished Ph.D.).

Also, A.S. Blumberg, Criminal Justice, (Chicago: Quadrangle Books, 1967).

169. K.B. Jobson, "Dismantling the System", Canadian Journal of Criminology and Corrections, Vol. 19, no. 3, July, 1977, p. 254.

170. S.S. Nagel and M.G. Neef, Legal Policy Analyses, (Lexington, Massachusetts: Lexington Books, 1977).

Also, S.S. Nagel, The Legal Process From A Behavioural Perspective, (Homewood, Illinois: The Dorsey Press, 1969).

Evaluations of the Fairness of Their Treatment",
Law and Society Review, Vol. 12, no. 2, 1978, p. 237.

171. The Law Reform Commission, First Research Program,
Information Canada, March, 1972, p. 12.
172. P. McNaughton-Smith, Permission To Be Slightly Free, A
Study of The Granting, Refusing and Withdrawing of
Parole in Canadian Penitentiaries, (Information
Canada, 1976).
173. J.D. Morton, The Function of Criminal Law in 1962,
(Toronto: C.B.C., 1962).
174. J. Giffen, op.cit., in M. Friedland, ed., op.cit.
175. Canadian Criminology and Corrections Association,
Towards A New Criminal Law For Canada; A Brief
submitted to the Law Reform Commission of Canada by
the Canadian Criminology and Corrections Association,
1973, p. 25.
176. This problem is recognized to a greater extent in the
U.S. where there are State and Federal programs and
institutes of theory and practice of sentencing
designed and conducted for trial judges.
177. P. Russel characterized Canadian judges as amateurs in
administrative matters in M. Friedland, ed., Courts
and Trials: A Multidisciplinary Approach, op.cit.,
p. 88.
178. C.H.S. Jagewardene, "The Criminal Justice System in
Canada", Proceedings of Ottawa University, 1975, p.
33. Some view this process as so advanced that it
created a "new due process" which is structure
oriented, characterized by being oriented toward
the court.

See i.e. A.S. Blumberg, op.cit.

179. Justice E.P. Hartt in Canadian Bar Review, 1973, p. 61.

See also, C.E. Reasons, ed., The Criminologist:
Crime and the Criminal, (Palisides, California:
Goodyear Pub. Co., 1974).

180. The Law Reform Commission of Canada, Working Paper on
Diversions, (Information Canada: 1975).
181. See A.S. Blumberg, op.cit.

Also findings of The Ontario's Royal Commission on the Organization of the Courts, discussed in M. Debicki, op.cit.

182. K.B. Jobson, "Dismantling the System", Canadian Journal of Criminology and Corrections, Vol. 19, no. 3, 1977.

183. J. Turner, op.cit., p. 1.

184. The Law Reform Commission of Canada, Report No. 1, Information Canada, March, 1972.

Also, Justice F.P. Hartt, Canadian Bar Review, 1973, p. 61.

S.K. Jaffary, op.cit.

W.T. McGrath, ed., Crime and Its Treatment in Canada, (Toronto: MacMillan, 1965).

J.D. Morton, The Function of Criminal Law, (Toronto: C.B.C., 1962).

J.D. Morton, The Crises In Criminal Law, W.W. Martin, Lectures, University of Saskatchewan, 1963, pp. 23-25.

185. See J. Hogarth, op.cit.

186. Report to The Solicitor General from the Canadian Committee on Corrections, March 31, 1969, (Ottawa: Queen's Printer, 1969), Chapter 9.

CHAPTER II

A STRUCTURE UNDER STRESS?

Introduction

The review of the mainstream of the literature on courts leaves one in doubt as to whether there are any reliable measures of the quality of judicial decisions. As has been demonstrated, each and every possible goal of sentencing emerging from normative studies has been discussed and found lacking (in empirical evidence) from a variety of perspectives. Studies of the population subject to the decisions show a greater (although by no means unanimous) area of agreement. The characteristics of the populations studied are more or less agreed upon. However, the interpretations of the findings with respect to sentencing are varied and full of confusion and contradiction. The literature which shows the greatest promise is that which focusses on the court as a structure. This literature identifies some possible alternatives to the traditional goals of judicial structures and in general shifts the focus of attention away from the normative model of the courts. The literature focussing on the court as a structure also facilitates the comparison of the courts to other political structures.

Structure Under Stress

It is interesting to note that conclusions declaring the courts to be structures under stress beyond the ability to cope (or in the extreme cases on the verge of collapse) are reached without any reference to systems theory in so far as

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it provides a general framework for the analysis of structures under stress, or to studies of political culture which can provide us with hypotheses relevant to the possible feedback and demands which come from the people who are sentenced. The assessment of these researchers that there is a lack of stability is reached in a vacuum, as if the courts operated as the one and only structure in a political system. Systems theory should allow the researcher to reach some conclusions as to whether in fact courts are under stress, the possible extent of this stress and finally to an assessment of the future ability of the courts to cope with the stress which they are under.

If the students of the courts are correct in their assessments of the presence and extent of the stress on the lower criminal courts, then indeed these courts are facing a potential crisis situation. D. Easton is clear on this point.¹ He sees the possibility that the failure of a structure to handle certain demands (at least those coming from powerful members of the system) and/or the inability to produce outputs could lead to a situation in which the structure would not be protected from collapse. In such situations the system in order to persist has to either introduce another structure capable of producing the same outputs or provide for an immediate and almost direct translation of the demands into outputs.² (Historically, there have been illustrations of such occurrences, i.e. during

W.W. II in Warsaw the Resistance Army performed the functions of a criminal court. Also to some extent the "frontier justice" characteristic of the colonization of North America is an illustration of a similar "solution".)³ The same conclusion is reached by most psychologists of stress. An organism, if under stress faces a real danger of failure, and at the extreme, death, unless it can produce coping responses capable of reducing or (preferably) eliminating stresses.⁴ However, before such conclusions can be reached, systems analysis exiges an analysis of demands as a potential source of stress, and an assessment of the ways in which a particular structure responds to stress. The starting point is an evaluation of the volume, sources, and intensity of the demands on a structure. How powerful are these demands and how does the structure select some demands and reject others? When several competing demands are placed upon a structure, selection and prioritization of the demands necessarily takes place.⁵ The process of selection is usually based on some method if the structure is to survive. This process occurs within the constraints of available resources.

Easton underlines the importance of understanding the variance between different demands and the route by which they enter into the system. Perhaps one can expand his analysis of the evaluation of the sources of demands, their frequency and possible impact by an additional

qualification. It is possible (or even likely) that separate demands might have some common elements. Under such conditions each and every demand will be more powerful. In such cases sometimes even radically different demands can be partially satisfied. This can be illustrated by the following example:

- Demand I - Reduce volume of cases, otherwise judges will be overworked.
- Demand II - Reduce volume of cases or expenditures on the court system will reach an unacceptable level.
- Demand III - "We don't want overcrowded courts in which man loses his dignity."

Any policy capable of reducing the number of cases before the courts would partially satisfy all three demands. The reasons underlying such a policy might be entirely different from those articulated in the above demands.

Easton also underlines the importance of the time function in looking at demand and related outputs. Some structures can "afford" unlimited or extended time to deal with demands and to produce outputs. Other have severe time constraints which have to be taken into consideration.

Gross et.al.⁶ state that the structure which can adjust over time (rather than instantaneously) will face less stress and will be better able to cope with the stress to which it is exposed.⁷ The extent to which a structure can control the time over which the stressful event occurs is in the same way better equipped to lessen its effects.⁸

In an assessment of stress the nature, characteristics and extent of support have to be evaluated as well as the legitimacy of the structure. The implications of support (or lack thereof) for the survival of the structure are self-evident and don't require further clarification.⁹ If a structure cannot satisfy the demands "of most of the relevant members of the system with some minimal frequency",¹⁰ its stability can be most profoundly affected. Thus cleavages (and possible responses) among those vitally affected by the outputs have to be analysed before any conclusions are reached. Before we proceed with the assessment of the court system as a structure in terms of its "equipment" to deal with stress, the notion of stress should be further explored. The language which D. Easton uses in his discussion of the political system and its structures has much in common with psychological theories of stress. Easton does not provide a definition of stress sensu stricto,¹¹ but, the symptoms, according to his description, correspond very closely with those observed in individuals experiencing stress.¹² Since there is no political literature on stress other than that of Easton the question which has to be resolved is to what extent can the findings of psychologists be utilized in an assessment of the courts? Lower criminal courts as a structure primarily operate through the instrumentality of an individual judge - who furthermore, both in terms of legal culture and legal norms, has a great degree of independence.

Thus on one level the psychological literature on stress is directly applicable to the study of judicial behaviour. (Theoretically it would be very easy to measure even the physiological symptoms of stress). On another level when looking at the court as a structure one has to be more careful in understanding the limitations affecting the applicability of the theories of stress.

Social scientists occasionally utilize psychological theories of individual behaviour in the discussion of structures. R.K. Merton subscribes to a position that the "problems of social science differ from problems of individual behaviour in the degree of specificity, not in kind."¹³ Furthermore he utilizes theories of deviant behaviour in explaining structural behaviour. Another example of the "marriage" or shall we say the "arrangement" between the psychology of individual behaviour and the study of political structures can be found in the work of D. Katz and R.L. Khan, who on the one hand warn researchers against the over-utilization and direct application of psychological theories to the study of structures, but on the other hand see areas where the boundaries between the two disciplines are not so sharp.¹⁴ In the study of the boundaries of subsystems and structures, they themselves utilize the psychological notions of stress.¹⁵ Unlike the case of D. Easton their choice is a deliberate one and leaves no doubt that the concept of stress in their work is the very same as that utilized by

psychologists of individual behaviour. Additional evidence supporting the utilization of the psychological literature on stress in an examination of a structure can be found in the work of psychologists themselves. R.L. Khan states that stress can equally well occur in individuals as in organizations.¹⁶ It is furthermore postulated by some social psychologists that organizations have both stress increasing and stress reducing capacities.¹⁷ The distinction between social and individual psychology in the case of stress literature is neither sharp nor is it always maintained. N.J. Smelser's work on structural strain has been recognized by stress psychologists as being within the theory of stress.¹⁸

The psychological definitions of stress utilize very similar concepts to those used by D. Easton in describing structural stress. Although the definitions vary in details they all have certain common elements. Stress then occurs when stimulæ approach the threshold of tolerability in which they neither are nor can be coped with by "normal" coping responses.¹⁹ The stressful stimulæ which are so threatening to an individual can be of a very wide range - from the behaviour of others to the anticipation of psychological or biological harm.²⁰ This corresponds very closely to the Eastonian notion of stress. An individual experiences stress when his over-all adjustment is threatened, his adaptive mechanisms are severely taxed and tend to collapse; unless a person can produce coping responses capable of

reducing or (preferably) eliminating stress, he faces failure or at the extreme death. A structure under such conditions faces collapse. Psychologists concentrate their work on two areas; the identification of symptoms and the study of the coping responses. Psychologists uniformly state that outputs are among the best indicators of stress.²¹ Looking at outputs, one can say with some degree of confidence whether a person or structure is under stress or not, and in the case of a positive answer, whether the outputs are evidence of coping.²² If there is evidence of withdrawal, reduction of outputs, delays, erratic behaviour and other forms of performance deterioration, the person or structure is under stress.²³ (It is important to note that it is commonly agreed that there is a high congruency between various indicators of stress.)²⁴ If there is no sign of improvement in any or all of these symptoms, the structure is obviously undergoing difficulty in coping with this stress. On the other hand, if any or all of these symptoms show signs of changing in a positive direction or in other words, if they are noticeably diminishing, the structure is attempting to cope with the stress which it is under. An increase in the level of outputs and/or anticipatory behaviour is likely an indicator that the person or structure is satisfactorily coping with stress.²⁵

Systems feedback also plays an important role in the assessment of stress. Feedback provides a structure with

signals which either can be used to identify outputs indicating stress, or to recognize supportive attitudes. As a result of these signals, a structure may shape its outputs in expectation of, or in order to prevent, certain potentially stressful feedback. Feedback, depending on the source and intensity, can act either as a stressor, or on the contrary, as a reducer of strain.²⁶

Stress psychologists have done extensive research on the predisposition to stress both in terms of personal and in terms of situational characteristics.²⁷ Different structures are differently equipped to avoid or handle stress. Some by design cannot avoid stress but are well prepared to cope with it. We shall now look at the criminal courts from this perspective in order to partially assess the claim of possible crisis which they face.

The Capacity of the Courts to Handle Demands

The capacity of a structure to cope with demands is crucial in assessing its potential for the avoidance or successful management of stresses.²⁸ This discussion shall be divided into two parts: the first part will consist of an assessment of the capabilities of the courts to deal with stressors which occur in the immediate environment of the court (i.e. the courtroom); and the second part will deal with secondary or indirect stressors.²⁹ It can be stated at the outset that courts have a remarkable system

of protections developed over millenia. There is a direct link between procedures utilized in the Corpus Juris Civilis Ro Manorum and modern legal tools for the protection of the judiciary. These protections range from those protecting both individual judges and the courts such as laws dealing with the independence of and non-interference with the judiciary, to rules obliging some actors to assist judges in their task, and ending with the rules prescribing proper behaviour in court.³⁰ (Recently, a Winnipeg judge sentenced a defendant for contempt of the court because his shirt was unbuttoned and he put his hand in his pocket!)³¹

Primary Demand Stressors

The literature on stress indicates that the first element reducing the stress creating potential of demands is the degree of anticipation on the part of the structure.³² In the Provincial Judges Courts, only under unusual circumstances does the judge face an unanticipated demand. (This observation is correct for all criminal courts). Furthermore, most of the demands are presented in a ritualistic way providing the judge with a period to gradually adjust to any departure from the norm.³³ He has at his disposal legal tools for manipulating time, (He can ask that the demand be repeated, he can order a break or adjourn the case) and can therefore even reduce the time over which the demand is stated.³⁴ The "legal rules" stipulate that the demands cannot be threatening,³⁵ and furthermore, demands are

compartmentalized.³⁶ In terms of the expectations of those who make demands "due to the rules of the game" it is entirely within their expectations that some of the demands will not be met.³⁷ In addition, some demands can be interpreted as illegitimate,³⁸ thus not necessarily producing stress. Under normal conditions the court cannot perceive most of the direct demands as even potentially harmful.³⁹ The demands are presented in a ritualistic manner, the range of the demands is also known a priori and there is no threat behind the demands.

Finally there is a certainty on the part of all parties that after all of the demands are stated the judge will produce a decision.⁴⁰ In sum, the court has at its disposal a vast bag of tools which can either eliminate or reduce stress to an extent not available to many other structures.

All of these tools read like prescriptions provided by psychologists of stress who can only wish that individuals facing stressful demands had the same coping capacity.

Secondary Demand Stressors

A structure's capacity for coping with demands is increased if these demands: a) facilitate decisions; b) are congruent with the culture; c) are non-competitive; d) are non-antagonistic.⁴¹ Prospects of moral sanction or of social disgrace increase stress.⁴² In individual decisions courts are well "insulated" against stressful demands. (The recent

resignation of a Cabinet Minister resulting from what could be interpreted as a very indirect attempt at stating a demand can serve as an illustration.)⁴³ What potentially could be a powerful stressor - evaluation by superiors - is a very rare occurrence.⁴⁴ One could see that if the decisions of the Provincial Judges Court were subject to frequent appeals the anticipated action of higher courts would act as a stressor.⁴⁵ This, however, was not the case at the time of the study⁴⁶ (in approximately 96% of all criminal cases at the time, the magistrates' courts acted as the court of first and last instance), although recently there is some increase in the number of appeals. Furthermore, the legal culture is geared primarily to a critique of individual decisions and concentrates on the analysis of points of law. Lower criminal courts are in that sense well isolated from the mainstream of professional analysis and critique since they primarily make sentencing decisions on the basis of facts rather than law.⁴⁷ Unlike many other structures courts find themselves in a non-competitive market. Thus they are not exposed to the potential that "some other structure" will "take over" their role. To the contrary there is evidence that courts are very "skillful" at incorporating "others" in order to facilitate decision-making (court facilitators, psychologists, social workers, etc.).⁴⁸ Thus the demands coming from "outside" face a structure which should not have a high "appraisal of threat"

but, to the contrary, should possess a favourable balance between harmful stimulæ and counter-resources.⁴⁹

The previously described scholarly and official critique is a major source of potentially stressful demands. The interest of this study is only in evaluating the potential of these demands as stressors. In the first place the cues are very ambiguous. There is no agreement as to what is wrong, who is responsible and what is to be done.⁵⁰ There is even no agreement as to what the courts are supposed to be doing.⁵¹ This indicates the stress-producing properties of the demands, unless there is evidence that the structure is successful in filtering, ordering and finally coping with these demands through outputs.⁵² The work of J. Hogarth⁵³ is an excellent assessment of the attitudinal dimension of the problem. His work supplies indicators as to the process of filtering and prioritizing by judges of various demands. It is very likely that confusion and contradictions between various demands lessen the cumulative effect. Since many of the demands are very imprecise there is less necessity for their satisfaction.⁵⁴ Frequently the sources of demands are far removed from the court, and in the case of "official" demands from other jurisdictions than that of the court, therefore their impact is probably lessened. The best illustrations of this are the demands made on the lower criminal courts by the Law Reform Commission of Canada, since these courts are under

provincial jurisdiction. (Other areas of criminal justice are under the jurisdiction of Provincial Attorneys-General or Ministers of Correction. Even the area of substantive criminal legislation is not exclusively under the jurisdiction of the parliament of the Dominion since there are provincial statutes equipped with criminal sanctions.)

The group which has the greatest need of stating demands consists of the subjects of judicial decision-making - after all this group is directly affected by the sentences, and can therefore benefit or suffer most by changes in the outputs. The literature on political culture can help in identifying those subpopulations which are most likely to put demands on the political system in general and on specific structures in particular.⁵⁵ The understanding of characteristics of the sentenced population should provide some indicators as to the potential of this group to produce stressful demands. It can be said that a population showing participatory characteristics is more likely to put at least some demands on the system; on the other hand a parochial or a parochial-subject population has a very limited potential for producing stressful demands. To the extent to which population characteristics can serve as indicators of the likely political culture this potential has to be assessed as very low in the case of those who are not likely to consider themselves as competent.⁵⁶ Those whose cumulative experiences are positive are more likely to participate,

and furthermore, elites have various "anticipations of demands",⁵⁷ on the part of various groups of citizens. The "clients" of lower criminal courts are thus unlikely to make such demands themselves. Any demands on their behalf would likely be made by members of various elites, hence, reducing the immediacy and cumulative effect of these demands.

There is one area where most of the demands are in agreement. Governments and scholars are in agreement that courts face overloading (or already are overloaded).⁵⁸ As has been stated before, a situation in which an organism or structure is overloaded beyond its capacity to respond is a primary characteristic of stress.⁵⁹ Under such conditions, the structure has to find a means of information processing and move to a higher level of outputs or it is likely to collapse.⁶⁰ This is then a crucial point in assessing both the extent of stress and the structural anticipation and response.⁶¹ If the structure is not capable of producing a satisfactory number of outputs in the first place, how can it handle demands for more diversified or specialized outputs? (Postal services come to mind as a good illustration of this point.) In the case of the courts it is also important to understand that many of the specific demands "by definition" assume the ability to cope with a volume of decisions or require as a prerequisite for satisfaction a very high level of outputs? (With the notable exception of the Ontario Law Reform Commission's report on

the Organization of Courts in Ontario, very few studies even recognize the potential conflict between stating time consuming demands and expecting speedy output at the same time.)⁶²

It is the researcher's contention that with reference to the assessment of stress, future stability and patterns of support, the first demand which has to be met by the courts is the provision of "adequate outputs".⁶³ Only after there is an adequate level of output does it become important which and whose demands are met. This is particularly true in the case of a structure with a limited delaying capacity. Although the courts have the ability to manipulate the time function in an immediate situation, they nevertheless face severe time constraints. A judge cannot appoint a Royal Commission or refer the matter for "further study".

It seems that students of courts underestimate the extent to which, in Canadian political culture, courts defend themselves against any "non-technical" - non-legal inputs.⁶⁴ Since many of the most threatening demands coming from the critics are of an extra-legal nature they are likely to face strong opposition from well-established norms. (In a famous obscenity case Justice Friedman was asked by the defence to admit as evidence the results of a sociological survey as to the attitudes of the community with respect to certain publications. (The law requires judges to decide whether moral standards of the community

are offended.) The learned judge (although he admitted the survey) stated "I decide by the virtue of law what are the moral standards of the community."⁶⁵)

The above catalogue of the stress-handling mechanisms available to judges and courts is remarkable. Generally speaking people under stress have to develop management techniques. Judges and courts already have such tools. Furthermore these can be and are reinforced by coercive power. In the presence of such mechanisms for blocking, transforming and absorbing stressful stimulæ, predictions of an imminent crisis situation in the courts are suspect and have to be based on very solid and congruent evidence. These norms of Canadian legal culture viewing judicial decisions as purely technical matters act as powerful brakes on the recognition of demands. (Our criminal courts are perhaps the strictest "constructionists".) There is also evidence of very strong attitudinal determinants of judicial behaviour based almost entirely on variants of the "legal normative model".⁶⁶ It is then very likely that the broader demands (particularly ones which are not stated within the confines of the existing law) are neither perceived as stressors nor do they produce behaviour indicative of stress.

It is therefore the outputs of courts which should provide the best evidence of the presence or absence of stress, and of the ability of the courts to cope with what stress there is. The outputs should also present indicators

as to the level of demand satisfaction. Thus it is first necessary to assess the courts' ability to produce a satisfactory volume of outputs.⁶⁷ Some U.S. studies indicate that courts have already reached the point at which they are unable to cope with the volume of business.⁶⁸ Others claim that the process and goals of the decision-making process are perverted due to stress.⁶⁹ Canadian courts are also under similar pressure.⁷⁰ Thus an assessment of that dimension is crucial.

It is worthwhile noting at this stage that the present study is restricted to the evaluation of only those judicial activities which occur in the courtroom. Furthermore, as there can be no doubt that sentencing is the primary activity of the lower criminal courts, and as most if not all other functions are subservient to this primary task, sentencing will be the focal point. This is not however to deny that courts and judges in general, and lower criminal courts in particular, perform other functions. An evaluation of the outputs of the sentencing process could be performed from various perspectives. One could look at sentencing decisions from the perspective of the various goals of sentencing, or from the perspective of the extent to which the court serves the interest of the state as represented by the Crown. This study, however, is primarily concerned with an assessment of the sentencing process in terms of the ability of the court to adapt to and cope with

real and potential stress. This type of evaluation requires an examination of several basic questions. Stress psychologists are clear on the point that the inability to produce decisions based on the consistent filtering and integration of information is one of the best indications of the inability of a structure to cope with stress. Thus an analysis of the ability of the courts to cope with stressful demands depends to a large extent on the assessment of their ability to recognize and enhance the elements of the trial which affect the efficient delivery of the sentence. An assessment of the ability of the lower criminal courts to adapt and respond to the most common charges raised against the sentencing process is also important to this type of evaluation. In a study based on the data derived from the direct observation of the formal proceedings of the lower criminal court, one can observe the methods these courts utilize in handling the time function of the decision-making process and in processing information. One can also observe the degree of consistency exercised in deciding a large number of cases and the extent to which elements irrelevant to the offence itself have an impact on sentencing decisions. It is not being claimed that the coping responses of the court as a structure can only be assessed through the direct observation of the formal court proceedings. To the contrary, some of the more useful tools at the disposal of the courts are found outside of the courtroom. Such factors as formal

or informal pre-hearing disclosure and plea bargaining might have a significant impact on the ability of the courts to cope. However these mechanisms were not utilized by the system to the extent they are at present at the time the data for this study was collected. Furthermore, a full assessment of the assistance the courts receive in coping with the demands placed upon them is perhaps impossible (it would require an assessment of the 'real' rate of crime, informal treatment by police, etc.) and certainly beyond the limited scope of this study. This study attempts to assess the manner in which the court conducts the sentencing process in terms of the treatment of available information, the ability to produce efficient decisions and the extent to which the most important charges against the courts are justifiable. (For a full discussion of these dimensions see chapter three.)

Conclusion

Our conclusion on theoretical grounds is that it seems that courts are extremely well equipped to either avoid and/or cope with stress. The catalogue of stress reducing and preventing mechanisms at the court's disposal is wide and varied. Among the strongest weapons are:

- a) the provision of an arena in which the demands of important actors are heard and partially met; (Superficially at least, the courtroom is an arena where conflicting demands compete with each other. The very idea of the adversary system as opposed to the inquisitional model is based on the presumption that it creates a

better 'marketplace' for testing demands. It is an arena where all the major participants are guaranteed the right to state their demands.)

- b) the possession of norms strongly prohibiting the expression of discontent; (The strongest weapon of the courts is of course the power to sentence for contempt of court. In addition there are other such norms, ranging from customs reinforcing reverence for the judges to legal norms i.e. a barrister is legally an officer of the court which creates a special set of obligations on his part. Even if someone who is not a barrister represents a person in Provincial Judges Court, he acts as an 'amicus curiae', or friend of the court.)
- c) the prohibition of aggregate expression of discontent; (There is no room in court for any form of collective action. Only one person can speak at a time, and only if recognized by the judge - the Chicago Seven trial provides a good illustration of the way courts deal with any attempt at collective action.)
- d) the possession of norms and language homogenizing those who are subject to its decisions; (People appearing before the courts are stripped of all group characteristics, and are all referred to as defendants. From the legal point of view, laws of vagrancy apply equally to the pauper as to the millionaire. [A now deceased judge of the Winnipeg Court once referred to a defendant as 'drunk like all Indians'. This was considered as such a drastic departure from norms of judicial behaviour that it caused calls for his removal from the Bench].)
- e) the utilization of other structures as stress reducers (police, prosecutors, legal counsel, etc.); (The police apprehend the defendant, the Crown charges him, the barrister defends him, the jails rehabilitate him, etc. The modern judge, like the biblical Pontius Pilate, can almost wash his hands of all responsibility.)
- f) the fact that decisions are based and focussed on individuals whose actions are understood as those of a free agent; (From the legal point of view a crime is an act of a person who engages freely and knowingly in prohibited behaviour.

Thus on the one level it is the individual who sentences himself by his decision to engage in crime in the first place, again removing responsibility from the judge.)

- g) the presence of a high degree of legitimacy; (Both the courts and judges enjoy a high degree of legitimacy to an extent enjoyed by very few structures and actors in the political system.)
- h) the utilization of norms which have to be supported by the vast majority, with reference to the defence of persons and property;
- i) the almost total absence of interference and supervision by other structures; (The standard way in which the quality of judicial 'work' is evaluated is in the form of appeals. Since there are very few appeals from the decisions of the courts of lower instance, they are to a large extent even excluded from this form of evaluation.)
- j) the presence of highly depoliticized outputs; (In an examination of over 1,000 cases decided by a Provincial Judges Court, the researcher has encountered only one decision in which the judge permitted himself to make political remarks. The case involved sentencing a person for refusal to provide some personal data to an agent of the Dominion Bureau of Statistics. The judge commented on the nuisance created by all the data collecting agencies of the various governments.)
- k) the low penetrating power of outside demands; (Canadian courts rely very strongly on precedent and unlike American Courts are very reluctant to accept the findings of social scientists.)
- l) the lack of competition from other structures; (Although the civil side of adjudication faces increasing competition from various tribunals, the Canadian criminal courts have a virtual monopoly on sentencing. In some other political systems this power is shared with other structures.) and finally,
- m) the fact that courts act in an environment which reinforces the status of actors and decisions (the reference group for the judges is the legal profession at large.)

The above catalogue of the major stress reducing properties of judges and the courts is remarkable. Generally speaking people under stress have to develop management techniques in order to cope with threat. In the presence of such mechanisms for blocking, transforming and absorbing stressful stimulæ, the predictions of imminent crisis in the Canadian courts are suspect. Thus on theoretical grounds the courts appear to be a fairly stable structure. It is hoped that a direct observational study of the sentencing proceedings of the Winnipeg lower criminal courts will determine whether the courts are satisfactorily coping with the pressures to which they are exposed; in terms of reducing the time necessary to reach decisions, the methods of integration and utilization of information, and the way in which the courts respond to charges of discrimination and differential treatment.

1. See D. Easton, A Systems Analysis of Political Life, (New York: John Wiley & Sons, 1967), p. 60.
2. Ibid., pp. 88-89.
3. For description of the frontier justice see i.e. C.A. Reich, The Greening of America, (New York: Random House, 1970).
4. D. Easton, op.cit., p. 69.
Also, D. Easton, A Framework For Political Analysis, (Engelwood, New York: Prentice-Hall, 1965), Chapters 7 and 8.
5. D. Easton, A Systems Analysis of Political Life, op.cit., p. 6.
6. N. Gross, W.S. Mason, A.W. McEachern, Exploration in Role Analysis, (New York: John Wiley & Sons, 1958).
7. N. Gross, et. al. op.cit., pp. 281-318.
8. N. Gross, et. al. op.cit., p. 326.
9. See D. Easton, op.cit., p. 221.
10. D. Easton, op.cit.
11. See D. Easton, op.cit., pp. 22-24.
12. See R.K. Merton, Social Theory and Social Structure, (New York: The Free Press, 1968), Part 17 and in particular pp. 195-203.
13. See R.K. Merton, op.cit., p. 186.
14. See D. Katz and R.L. Khan, The Social Psychology of Organization, (New York: John Wiley & Sons, 1966), in particular Chapter 2.
15. D. Katz and R.L. Khan, op.cit., p. 61.
16. D. Katz and R.L. Khan, op.cit., p. 27.
17. See E. Gross, "Work, Organization and Stress", in S. Levine and N. Scotch, eds., Social Stress, (Chicago, Illinois: Aldine Publishing Co., 1970), pp. 54-105, and the included bibliography.

Also, N.J. Smelser, Theory of Collective Behavior,

(New York: Free Press, 1963), in particular the concept of structural strain utilized in this work.

18. See R.S. Lazarus, Psychological Stress and The Coping Process, (New York: McGraw-Hill Book Co., 1966), p. 12.

19. See i.e. M.H. Appley and R. Trumball, eds., Psychological Stress: Issues in Research, (New York: Appleton-Century Crofts, 1967), Chapter 1 by the editor.

20. R.S. Lazarus, op.cit., p. 390.

21. See i.e. M.M. Berkun, H.M. Bielek, R.P. Kern and K. Yegi, "Experimental Studies of Psychological Stress in Man", Psychological Monograph, No. 76, 1962, p. 534.

Also, E. Farber and K.W. Spence, "Effects of Anxiety, Stress, and Task Variables on Reaction Time", Journal of Personality, no. 25, 1956, pp. 1-18.

Also, J.E. McGrath, op.cit., p. 80.

Also, R.S. Lazarus, op.cit., Chapters 5-8.

22. J. Weitz, "Psychological Research Needs on The Problems of Human Stress", in J.E. McGrath, op.cit., p. 125.

Also, in American Journal of Sociology, no. 61, 1955, pp. 16-24.

23. R.S. Lazarus, op.cit., p. 390.

24. See i.e. R.S. Lazarus, op.cit.

25. See J.E. McGrath, op.cit., Chapter 2.

26. See i.e. C.W. Beckman, op.cit., in particular p. 382.

Also, C.D. Spielberger and I.G. Sarason, eds., Stress and Anxiety, (Washington, D.C.: Hemisphere Publishing Co., 1976), p. 220, and

R.G. Gace, "The Role of Social Environment in The Induction and Reduction of Anxiety", in C.D. Spielberger and I.G. Sarason, op.cit., p. 120.

27. On this point there is again an agreement between D. Easton and psychologists of stress.

28. See D. Easton, op.cit., p. 148.

Also, R.L. Khan et. al., op.cit., and J.E. McGrath,

op.cit., Chapter 2.

29. See R.S. Lazarus, op.cit., Chapter 2.
30. These are both legal and cultural norms. A good illustration of the norms in operation are the recent "misfortunes" of federal and provincial ministers who gave the impressions of interfering with the courts even if no charges were pressed.
31. Unrecorded case.
32. See J.E. McGrath, op.cit., in particular Chapter 3.
 Also, see C.D. Spielberger and G.S. Sarason, op.cit., p. 328.
33. See S. Brezmitz, in C.D. Spielberger and G.S. Sarason, op.cit., p. 131, who indicates that under such conditions stress will be reduced.
34. The manipulation of time over which stress occurs is important in assessing the extent of stress, see i.e. N. Gross et. al., op.cit.
35. Which reduces the stress reducing properties of demands.
36. See for example N. Gross et. al., op.cit., p. 316.
37. This also reduces the potential of such demands as stressors, see for example the literature on the role of anticipation cited in R.S. Lazarus, op.cit., pp. 31-38.
38. R.P. Grinker and J.P. Spiegel, Men Under Stress, (New York: McGraw-Hill, 1945).
 Also, N. Gross, et. al., op.cit.
39. I. Altman and E.E. Lett, "The Ecology of Interpersonal Relationships: A Classification System and Conceptual Model", in J.E. McGrath, op.cit., pp. 177-201.
40. That certainty on the part of all concerned also has stress reducing properties.
 See i.e. R.S. Lazarus, op.cit., Chapter 2, p. 43.
41. See R.P. Grinker and J.P. Spiegel, op.cit., p. 89.
 Also, I. Altman and E.E. Lett, op.cit.

42. See R.S. Lazarus, op.cit., pp. 31-38.
43. It seems that in such situations there is a very fast and strong response of the system.
44. See R.S. Lazarus, op.cit., Chapter 14.
45. Courts could be under pressure of evaluation in terms of legal correctness of the decisions.
46. Appeals are such a rarity that it is very unlikely that courts are subject to this stress.
47. Thus the decisions of lower criminal courts are very rarely discussed in legal journals and books.
48. This point has been made most forcefully by A.S. Blumberg in Criminal Justice, (Chicago: Quadrangle Books, 1967).
49. This is viewed as a stress reducing situation by most psychologists. See i.e. J.R.P. French, Jr., and B.B. Raven, "The Base of Social Power", in D. Cartwright and A. Zander, op.cit.
50. This literature is discussed in Chapter 1.
51. Uncertainty of signals, questioning of the very essence of the structure, doubts about outputs, etc. all have stress producing properties.
52. See D. Easton, op.cit., p. 275.

Also, D. Easton, A Framework For Political Analysis, (Engelwood Cliffs, New York: Prentice-Hall, 1965), Chapter 8 in particular.
53. See J. Hogarth, op.cit.
54. It is sometimes even difficult to assess which structure is the object of demands - courts, police, lawyers, penitentiary systems, etc.
55. In particular see the work of Almond and Verba, and R.E. Lane's studies of the attitudes and political culture of the poor.

See G.A. Almond and S. Verba, The Civic Culture, (Boston: Little, Brown & Co., 1965).

R.E. Lane, Political Ideology, (New York: Free Press, 1968).

R.E. Lane, Political Life, (Glencoe, New Jersey:

Free Press, 1959).

R.E. Lane, Political Man, (New York: Free Press, 1972).

56. See Almond and Verba, op.cit., p. 481.
57. See Almond and Verba, op.cit., p. 487.
58. See i.e. Ontario Law Reform Commission Report on Organization of Courts in Ontario.
59. See i.e. J.E. McGrath, op.cit., Chapter 3. Lazarus also agrees with this statement.
60. See i.e. W.J. Goode in C.W. Beekman and P.F. Secord, op.cit., p. 381.

Also, B. Weybrew, "Stress and Anxiety", in C.D. Spielberger and I.G. Sarason, eds., op.cit., p. 83.

M.H. Appley and R. Turnbull, Psychology of Stress, (New York: Appleton and Croft, 1967).

61. There is a total agreement on this point among psychologists of stress.
62. See The Report of the Ontario Law Reform Commission on Organization of Courts in Ontario.
63. Otherwise practically all demands will be unsatisfied.
64. See P. Russell, "Judicial Power in Canada's Political Culture", in M.L. Friedland, ed., Courts and Trials: A Multi-Disciplinary Approach, (Toronto: University of Toronto Press, 1975).
65. Regina v. Great West News Ltd., et. al. (1970-72, W.W.R.).
66. See J. Hogarth, op.cit., and the literature in his bibliography.
67. Both Easton and psychologists of stress as well as students of courts view this as a crucial element of the analysis.
68. This literature has been summarized in Chapter 1.
69. This literature has been summarized in Chapter 1.
70. This literature has been summarized in Chapter 1.

CHAPTER III

METHODOLOGY AND POPULATION

RESEARCH DESIGN

If the court system is under stress, or facing an imminent crisis situation, it can be expected that an examination of the judicial decision-making process will provide ample and congruent evidence. This study proposes to examine the sentencing process in a lower criminal court in Winnipeg, in an attempt to find whether there is evidence supporting some of the major charges against these courts, namely discrimination against defendants with low socio-economic status, differential treatment of those who are not represented, and the inability to cope with the volume of cases and input of information. This study is restricted to the examination of sentencing decisions in a lower criminal court and therefore does not and cannot shed light on the totality of judicial activities. Sentencing is however ~~the~~ core of judicial activity; thus it is the most important area one can examine. Furthermore, data obtained from direct courtroom observation cannot provide information about the formal and informal diversion of potential cases away from the courtroom to various social agencies.

Through an examination of the following elements, all of which have been identified as potential stressors, the researcher should be able to assess the stability of the Magistrate Court in Winnipeg.

a) Previous Convictions

The previous record of the accused provides some of

the most important information available to the court. As the previous record provides fairly complex information about the past behaviour of the accused, (even the simple classification of the types of previous record has seven categories) it should serve as an important indicator in determining the sentence.

The stressful potential of this element is further enhanced by the fact that the number of offenders with extensive records of previous offences is proportionately very high, according to most of the studies of the rates of recidivism.¹ If the court is under stress as a result of the input of this element, there should be ample evidence of the inability to utilize and integrate the information provided by the previous record of the accused, revealed in the manner in which the court utilizes this information. If the court is capable of handling the information provided by previous records in a satisfactory manner, one could assume that generally speaking, the recidivist would receive harsher treatment than the first-time offender, and that the type and extent of the previous record would also be taken into account. Furthermore, there should be no evidence of filtering and selecting the information on the type and extent of previous record in any orderly fashion. Signs of a lack of differentiation between the offender with a previous record and the offender without such a record would indicate that the court is under stress.

b) Plea

The plea entered by the accused is another important

piece of information available to the court. As the literature indicates that a not-guilty plea leads to a greater allotment of time to reach a decision,² one can assume that a large number of not guilty pleas would have a stressful impact on the courts due to the pressures of time. A possible indicator of stress due to the pressure of time as a result of a not-guilty plea would be revealed in harsher treatment of those offenders found guilty who pled not guilty than of those offenders who pled guilty. If there is little or no stress as a result of plea one would assume little differentiation of offenders who are found guilty regardless of plea.

c) Bail Decisions

Bail decisions are traditionally a separate area of examination, which must also be considered in terms of its stress producing properties. As the disposition of cases at first-hearing rather than in a series of hearings reduces the time pressure on courts, a high percentage of bail hearings and particularly bail refusals should increase considerably the amount of work the court faces. The treatment of bail decisions at the point of disposition should serve to indicate whether courts are coping satisfactorily with the additional pressure resulting from bail decisions. If the court is not coping satisfactorily, evidence should be found in the lack of congruency between bail refusals and sentencing. Evidence of satisfactory coping should be indicated by lighter sentences in terms of severity and type for those who are granted bail.

d) Length of Trial

The time element is another dimension of the trial which should be a strong indicator of stress. Evidence of the courts' ability to handle stress should be revealed in the capability of the court to reach decisions in a short time. Further indicators of the stability of the courts should be found in the identification and handling of other time consuming elements of the trial. If the courts are unable to minimize time consuming elements it is reasonable to assume that the result would eventually be a crisis situation (given the increasing caseload). Conversely, if the data provides evidence of the courts' ability to recognize and reduce the time-consuming elements, one can assume that it is further evidence that the court is able to cope with stress.

e) Individual Judges

Evidence of significant variance between individual judges in their respective abilities to cope with the pressures of time and their respective treatment of similar offenders should be considered as indicators of stress both in individual as well as institutional terms. On the other hand, consistency and similarity of treatment of similar offenders should be viewed as evidence of stress reducing properties.

f) Legal Representation

As the presence of a lawyer in the courtroom is beyond judicial control and increasingly subject to governmental policies, it can have stress minimizing or inducing

properties. The manner in which the judges cope with the presence of, and demands introduced by, lawyers should provide some indication as to the degree of stress introduced by the counsel for defense. Significant differences in the sentences received by represented as opposed to unrepresented defendants will be considered as evidence of stress. If the data shows that represented defendants are less likely to receive severe sentences, the frequent claims to that effect would be reinforced.

g) Socio-Economic Status

The most frequent charges against the courts are based on the hypothesis that poor defendants receive harsher treatment than affluent defendants. A survey of the literature indicates that there is a need to empirically examine this proposition before the validity of such claims can be assessed. An examination of the dimensions of the relationship between the socio-economic status of defendants and sentencing dispositions should answer with some degree of certainty the basic question posed by this study: are the courts unable to cope with the stress which they are under or are they coping successfully with ever-increasing demands?

h) Other Elements

There are other elements of the trial which might contribute to stress in the courts which were excluded from this study either due to the time limit (number of cases), or as a result of a value judgment. For example as a result of the latter the impact of the Crown Attorney on the trial has

been excluded. Due to the fact that the Crown was represented by a large number of lawyers, who occasionally appeared at the last minute, it proved to be impossible to find out who prepared the case. Furthermore, for all practical purposes the Crown Attorneys were indistinguishable in their performance. (This was confirmed by some preliminary analyses).

METHODOLOGY

The assessment of the stability of the court as a structure was undertaken in the setting of a Magistrate's Court in the city of Winnipeg. Although a case study can be utilized in hypothesizing about other populations, there is always a danger in generalizing to wider populations from the findings of one particular study. In studies of judicial behaviour it is very often assumed that the findings from one jurisdiction are applicable to other jurisdictions. The Canadian literature on judicial behaviour often even utilizes American studies either in support of or in place of Canadian evidence. Only some of the very careful, methodologically-oriented students pay any attention to this problem.³ For example, R.G. Hann, although his data is based on a sample of cases disposed by the Toronto Provincial Courts, in many instances has tentative conclusions referring to the "Criminal Court System"⁴ or even the "Canadian Criminal Court System"⁵. While keeping in mind the inherent danger of generalization, it is worthwhile assessing the extent to which

the findings from an observational study of the Winnipeg Magistrates' Court are relevant to the lower criminal courts in other Canadian jurisdictions. The dearth of information in this field also enhances the importance of such a task.

There are some commonalities shared by all the lower criminal courts in Canada. All of the courts operate within the same federal legislation (although there are some discrepancies based on provincial statutes). The judges, the counsel for defense and prosecution belong to the same legal culture (at least within English Canada). Finally, as the substantive chapters of this thesis demonstrate, it appears that the sentencing process has many similarities, regardless of where in Canada the study was conducted. As by far the majority of Canadians live in urban centers, it is beneficial to note the comparability of the various urban regions across Canada. The final support for the generalization of the Winnipeg findings to other lower criminal courts or at least those in medium sized cities comes from the study of urban development and urban politics in Canada. L.O.S. Stone points out that the differences in the urbanization in Canadian regions have "narrowed sharply" since 1941.⁷

J.M.S. Careless, one of the prominent students of Canadian urban development and the author of the concept of metropolitanism provides evidence of significant similarities between Winnipeg and Toronto.⁸ The same author while discussing the "urban west"⁹ states that "Winnipeg, Edmonton,

Calgary and Vancouver rose to become affluent, technologically advanced and socially fast maturing urban units".¹⁰ W.L. Morton also notes the increasing homogeneity of urban Canada, stating that "The West, in other words, during the past century, has been Canadianized... that is to say that in part it was Ontarioized."¹¹ Even some of the studies which focus on the development of a comparative methodology for urban centers treat metropolitan areas as a group,¹² and refer to a "nationally integrated urban system"¹³ consisting of three metropolises and 12 cities of regional significance.¹⁴ Therefore although all the data and analysis is limited to this particular court, at least some of the findings and conclusions should be applicable to other lower criminal courts in comparable urban centers. The data pertaining to this study was obtained through direct observation of the activities in the courtroom of the then Winnipeg Magistrates' Court (since re-named Provincial Court) over a three month period starting May 17, 1971 and ending August 9, 1971. The method of direct observation was chosen since there were no adequate records of the court in existence. As this study focusses primarily on sentencing decisions, only those cases ending in a final disposition were recorded. Cases moved to higher courts and preliminary inquiries were excluded.

The information utilized in this study was mainly obtained through direct observation in the Winnipeg Magistrates' Court by two independent observers, although supplementary

information was obtained from police arrest sheets, through the courtesy of Crown-Attorneys, and from court dockets. After each day of hearings the observers compared their records and each case was recorded on data sheets (see Appendix A). The duration of each case was measured by using stop-watches from the time the case was called to the pronouncement of the sentence. In this manner 1197 cases were recorded constituting a universe for the period under study and a sample in terms of a yearly perspective. (The only detected seasonal characteristic which might affect the overall implications of the findings lies in a relatively large proportion - 7.2% - of charges under the British Railway Act.) The collected data was then coded and transferred from the data sheets to machine punched cards.

Two general types of analyses were then performed, namely an analysis of the total population and an analysis by groups of charges. In the former, the whole population of those sentenced was treated as homogenous, in order to determine the general trends in the sentencing process (ignoring the charges faced by the defendants). This type of analysis is valuable since it treats the sentencing process in global terms. The nature of the sentencing process encourages such an approach, as the rapidity with which the defendants appear before judges and the lack of legal arguments make the process take on the appearance of a mass decision-making process, without significant differentiation of defendants and their

cases beyond minimum legal requirements. This type of analysis was followed by grouping the charges and by dividing according to the main groups of charges (see appendix B). Comparisons of the results obtained by this method were made whenever possible, and where differences were found, possible explanations were offered.

For the purposes of this study two specific types of analyses of the sentence itself were performed; an analysis of the severity of the sentence and an analysis of the type of sentence. In order to conduct the former, a scale of severity of the sentence was constructed (see Appendix C). The uniform measure of 'days in jail' was utilized for this purpose. Fine sentences were converted into days in jail by using a formula in which ten dollars was equal to one day (At the time of the study, this was the formula used by the courts in converting unpaid fines into jail sentences). As probationary sentences are converted directly into jail sentences in case of violation (a frequent occurrence), one day of probation was considered equal to one day in jail. There is perhaps a certain degree of artificiality in using a common denominator for jail sentences, probationary sentences and fines. For this reason, a second type of analysis was conducted in which sentences were divided into seven categories and ranked from the least severe (fines) to the most severe (time plus fine) (See Appendix D). It was hoped that a comparison of these measures of severity would lead to a more

accurate assessment of the type of sentence.

Through the utilization of the above-mentioned techniques of analysis, the relationships between the following characteristics of the defendant and the dispositions received were examined:

a) Previous Record and the Sentence

Two types of scales were used to categorize the previous record of the accused; a nominal scale of all previous convictions (see Appendix E) and a scale of the severity of the previous record from non-criminal, unrelated offences to non-criminal and criminal related offences (see Appendix F). The latter scale was established in order to measure the manner and extent in which judges utilize the available information.

b) The Socio-Economic Status of the Accused and the Sentence

In analysing the relationship between the socio-economic status of the accused and the sentence, a comparison of different indices of socio-economic status was made. The over-all socio-economic status was measured utilizing the Blishen Socio-Economic Index which ranks Canadian occupations in terms of their social standing.¹⁵ This scale appeared to be most appropriate since it is based solely on Canadian data and it also allows for comparison with other studies utilizing the same scale. One possible short-coming is the fact that the scale is somewhat dated. A second analysis was performed dividing the population into the employed v. the unemployed.

There are some problems with this analysis since in many instances information as to the employment status was obtained from police files which were not available to the sentencing judge. A third measure of socio-economic status which was utilized was the assessment of income (see Appendix G). The reliability of this information is not very high since the defendants frequently employ a simple strategy to impress the judge, that strategy being an exaggeration of their stability in terms of income and employment. A fourth measure was obtained by utilizing the stated profession or occupation of the defendant. Confidence in the usage of these instruments is confirmed by the fact that in almost all instances congruent results were obtained in a comparison of all four scales. In addition, a series of analyses were performed in which the population was grouped according to ethnicity (see Appendices H and I). The information as to the ethnicity of the defendants was obtained from police arrest sheets and is based on self-reporting. Since ethnicity is a subjective concept, a possible problem can occur in the category of 'Native Offenders' which can either be based on self-reporting or on the legal definition of a 'treaty Indian'. No information was available to make such a distinction.

STATISTICAL PROCEDURES

Three statistical procedures were utilized throughout the Winnipeg study. Initially after obtaining information from the analysis of means and marginals, the data was analysed

utilizing chi-square since most of the analysis is bivariate. Secondly, in order to determine whether the means of several groups differed significantly, the simple analysis of variance - F test - (A N O V A) was applied, answering the question: "Is the variation between groups greater than the variation within groups to show that the groups probably represent different parent populations?".¹⁶ Thirdly, several multi-variant analyses have been utilized in order to better understand the inter-relationship between the different groups of variables.

DESCRIPTION OF THE POPULATION

a) Sex

The population under study was composed mainly of males (see table 3-1). Among the female offenders there is a startling over-representation of native women who constitute 42.4% of all female offenders (see table 3-2).

b) Age

An astounding 41% of the population under study falls between the ages of 18 to 24 years, (see table 3-3) yet according to the Dominion Bureau of Statistics 1971 census, the age group between 15 and 24 comprises only 9% of the total population of the city of Winnipeg. A progressive decline in the crime-rate occurs with a progression in age, as can be seen by table 3-3. However, there is some indication of a slight increase in criminal activity with a corresponding increase of age at certain points (see table 3-3). This suggests that specific age groups are in need of further and

isolated study in order to better understand the causes for these variations.

c) Marital Status

The vast majority of the population was single, the next largest category consisted of those who were married, followed by those who were separated or divorced and finally by those living in a common-law relationship (see table 3-4).

d) Education

As can be seen from tables 3-5 and 3-6, the education of the vast majority of those sentenced by the court ended before the completion of high school. Only 48 people out of the total sample attended university (see tables 3-5 and 3-6).

e) Affluence

The population under study shows every sign of economical deprivation (see table 3-7). Perhaps the most revealing figure is that of unemployment - 61.4% of all those sentenced fall into this category (see table 3-8). Among those who claim to have an occupation, 60% identified themselves as 'unskilled' (see table 3-9). Again looking at subjective classification of occupation (see table 3-10), it is obvious that very few defendants were willing to volunteer the information that they were unemployed (22.5%). The utilization of Blishen's Socio-Economic Index confirms this picture: 64.3% of the population score low on this index and only 2.3% have a relatively high score (see table 3-11).

Table No. 3-1

Sex of the Offenders

SEX OF THE OFFENDER	N	%
Male	1065	89.1
Female	129	10.9

Note: Census for 1971 shows population of Winnipeg broken by sex is composed of 49% males and 51% females.

Table No. 3-2

(row percentages)

Total Population

Sex By Ethnicity

SEX	ANGLO	NATIVE	EAST EUROPEAN	WEST SOUTH EUROPEAN	NORTH CENTRAL EUROPEAN	N
Male	37.8%	20.5	12.3	19.4	10.0	930
Female	22.8%	42.4	9.8	16.3	8.7	92

Chi Square = 31.19899 - 4 degrees of freedom
significant at .005

Number of People

Table No. 3-3
Break-Down by Age

18 yrs. - 20 yrs. = 23%

18 yrs. - 24 yrs. = 41%

Mean = 31 yrs.

Mode = 27 yrs.

f) Ethnicity

As expected, the ethnic composition of the population under study bears little resemblance to that of the city of Winnipeg. As has been reported in many studies, the most noticeable over-representation occurs in the case of Native people (see tables 3-12 to 3-14).

g) Charge

Out of the total number of charges, 60.2% were tried under the Criminal Code and 39.8% under other statutes (see table 3-15). The breakdown of charges is stated in table 3-16.

h) Previous Record

The population under study show a very high percentage of repeating offenders (see table 3-17), with a large number of convictions for previous offences.

i) Arresting Officers

The population under consideration was brought into trial as a result of the efforts of various police forces (see table 3-18). What is of interest is the fact that there are significant differences in the source of arrest pending on the ethnicity of the accused (see table 3-19). Noticeably, Native offenders are most likely to be arrested by the Morality Division.

j) Legal Representation

The majority of those appearing before the court were unrepresented. Those who were represented were almost

Table No. 3-4

Marital Status

MARITAL STATUS	N	%
Married ¹	242	20.7
Single ²	663	56.6
Separated/Divorced	195	16.7
Common-Law	71	6.1

1 DBS figure for 1971 - 47%

2 DBS figure for 1971 - 20%

Table No. 3-5

Education

Table No. 3-6

Education

Education	N	%
University Graduate	9	.8
Some University Education	39	3.3
Grade 12	139	11.8
Grades 8-11	751	63.7
Grades 5-7	145	12.3
Grades 1-4	96	8.1

Table No. 3-7

Income

Income	N	%
\$8,000 - 10,000	14	1.2
\$6,000 - 8,000	16	5.1
Below \$6,000	331	27.1
Student	74	6.2
Welfare - Single	531	44.4
Welfare - Married	28	2.3
Welfare - Children	44	3.7
Not Stated	110	9.2

Table No. 3-8

Employment Status

Employment Status	N	%
Employed	451	38.6
Unemployed	716	61.4

Table No. 3-9

Stated Occupation

Occupation	N	%
Unskilled	512	60.0
Skilled	314	36.8
Self-Employed	16	1.9
Professional	12	1.4

Table No. 3-10

Stated Occupation

Occupation	N	%
Military Police	7	2.3
Farm, Fish, Trap	8	2.6
Business	34	11.1
Domestic	24	7.8
Student	78	25.4
Pensioner	16	5.2
Welfare	44	14.3
Housewife	27	8.8
Unemployed	69	22.5

Table No. 3-11

Socio-Economic Index

	N	Adjusted %
High	27	2.3
Medium	400	33.4
Low	769	64.3
Total	1196	100.0

Table No. 3-12

Ethnicity

Ethnic Origin	N	%	1971 Dominion Bureau of Stats. Census, for Winnipeg
Anglo	374	37.6	71.0%
French	178	17.9	6.0%
Indian and Metis	230	23.1	.5%
Ukrainian	81	8.1	7.0%
Polish	20	2.0	2.0%
Scandinavian	29	2.9	
German	51	5.1	7.0%
Italian	10	1.0	1.0%
Austrian	10	1.0	
Dutch	11	1.1	

Table No. 3-13

Ethnicity

Ethnic Origin	N	Adjusted %
Anglo	374	36.5%
Native	230	22.5%
East European	124	12.1%
West South European	195	19.0%
North Central European	101	9.9%

Table No. 3-14

(column percentages)

Ethnicity by SEI

(Total Population)

SOCIO-ECONOMIC INDEX	ANGLO	NATIVE	EAST EUROPEAN	WEST SOUTH EUROPEAN	NORTH CENTRAL EUROPEAN	ROW TOTAL
High	1.9%	.5%	4.9%	3.1%	3.4%	2.3%
Medium	40.1	11.7	41.2	33.1	53.9	33.4
Low	58.0	87.9	87.9	63.8	42.7	64.3
N	317	214	102	163	89	

Chi Square = 83.35645 with 8 degrees of freedom

significant at .005

Table No. 3-15

Type of Charge

Type of Charge	N	%
Criminal	720	60.2
Non-Criminal	476	39.8

Table No. 3-16
Type of Charge

Type of Charge	N	%
Assaults	88	7.35
Fraud	26	2.1
Minor Traffic	114	9.5
Serious Traffic	41	3.4
Theft Under \$50	117	9.8
Theft Over \$50	118	9.9
Other Offences Against Property	147	12.3
Sexual Offences	9	0.7
Liquor Related Offences	329	27.5
Possession of Weapons	23	1.9
Miscellaneous	185	15.5

Note: Above the already very high percentage of liquor related offences liquor was involved in additional 21.6% of cases.

Table No. 3-17

Previous Convictions

Previous Convictions	N	%	Adjusted %
Yes	618	51.6	57.5
No	456	38.1	42.5
Not Stated	123	10.3	Missing

Note: 58.7% of those with previous record had more than one previous conviction.

5.6% of the total population had 8 or more previous convictions.

Table No. 3-18

Arresting Officer

Arresting Officer	N	%
Detective	547	45.7
Traffic Officer	201	16.8
CPR	89	7.4
Morality	359	30.0
Health Department	1	.1

Table No. 3-19

(column percentages)

Arresting Officer by Ethnicity

Arresting Officer	Anglo	Native	East European	West South European	North Central European
Detective	44.4%	33.9%	57.3%	48.2%	60.4%
Traffic	15.2	6.1	16.1	10.8	12.9
CPR	11.8	5.2	1.6	10.8	5.9
Morality	28.6	54.8	24.2	30.3	20.8
Health Department	.0	.0	.8	.0	.0
N	374	230	124	195	101

Chi Square = 94.07756 with 16 degrees of freedom
significant at .005

equally divided between counsel on retainer and legal aid counsel (see table 5-1).

Conclusion

The picture of the population thus appears to be clear: predominantly young, male, unemployed with low occupational skills, low levels of education, single or with an early record of marital disfunction and frequently with recidivistic characteristics. The largest group are single people on welfare who constitute 44% of the total population. The population in question shows all the symptoms of alienation, low achievement, and frequent social problems. It seems that legal confrontation is one more part of a congruent life pattern on the margin of society. It is this very situation which leads to powerful criticism of the courts. The courts are obviously neither responsible for, nor equipped to deal with, the problems these people face. It is the very low socio-economic status of the defendants that results in charges of differential treatment against the courts. The best the court can do is to avoid differential treatment on the basis of socio-economic characteristics, but the courts have no choice but to sentence those who appear and plea guilty before them. The stress^o resulting from this situation is unavoidable to the extent to which the characteristics of the population in question are constant. The courts are aware of the socio-economic profile of most of the defendants, and anticipate the continuation of a similar pattern. The effects of stress are

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thus reduced by judicial anticipation. Furthermore, (with the exception of native offenders) there are no powerful spokesmen for these groups, therefore the court has neither the experience nor the expectation of the input of powerful demands on behalf of the poor offenders.

1. See discussion of this point in Chapters one and six.
2. K.A. Carlson, "Some Characteristics of Recidivists", Canadian Journal of Criminology and Corrections, Vol. 15, no. 4, 1973, p. 76.
3. R.G. Hann, op.cit., p. 12.
4. R.G. Hann, op.cit., p. 154.
5. R.G. Hann, Ibid., p. 38.
6. See G.A. Nader, Cities of Canada: Theoretical, Historical and Planning Perspectives, Vol. I. Canada, MacMillan of Canada, 1975. In particular pp. 202-214. Also L.O. Gertler and R.W. Crowley, Changing Canadian Cities: The Next 25 years. (Toronto: McClelland and Stewart, 1977).
7. L.O. Stone, Urban Development in Canada. Ottawa: Dominion Bureau of Statistics, 1967, p. 97.
8. J.M.S. Careless found in G.A. Stelter and A.F.J. Artibise (eds.), The Canadian City: Essays in Urban History Toronto: McClelland and Stewart Ltd., 1977, p. 434.
9. J.M.S. Careless, "Aspects of Urban Life in the West 1870-1914", p. 25 in A.W. Rasporich and H.C. Klassen, (eds.), Prairie Perspectives 2. (Toronto, Montreal: Holt, Rinehart and Winston of Canada Ltd.), 1973, p. 25.
10. J.M.S. Careless, Ibid., p. 26.
11. W.L. Morton "The West and The Nation 1870-1970", in A.W. Rasporich and H.C. Klassen (eds.), op.cit., p. 20.
12. See i.e. G.A. Nader, op.cit.
13. G.A. Nader, op.cit., p. 202.
14. G.A. Nader, op.cit., p. 214.
15. B.R. Blishen, Canadian Review of Sociology and Anthropology, Vol. 4, no. 1, Feb. 1967, pp. 41-53.
16. N. Nie, B.H. Bent and C.H. Hull, Statistical Package For The Social Sciences, (New York: McGraw-Hill Book Co., 1970).

See also, K.B. Rai and J.C. Blydenburgh, Political Science Statistics, (Boston: Holbrook Press Inc., 1973), Chapter 7.

See also, O. Benson, Political Science Laboratory, (Columbus, Ohio: C.E. Merrill Publishing Co., 1969), p. 158.

See also, J. Palumbo, Statistics in Political and Behavioural Science, (Appleton Century Crofts, 1969), chapter 11 and literature quoted at the end of this chapter.

CHAPTER IV

SENTENCING AND SOCIO-ECONOMIC STATUS

INTRODUCTION

"The poor are arrested more often, convicted more frequently, sentenced more harshly..."¹ Statements of this nature are very frequent, and no longer surprising.² The importance of such charges against the courts cannot be underestimated. If indeed those who hold such opinions are correct, then it is a very powerful indictment of the judicial decision-making process. Differential sentencing on the grounds of a person's sex, ethnicity, educational background, type of employment or affluence goes strictly against the normative model of criminal justice. Well documented evidence of such practices could undermine the stability of the courts, and could clearly provide munition for very powerful demands in a democratic society. It is inconceivable that our legislators and courts could subscribe to differential sentencing policies providing for harsher sentences for native offenders, holders of low-skilled jobs or those who did not complete high school. The political system at large would most likely face, in such a situation, a multitude of stressful demands, and have to respond with extraordinary policies. Yet this is precisely what many of the critics of the court system claim to be the case.

It is surprising that, in the light of the gravity of such charges, empirical studies assessing the relationship

between the socio-economic status of the accused and the sentence are very scarce and far from conclusive. In Canada there are so far only three studies which shed some light on the problem; however these studies are limited in scope and inconclusive. K.B. Jebson provides some evidence that "poor people go to jail for lack of money".³ He also finds differences in the sentencing practices of various lower criminal courts in Nova Scotia. Unfortunately his findings are limited to fines, and furthermore, he provides practically no data in support of the above statement. R. Bienvenue and A.H. Latif in "Arrest, Disposition and Recidivism: A Comparison of Indians and Whites" conclude that the relationship between S.E.S. and sentences is at best tenuous. They also find no evidence of harsher sentencing of native people.⁴ The lack of analysis on their part of the legal determinants of sentencing limits the value of their findings. Similar conclusions have been reached by D.J. Schmeiser et.al. who find that "native inmates in the Prince Albert Penitentiary obviously have a higher proportion of sentences in the short sentence categories than non-native inmates."⁵ They also find that native offenders are less likely to receive probationary sentences than non-natives. As these conclusions are reached on the basis of the records of inmates in the penitentiary without any analysis of the sentencing process leading to the disposition, they provide little information as to the

sentencing behaviour of various courts.

The above-mentioned studies do not provide sufficient evidence on the basis of which sweeping generalizations about the court system in Canada providing different 'justice for the poor' can be sustained. The courts and the policy makers will find the critical analysis of these demands, which are based on such limited and inconclusive evidence, to be an easy task, thus reducing the element of stress resulting from the demands.⁶

Most studies of sentencing disparities come from the United States, and Canadian scholars are clearly influenced by the American findings.⁷ However the debate as to the impact of non-legal variables on sentencing is still unresolved. Some studies emphasize the importance of socio-economic variables: "(We) have concluded, on the basis of hard statistical data, that in determining guilt or innocence a man's finances are more important than the circumstance surrounding the charge. And ultimately money determines the final disposition".⁸ Others are equally vehement that; "In a sample of non-capital cases, however, the relationship between class and disposition was diminished in strength, and reduced below statistical significance...".⁹ Typical among those who find a positive relationship between the severity of sentences and socio-economic status are the results of S.R. Bing and S. Rosenthal who found that 55% of their sample earned not more than \$75.00

a week or less, and that the poor person was two to three times more likely to be sentenced to jail than an affluent person.¹⁰ Similar findings emerge from R. Hood's study of four ~~Magistrate~~¹¹ Courts in London, England. He discovered that some of the courts under examination treated defendants with regular jobs and 'good' working habits more favourably. Such offenders were more likely to receive probationary sentences, whereas those with unsteady working habits more likely faced imprisonment. The explanation for the variance in sentencing is somewhat more complicated since Hood finds that the characteristics of the area within which the court is operating contribute more to the variance than do individual characteristics.¹² Cressey provides a different explanation of the higher rate of arrests, conviction and prison sentences among people on a lower socio-economic plane. His explanation is twofold; firstly "the statistics on ordinary crime so consistently show an over-representation of lower class persons that it is reasonable to assume that there is a real difference between the behaviour of the members of this class and the members of other social classes so far as criminality is concerned".¹³ Furthermore, "the person's position in the occupational structure determines the opportunity for some kinds of crime and also determines whether or not a person will possess the skills necessary to perpetrate some type of offence".¹⁴ In Cressey's opinion, members of the lower class have the skills

necessary to commit crimes against property. This whole argument is based on a very loose interpretation of crime statistics.

Studies examining selected socio-economic variables are more frequent. The sentencing of black Americans has been under the greatest scrutiny. The majority of the studies finds no relationship between ethnicity and the severity of the sentence. Green, Skolnick, Black, Trebach, Mileski and scores of other studies have come to this conclusion.¹⁵ Some of the authors find different (but not necessarily discriminatory) treatment of black Americans. Thus M. Mileski found that "the court incarcerates over three times as many white defendants as black defendants for intoxication. The treatment is plainly different but not plainly discriminatory."¹⁶ She suggests as a partial explanation the hypothesis that the white offender comes from the skid row area while his black counterpart is younger, more often employed and dressed comparatively better. She provides no evidence to support this conjecture. Even if she is correct, one form of discrimination replaces another.¹⁷ There are however some studies which do claim discrimination on the grounds of ethnicity.¹⁸ Other studies examine the relationship between age, education and religious affiliation and sentencing. The usual conclusion is that there is no significant relationship between these variables and the sentence.¹⁹

J. Hogarth provides us with some S.E.S. correlates of judicial attitudes toward various types of sentences:

"Older magistrates tend to be somewhat more offence oriented than offender oriented. They also appear to be rather more discriminating in assessing offences, considering a large number of factors to be 'essential' to the proper assessment of a criminal act."²⁰ He found magistrates with a professional family background to be more positive toward parole and probation. Conversely, those from a working class background were more punitive.²¹ Hogarth also reports variance between urban and rural magistrates: "Urban magistrates tend to simplify the decision process by operating with a large number of presumptions which guide them in the exercise of discretion. Moreover, these presumptions are more likely to be in the direction of using imprisonment rather than probation or fines".²² As the relationships between judicial attitudes, their S.E.S. characteristics and sentencing behaviour have never been tested, they remain as hypotheses only.

The most authoritative evaluation of the whole area of the relationships between the socio-economic characteristics of the offenders and sentencing decisions is found in the work of J. Hagan, who evaluated a representative sample of studies claiming a positive relationship between race, socio-economic status, age and sex and the sentencing process. Ironically enough, although this is the work of a Canadian scholar, not

a single Canadian study is included. Among the studies which Hagan critically analysed, not one definitively proved a significant relationship with respect to the impact of S.E.S. on sentencing. Some of the studies which Hagan evaluated did however show a modest relationship between race and disposition. No relationship was shown to exist between age and sex and sentencing. Many of the studies under consideration did not examine the necessary legal variables, others did not provide any tests of significance and in some instances, the characteristics of the populations in question were so skewed as to render statistical tests impossible.²³

Hood and Sparks point out three future research strategies which should be utilized in order to better understand the determinants of sentencing disparities and the causes thereof:

- 1) Comparisons should be made between the proportions of offenders receiving various sentences in different courts;
- 2) Studies of a large number of cases should be undertaken on the assumption that different variables will be distributed at random; and
- 3) Studies should be undertaken controlling for different offenders coming before different judges by using matching or predictive techniques.²⁴

Since studies of this nature are very difficult to conduct, the general direction of the research will probably continue to confine itself to case studies of one court.

DATA ANALYSIS

The data indicates primarily a high rate of conviction. Acquittals account for only 1.4% out of over 1,100 cases. This figure is understandable as 94.9% of the accused pleaded guilty. These two figures indicate that both the police forces and the Crown perform extremely well in screening cases coming before the court. Since both cases ending in acquittal and those in which a not guilty plea has been entered are more time consuming, the organs of arrest and prosecution function remarkably as stress reducers. (It can be stated once again that at the time of data collection plea bargaining, if utilized, occurred as a result of totally informal negotiations between the Crown and the defense counsel. Furthermore, nothing in the courtroom indicated whether such negotiations took place.) By assuring that the courts have only a small number of time-consuming cases, they assist the court in coping with the volume of "business".

Fines compose the largest group of sentences. 43.4%²⁵ of all sentences are fines, with only 24.5% consisting of \$100.00 or more. This also acts as a stress reducer since "fines have the advantage of requiring less thought"²⁶ and therefore these decisions take less time to reach. It is also perhaps worth mentioning that fines (in general) provide a relatively large source of income. This fact also has stress reducing properties in times when governments scrutinize their expenditures.

Jail sentences form 30% of all dispositions of which 48.9% are for a period not exceeding six months. Probationary sentences compose 24.1% of all sentences. There is a marked judicial preference for probation without supervision which composes 61.9% of the total probationary disposition. Such sentences are not only less time-consuming but they might also be a reflection on already over-taxed supervisory services.

The data has been analysed from two perspectives;

1. The total population of sentences has been analysed; and
2. An analysis has been undertaken controlling for charges.

The Total Population

The analysis of the total population shows an interdependence between various socio-economic variables, and the type and severity of sentence. The analysis of the relationship between the severity of the sentence for the employed as opposed to the unemployed defendants shows that there are no marked differences in sentences on the lighter end of the scale. (See Table 4-1). The difference manifests itself from the medium to the harsher end of the scale with the employed receiving a greater proportion of sentences of medium severity while the unemployed receive a greater proportion of harsher sentences. Although the differences are not greater than 6.3% at the harsh end of the scale, they are nevertheless statistically significant.

Table No. 4-1

(row percentages)

SEVERITY OF THE SENTENCE BY EMPLOYMENT STATUS

Total Population

EMPLOYMENT STATUS

Low

High

N

	1	2	3	4	5	6	7	8	9	10	11	
Employed	5.4%	6.4	13.7	13.7	7.6	8.6	10.3	4.2	.7	9.3	20.3	409
Unemployed	4.8%	5.9	12.8	8.9	4.6	3.5	3.5	6.2	6.2	17.0	26.6	564

Chi Square = 77.461

df = 10 significant at .001

Similar overall results were obtained utilizing the Blishen socio-economic index (see table 4-2) although the differences become more pronounced - 69.5% of those scoring relatively higher on the scale received sentences in the lower range as opposed to 46.1% of those with lower scores on the socio-economic index. No variance can be found in the severity of the sentences in relationship to the ethnicity of the accused.²⁷

Since the above analysis is based on standardized sentences, it will be followed by an analysis of the type of sentence received by various socio-economic groups irrespective of charges. The assumption underlying this type of analysis is that fines and jail sentences are more severe than probationary sentences. (It is of course possible and even probable that an affluent person would rather pay a fine and 'forget the whole thing' than be placed on probation; however, the population under consideration is generally so poor that it does not warrant this assumption.) Employment proves to be a good predictor of the type of sentence a person receives (see table 4-3). The unemployed are more than six times as likely to face jail sentences than those who are employed. The employed are more likely to be sentenced to pay a fine. In probationary sentences, the unemployed are more likely to be sentenced to probation with supervision whereas the employed have a better chance of being placed on probation without supervision. As there are such a limited number of acquittals, it is impossible to assess the

Table No. 4-2
(row percentages)

SEVERITY OF THE SENTENCE BY SOCIO-ECONOMIC INDEX (BLISHEN SCORE)

Total Population

SEI

	High											N	
	Low	0	1	2	3	4	5	6	7	8	9		10
High	16.7%	2.8	8.3	25.0	13.9	2.8	8.3	.0	.0	.0	11.1	11.1	36
Medium	4.1%	5.4	12.1	11.7	6.3	8.9	10.2	5.7	2.5	11.7	21.3	315	
Low	5.1%	7.3	15.7	8.6	5.7	3.7	4.3	5.7	4.1	14.5	25.1	509	

Chi Square = 56.903

df = 18 significant at .005

Table No. 4-3

(row percentages)

TYPE OF SENTENCE BY EMPLOYMENT STATUS

Total Population

EMPLOYMENT STATUS	Total Population						N
	ACQUITTAL (0)	PROBATION (1)	PROBATION WITH SUPERVISION (2)	PROBATION PLUS FINE (3)	FINE (4)	TIME PLUS FINE (5)	TIME PLUS FINE (6)
Employed	2.3%	14.3	7.3	3.3	66.7	5.6	371
Unemployed	.9%	16.7	13.7	1.8	36.8	29.4	568

Chi Square = 141.352

df = 5 significant at .005

significance of the socio-economic status of those who are acquitted. The same applies to the small percentage of defendants who receive both time in jail and a fine. Yet another division of the population, into skilled as opposed to unskilled labourers, reveals that those who are in skilled labour positions receive 13.4% of the jail sentences and 18.4% of the probationary sentences, whereas those who are in the unskilled category receive 22.1% of the jail sentences and 12.4% of probationary sentences, showing a marked tendency for harsher sentencing of the unskilled. Furthermore, businessmen are more likely than any other occupational group to be given a fine sentence (56.3%) and only 12.5% of accused businessmen receive a jail sentence (see table 4-4). These findings are supported by many scholars who in other settings observed the importance the magistrates attach to the working habits of the offenders.²⁸

The explanation for the obvious disparities in sentencing practices is not necessarily simple. In cases where a fine is not paid, the offender has to be once more 'processed' by the court in order to convert the fine into a jail term. Thus perhaps the judges are not behaving in an overtly discriminatory manner, but rather attempting to save themselves to some extent from the possibility of having to further deal with the offender who is less likely to pay the fine.

The relationship between socio-economic status and the type of sentence is again confirmed utilizing the Blishen socio-

Table No. 4-4

(row percentages)

OCCUPATION BY TYPE OF SENTENCE

OCCUPATION	ACQUITTAL	PROBATION	PROBATION WITH SUPERVISION	PROBATION PLUS FINE	FINE	TIME (5)	TIME PLUS FINE	N
	(0)	(1)	(2)	(3)	(4)	(5)	(6)	
(1) Military	14.3%	.0	.0	.0	57.1	14.3	14.3	7
(2) Farmer	12.5%	12.5	.0	.0	62.5	12.5	.0	8
(3) Business	3.1%	15.6	6.2	6.2	56.3	12.5	.0	32
(4) Domestic	.0%	22.2	5.6	5.6	50.0	16.7	.0	18
(5) Student	.0%	23.4	12.8	6.4	31.9	25.5	.0	47
(6) Pensioner	.0%	16.7	16.7	8.3	41.7	16.7	.0	12
(7) On Welfare	.0%	12.8	20.5	2.6	30.8	33.3	.0	39
(8) Housewife	.0%	57.1	19.0	4.8	14.3	4.8	.0	21
(9) Unemployed	.0%	14.5	12.7	1.8	36.4	34.5	.9	55

Chi Square = 102.232

df = 48 significant at .005

economic index. As the level of socio-economic status of the offender increases, so does the probability of the offender to receive a fine (see table 4-5). A decrease in social status increases the probability of incarceration. The only type of sentence where those with higher status seem to be more penalized is in the case of probationary sentences reinforced by fines. The most severely penalized offender is the single person who is unemployed and on welfare. 30% of the offenders in this category receive jail sentences (see table 4-5). Keeping in mind the fact that single welfare recipients constitute 44.4% of the total population, this figure becomes even more startling. In other words, this type of offender is more than four times as likely to receive a jail sentence than someone who is employed. These findings are further reinforced when married welfare recipients and married welfare recipients with children are treated as additional separate categories.²⁹ These two groups also appear more frequently in the category of jail sentences than those who are employed. If housewives can be treated as an occupational group, they are more likely than any other group to receive lighter sentences. A housewife has a 57.1% chance of being put on probation without supervision as opposed to a 4.8% chance of receiving time in jail (see table 4-4).

Ethnicity as an independent variable does not contribute to the type of sentence a person receives. This

Table No. 4-5
(Row Percentages)
Type of Sentence By Socio-Economic Index
Total Population

S.E.I.	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	N
1	.0%	8.3	.0	.0	87.5	4.2	24
2	.0%	16.7	16.7	8.3	58.3	.0	12
3	.0%	5.9	11.8	5.9	76.5	.0	17
4	3.7%	15.6	7.5	3.1	53.1	16.8	160
5	1.2%	18.1	10.8	1.2	42.2	26.5	83
6	3.9%	15.0	7.2	3.3	58.8	11.8	153
7	.6%	16.2	13.1	1.7	45.4	23.0	474
8	.0%	20.8	14.6	6.2	35.5	22.9	48
9	.0%	9.8	12.2	4.9	46.3	26.8	41

Chi Square = 66.8

Table No. 4-5

(row percentages)

TYPE OF SENTENCE BY INCOME

INCOME

ACQUITTAI PROBATION PROBATION PROBATION TIME
AL WITH SUPERVISION PLUS FINE PLUS FINE
(0) (1) (2) (3) (4) (5) (6)

\$8-10,000	.0%	23.1	.0	7.7	61.5	7.7	.0	13
\$6-8,000	3.4%	8.6	5.2	1.7	79.3	1.7	.0	58
\$6,000 or lower	2.6%	13.9	9.4	3.5	62.3	7.7	.6	310
Student	.0%	20.8	16.7	4.2	39.6	18.8	.0	48
Unemployed, single on welfare	.5%	15.5	13.4	1.6	38.3	30.0	.7	426
Married, no children on welfare	.0%	34.6	3.8	3.8	42.3	15.4	.0	26
Married, children, on welfare	5.1%	23.1	25.6	.0	20.5	23.1	2.6	39

Chi Square 153.359

df = 36 significant at .005

conclusion is reinforced by the analysis of sentences for specific types of offences. (Only in the case of one charge has a very limited association between sentence and ethnicity been found).

Analysis by Charge

A series of analyses has been performed dividing the population according to the offences with which the defendants are charged. The general policy of sentencing which can be reconstructed from the data shows a consistent pattern of treating various offences differently. Conclusions as to the assessment of the gravity of various offences as perceived by the judges can also be reached.

The data shows evidence that magistrates consistently distinguish between major and minor theft. Offenders convicted of minor theft have an approximately 25% chance of receiving a jail sentence. Given that the value of stolen property in such cases does not exceed \$50.00, that policy is very questionable. As one would expect, as the value of stolen property increases, so does the chance for incarceration. Offenders convicted of theft of property worth over \$50.00 have an approximately 50% chance of serving a jail sentence. For other common offences, the possibility of a jail sentence dramatically decreases. In liquor offences the possibility of a jail sentence is approximately 1:10, for major traffic offences 1:15, and for minor traffic offences 1:33.

a) Theft Under \$50.00

The analysis of sentencing controlling for charges confirms the earlier observation about the interdependence between socio-economic status and the severity of the disposition. In cases of theft under \$50.00 the pattern of disposition reveals that all of the jail sentences were imposed on unemployed offenders (see table 4-6), and 70.6 of those sentenced to jail are single and on welfare. Furthermore, evidence indicates that when jail sentences and fines are converted into a standard measure the unemployed offenders are treated more harshly (see table 4-7). Since 45% of unemployed offenders have no previous record this disparity cannot necessarily be explained by the differences in various patterns of previous criminal behaviour. The pattern of sentencing further reveals that in the instance of probationary sentences the trade-off is very different. The unemployed are more likely to receive probation with supervision whereas the employed receive a greater share of probationary sentences reinforced by fines or probation with no further stipulation. The unemployed are less likely to be acquitted although the smallness of the number of cases in this category decreases the significance of this finding.

b) Theft Over \$50.00

Similar results have emerged as the result of the analysis of sentences in cases of theft over \$50.00. Of those

Table No. 4-6
(column percentages)

THEFT UNDER \$50

Employment Status By Type of Sentence

EMPLOYMENT STATUS

	ACQUIT TAL	PROBATION	PROBATION WITH SUPERVISION	PROBATION WITH FINE	FINE	TIME
	%	%	%	%	%	%
Employed	66.7	31.0	73.9	28.6	68.0	.0
Unemployed	33.3	69.0	26.1	71.4	32.0	100.0
N	3	58	23	7	25	34

Chi Square = 37.942

df = 5 significant at .005

Table No. 4-7

(column percentages)

Theft Under \$50

EMPLOYMENT BY TIME PLUS FINE (in DAYS)

	N	%	Mean In Days
Employed	24	33.3	15.958
Unemployed	48	66.7	61.437
Total	72	100.0	46.278

$$F(1.70) = 9.960$$

$$\text{Prob.} < 01$$

who receive jail sentences, 63% are single and on welfare.

As the social status of the offender decreases, the probability of incarceration increases. As in cases of minor theft, the imposition of fines seems to be reserved for those of a relatively higher status. However, the relationships between various types of probationary sentences are not as clearly portrayed as in the data pertaining to minor theft, and no clear-cut pattern can be detected (see table 4-8). The data pertaining to major theft also reveals harsher sentences in the combined category of time and fine for offenders of lower status (see table 4-B).

c) Offences Against Property

Additional analysis has been performed grouping together most of the offences against property. This analysis reveals further evidence of the consistent pattern of differential sentencing. Unemployed offenders are again more likely to serve a jail term or to be subjected to probation with supervision. Employed offenders constitute 68% of those fined, and 75% of those receiving both probationary sentences and fines (see table 4-9). Likewise, unskilled labourers receive harsher sentences than those who are skilled.

d) Minor Traffic Offences

In minor traffic offences the pattern of fines for the employed and the increased likelihood of jail sentences for the unemployed has been repeated, although jail sentences for this type of offence are exceptional (see table 4-10).

Table No. 4-8

(Row Percentages)

Theft Over \$50

Socio-Economic Index By Type of Sentence

S.E.I.	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	N
4	33.3%	13.3	13.3	6.7	33.3	15
5	.0%	33.3	.0	.0	66.7	6
6	53.8%	.0	.0	.0	46.2	13
7	18.3%	19.7	7.0	4.2	50.7	70
8	14.3%	57.1	.0	.0	28.6	7

Chi Square = 81.51

df = 16 significant at .005

Table No. 4-8

Theft Over \$50

Socio-Economic Index By Time Plus Fine (In Days)

S.E.I.	N	%	MEAN
4	8	13.3	230.625
5	6	10.0	389.333
6	46	77.7	266.956
Total	60	100.0	

Medium

 $F(3, 58) = 6.767$

Prob. < 01

Table No. 4-9

(row percentages)

OFFENCES AGAINST PROPERTY

Employment Status By Type of Sentence

EMPLOYMENT STATUS

	ACQUITTAL	PROBATION	PROBATION WITH SUPERVISION	PROBATION WITH FINE	FINE	TIME
Employed	66.7%	32.8%	25.0%	76.7%	68.0%	4.3%
Unemployed	33.3	62.7	75.0	23.3	32.0	93.5
N	3	64	30	8	25	45

Chi Square = 43.864

df = 5 significant at .005

Table No. 4-10

(column percentages)

MINOR TRAFFIC OFFENCES

Employment Status By Type of Sentence

EMPLOYMENT STATUS

ACQUITTAI, PROBATION

PROBATION WITH SUPERVISION

PROBATION WITH FINE

FINE

TIME

FINE PLUS TIME

Employed	50.0%	.0%	.0%	.0%	72.2%	25.0%	50.0%
Unemployed	50.0	.0	.0	.0	22.2	75.0	50.0

N

2

0

0

0

102

4

2

Chi-Square = 26.321

df = 6 significant at .005

e) Major Traffic Offences

In major traffic offences the well established pattern of jail sentences for the unemployed (66.7%) and fines for those who are fortunate enough to have jobs (56.9%) is again portrayed.

f) Liquor Related Offences

As is shown by tables 4-11 and 4-12, liquor related offences bring very similar results.

g) Crimes Against Persons and Sexual Offences

These findings are further confirmed by an analysis of the combined category of crimes against persons and sexual offences. Those who are unemployed constitute 90.4% of all those sentenced to jail (table 4-13) and 67.3% of those sentenced to jail are single and on welfare. The unskilled again tend to receive harsher sentences. The utilization of the Blishen socio-economic index in crimes against persons also indicates that those who score lower are more likely to receive harsher sentences. This category of offences, as expected, carries a higher proportion of longer jail sentences (table 4-14).

Table No. 4-11

(column percentages)

LIQUOR RELATED OFFENCES

Employment Status By Type of Sentence

EMPLOYMENT STATUS

	ACQUIT TAL	PROBATION	PROBATION WITH SUPERVISION	PROBATION WITH FINE	FINE	TIME
--	------------	-----------	----------------------------	---------------------	------	------

Employed

.0%	22.2%	13.6%	33.3%	36.6%	3.2%
.0	77.8	86.4	.0	63.4	96.8

Unemployed

N 0

18

22

1

41

31

Chi Square = 90.024

df = 5 significant at .005

Table No. 4-12

(column percentages)

Liquor Related Offences

Socio-Economic Index By Type of Sentence

S.E.I.	Probation	Probation With Supervision	Fine	Time
4	27.8%	9.1%	28.0%	.0%
5	.0	4.5	13.8	12.9
6	5.6	4.5	.0	.0
7	55.6	77.3	58.2	74.2
8	11.1	.0	.0	3.2
9	.0	4.5	.0	9.7
N	18	22	36	31

Chi Square = 39.6

df = 15 significant at .001

Table No. 4-13
(column percentages)

OFFENCES AGAINST PERSON

Employment Status By Type of Sentence

EMPLOYMENT STATUS

	ACQUIT TAL	PROBATION	PROBATION WITH SUPERVISION	PROBATION WITH FINE	FINE	TIME
Employed	66.7%	28.1%	16.7%	68.4%	50.0%	9.6%
Unemployed	33.3	71.9	50.0	31.6	50.0	90.4

N 3 32 36 4 56 52

Chi Square = 85.747

df = 5 significant at .005

Table No. 4-14

Offences Against Person

Socio-Economic Index By Time in Jail

CODES	N	%	MEAN (DAYS)
4	5	10.2	362.000
6	6	12.2	389.333
7	38	77.6	320.474
Total	49	100.0	

Medium

Low

$$F(3, 47) = 5.398$$

$$\text{Prob.} < 01$$

3

Conclusion

The analysis of the relationship between the socio-economic status of the offender and the severity of the sentence provides evidence of differential treatment. Whether income, social status or type of job is used as a measure, similar results emerge. Those with lower socio-economic status are treated more harshly. The best measure has proven to be the division of the population into those who are employed and those who are unemployed. Comparable results were obtained as a result of treating the population as a homogenous group and when specific charges were analysed. The pattern which has emerged is clear. Those who are employed pay for their crime with money, and those who are unemployed with a relatively short loss of freedom. The only socio-economic variable which did not point to differential sentencing is ethnicity. The claims of harsher treatment by various Native organizations are not supported by this data.

It is possible that the underlying reason for sentencing disparities is based on the current life patterns of the offenders. Someone who does not have a job may be considered to suffer less as a result of imprisonment than someone who is employed. In addition, someone who is employed might be considered less likely to commit another offence if not incarcerated and thereby is enabled to maintain his employment. Another possible explanation lies in the judicial

expectation that those who are employed are more likely to pay their fines. If this is the case then the court might be 'saving' itself from the additional work involved in converting unpaid fines into jail sentences.

The analysis also indicates a preference for definite sentences (fines or jail terms rather than probation) which constitute 73.4% of the total. Such sentences reduce the potential future involvement of the court with the offender who does not meet the conditions of his probation. The data also indicates a preference for sentencing decisions which take less time to reach.³⁰ In the case of fines and to some extent even jail sentences there is no need for interaction between the court and other organizations such as organs of supervision and mental hospitals. This preference is also revealed in probationary dispositions, since there is a marked preference for probationary sentences without supervision.

The data does not support the hypothesis that the court system is a structure experiencing difficulty in coping with stress. The outputs are consistent and also indicate that the court acts in a manner which serves to reduce the pressure of time and hence assists in coping with the volume of cases. The trend to avoid involvement with other structures aids in neutralizing the potential sources of secondary stressors. The evidence of the reported differential treatment is not highly visible. Several controls must be applied to hundreds of cases before even tentative conclusions as to the differential treatment begin

to emerge. What is perhaps the most important indicator of the lack of stressful demands is the fact that most defendants expect to be punished, as the large majority pleaded guilty. There is little likelihood and no evidence of stressful demands coming from those who are discriminated against.

The sentencing decisions are neither unduly harsh nor are they very lenient.³¹ If there is one value transgression which meets with more severe treatment it is the transgression against property. There is also some evidence that society is not going to be upset over the severe treatment of the offender. If anything, there are articulated demands for more severe treatment.³²

Although there is evidence that differential treatment on the basis of socio-economic status does exist, there is no congruent evidence that it contributes to the malfunction of the court system. If anything, differential treatment on the basis of socio-economic status as currently practised may even enhance the equilibrium of the structure.

1. P.M. Wild, "Poverty and Criminal Justice", in L. Radzinowicz and M.E. Wolfgang, op.cit., p. 598.
2. John Turner, "Justice for the Poor: The Courts, The Poor and the Administration of Justice", address to the International Conference of the North American Judges Association, San Francisco, December 1, 1969. Reprinted in Canadian Journal of Corrections, Vol. 12, 1970, p. 1.

E. Ehrlich, "Fundamental Principles of the Sociology of Law", in J.E. Carlin, J. Howard and S.L. Messinger, Civil Justice and the Poor, (New York: Basic Books, 1967), p. 13.

J. Lambert, Crime, Police and Race Relations, (London: Oxford University Press, 1970), p. 283.

United States President's Commission of Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society", Washington, D.C., 1966, p. 6.

J.H. Tieger, "Police Discretion and Discriminatory Enforcement", Duke Law Journal, 1971, p. 717.

J.H. Tieger, "Fining the Indigent", Columbia Law Review, 1971, p. 1281.

S.R. Bing and S. Rosenthal, The Quality of Justice in The Lower Criminal Courts of Metropolitan Boston, (Boston: Little, Brown & Co., 1970), pp. 26-27.
3. K.B. Jobson, "Fines", McGill Law Journal, Vol. 16, 1970, p. 665.
4. R.M. Bienvenue and A.H. Latif, "Arrest, Disposition and Recidivism: A Comparison of Indians and Whites", Canadian Journal of Criminology and Corrections, Vol. 16, no. 1, January, 1974, p. 105.
5. The Law Reform Commission of Canada, "The Native Offender and the Law", prepared by D.A. Schmeiser, H.W.B. Henmann and J.R. Menning, Information Canada, 1974, p. 59.

See also, A. Leing, "Indians and the Law", The Canadian Corrections Association (Ottawa: Queen's Printers, 1967), in particular pp. 42-65. This study reports five times the conviction rate for indictable offences for native offenders. It also provides evidence of

slightly lighter sentences for minor offences received by natives.

6. See i.e. N. Gross and W.S. Mason, Exploration in Role Analysis, (New York: John Wiley & Sons, 1958).

Also, R.L. Khan, "Some Propositions Towards Researchable Conceptualization of Stress", in J.E. McGrath, ed. Social and Psychological Factors in Stress, op.cit., p. 103.

7. Even the literature utilized in the studies provides evidence of that influence, i.e. The Law Reform Commission of Canada, A Report on Discovery in Criminal Cases, (Information Canada, 1972).

8. S.R. Bing and S. Rosenthal, op.cit., p. 27.

9. J. Hagan, "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint", Law and Society Review, Vol. 8, no. 1, 1973, p. 378.

See also, D. Jaros and R.I. Mendelsohn, "The Judicial Role and Sentencing Behaviour", Midwestern Journal of Political Science, Vol. 11, no. 4, 1967, p. 471.

10. S.R. Bing and S. Rosenthal, op.cit., p. 29.

Also, S. Box and J. Ford, "The Facts Don't Fit: On The Relationship Between Social Class and Criminal Behavior", The Sociological Review, Vol. 19, no. 1, 1971, p. 31.

Also, M.A. Forsland, "Age, Occupation, and Conviction Rates of White and Negro Males: A Case Study", Social Science Journal, no. 6, 1969, p. 41.

S. Nagel, The Legal Process From A Behavioral Perspective, op.cit.

Also the literature cited in J. Hagan, op.cit., and M. Mileski, "Courtroom Encounters: An Observation Study of a Lower Criminal Court", Law and Society Review, Vol. 6, 1971, p. 473.

R. Hood and R. Sparks, Key Issues in Criminology, (New York: McGraw Hill, 1970), chapter 5.

11. R. Hood, Sentencing In Magistrates Court, (London: Stewart & Sons, 1962).
12. Ibid, pp. 59-60.
 See also, L. Phillips and H.L. Voitey, Jr., "An Economic Analysis of the Detailed Effects of Law Enforcement on Criminal Activities", Journal of Criminal Law, Criminology and Police Science, Vol. 63, 1972, p. 101.
13. D. Cressey, "The Correlates of Crime", in S.M. Sykes and F.E. Drabek, eds., Law and the Lawless, (New York: Random House, 1969), p. 192.
14. Ibid, p. 201.
15. E. Green, Judicial Attitudes Toward Sentencing, (London: Macmillan, 1961).
 J. Skolnick, Justice Without Trial, (New York: John Wiley & Sons, 1966).
 D.J. Black, "Production of Crime Rates", American Sociological Review, Vol. 35, August, 1970, p. 733.
 A.S. Trebach, The Rationing of Justice: Constitutional Rights and the Criminal Process, (New Jersey: Rutgers University Press, 1969).
 M. Mileski, op.cit.
 J. Hagan, op.cit., p. 373.
 See also, D. Jaros and R.I. Mendelsohn, op.cit.
16. M. Mileski, op.cit., p. 507.
17. Ibid, p. 511.
18. See for example J.D. Casper, "Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment", Law and Society Review, Vol. XIII, no. 2, 1978, p. 241, he provides evidence of harsher sentences received by Black Americans.
19. See i.e. Carter and Wilkins, "Some Factors in Sentencing Policy", Journal of Criminal Law, Criminology and Police Science, Vol. 58, 1967, p. 507.
 Also, R. Hood, op.cit.

20. J. Hogarth, Sentencing As A Human Process, (Toronto: University of Toronto Press, 1971), p. 211.

Although in a setting of a very different court, one American study found that the differences in the S.E.S. characteristics of the Justices explained 70% of the variance in voting in criminal cases.

See S.S. Ulmer, "Social Background as an Indicator to the Vote of Supreme Court Justices in Criminal Cases: 47-56 terms", American Journal of Political Science, Vol. XVIII, 1973, no. 3, p. 622.

21. Ibid., p. 212.
22. Ibid., p. 221.
23. See J. Hagan, op.cit., in particular tables 1, 2, 3, 4 and 9, also p. 378.
24. For a more detailed analysis and criticism of sentencing studies the reader is referred to the work of R. Hood and R. Sparks, op.cit.
25. K. Jobson reports slightly higher percentage of fines - 48% - see K.B. Jobson, "Fines", op.cit. This study also provides comparative figures for fines from various jurisdictions.
26. J. Hogarth, op.cit., p. 217.
27. Only in case of one charge a modest relationship between severity of the sentence and the ethnicity (favoring the Natives) has been found.
28. See i.e. R. Hood, op.cit., footnote 11.
29. No distinction is made between common-law marriages and other marriages.
30. See J. Hogarth, op.cit., pp. 215-218.

A similar point has been raised in the following articles:

M. Friedland, "Magistrate Court: Functioning and Facilities", Criminal Law Quarterly, Vol. 11, 1968-69, pp. 52-65.

"Due Process Safeguards: Canadian Criminal Justice,

· A One Month Inquiry", Canadian Civil Liberties Association, op.cit.

B. Grossman, The Prosecutor: An Inquiry Into The Exercise of Discretion, (Toronto: University of Toronto Press, 1969), pp. 51-54.

31. A similar observation can be found in "Due Process Safeguards: Canadian Criminal Justice, A One Month Inquiry", Canadian Civil Liberties Association, op.cit., pp. 47-48.
32. The best evidence comes from gallup polls on capital punishment, see R. Manzer, op.cit.

CHAPTER V

LEGAL REPRESENTATION AND THE SENTENCE

Introduction

In 1967 the United States Task Force on Administration of Justice stated that "the right of a criminal defendant to be represented by counsel is a fundamental protection for individual liberty in our system of criminal justice".¹ Two years later the then Mr. Justice Freedman on behalf of the Manitoba Court of Appeal stated: "Among these (individual liberties in a free society) is assuredly the right, on being arrested or detained, to retain and instruct legal counsel without delay".² These two statements are perhaps the best illustrations of the direction taken by the literature and the courts on legal representation.

It is assumed by both the courts and most scholars that by definition legal counsel makes a profound difference to the defendant's case. As early as 1932, in the case of *Powell v. Alabama*, the United States Supreme Court stated that:

even the intelligent and educated layman has small and sometimes no skill in the science of law... Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequate to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.³

Ever since *Powell v. Alabama* the judiciary and scholarship both in the United States and Canada have concentrated on expanding the notion of the right to counsel. Canadian scholars have looked with envy at the American law which extended the notion of the right to counsel much further than either the Canadian courts or statutory instruments have done. Yet the right to counsel has been considered so important that it has been said to be "enshrined in English Common law, vindicated by many judicial decisions of high authority, and clearly and unmistakably affirmed in the Canadian Bill of Rights."⁴ However neither case law nor legal scholarship support this optimistic and broad view of Canadian law on the right to counsel.⁵

Both in the United States and Canada the basic position defending the right to counsel has been elaborated in a series of judicial decisions.⁶ In the United States, these decisions culminated with the case of *Gideon v. Wainwright*,⁷ which required the states to provide, at their expense, legal counsel for indigent defendants in felony cases. This landmark decision was later reinforced and extended in the cases of *Escobedo v. Illinois*⁸ and *Miranda v. Arizona*.⁹ These decisions also had a profound impact on Canadian thinking about the right to counsel. W. Tarnopolsky provides evidence that even the Canadian Minister of Justice stated that the interpretation of the relevant provisions of the Canadian Bill of Rights should be guided by American jurisprudence.¹⁰

Following these decisions, most of the literature on legal counsel in Canada has concentrated on showing the extent to which our judiciary varies from the American in the limitation on the right to counsel.¹¹ This approach produces two types of research. The majority of scholars concentrate on an interpretation of the various legal aspects of the right to counsel, including the legal consequences of the delay, absence or even the denial of counsel.¹² The second trend in the literature describes the sub-populations which are least likely to be represented by counsel before the courts of law.¹³ Most of these studies not surprisingly indicate that poor defendants are less likely to be represented by counsel.¹⁴ Although most of the authors view this finding as a simple manifestation of the lack of financial means on the part of the defendant, a few identify additional potential factors. Thus for example Carlin and Howard state that "we do not believe, however, that inequality of legal representation is simply a function of differential income..."¹⁵ According to Carlin and Howard, the explanation is more likely cultural than economical, (although perhaps they underestimate the relationship between culture and economics). They suggest that the explanation lies in the fact that the usage of lawyers in general is less prevalent among lower than among upper classes in the United States. (Survey data indicates that over two thirds of the lower class families have never employed a lawyer as compared

to about one third of the upper class families¹⁶). Furthermore, Carlin et.al. describe the court as an organization based on the notion of human activism (two players fighting before impartial referees), whereas they view the culture of the accused poor as passive. Practically all studies find lower representation among minorities and other groups with low socio-economic status.¹⁷ The actual estimates of the size of the population which is not represented varies from about 16% to over 50% of the total population.¹⁸

As has been already stated, the assumption underlying the studies of the limitations on the right to counsel and the unrepresented sub-populations of defendants is that legal counsel improves the position of the accused. Although this assumption is generally accepted without question, hard evidence to support it is rather scarce.¹⁹ Many studies of sentencing simply ignore the problem of legal representation. The best example of the latter is perhaps a sophisticated study undertaken by Hood and Sparks. This study attempts to determine to a very precise degree the differences in the sentencing practices of various judges in seven different courts. Legal representation or lack thereof is totally disregarded as a variable, from which one cannot help but infer that Hood and Sparks do not consider it to be a relevant factor in the judicial decision-making process.²⁰ Other studies which likewise provide little or no information as to the impact of

the legal counsel on judicial outputs (other than a reiteration of the finding that there is variance in the rate of representation) are those of D'Esposito, Jaffary, Friedland and Hogarth.²¹

Increasingly, students of sentencing are beginning to inquire into the impact of legal representation on sentencing. Studies which attempt an evaluation of the impact of legal representation on judicial decisions come to diametrically opposite conclusions. A small group of scholars provides some evidence that legal representation improves the position of the accused and therefore contributes to a higher rate of acquittals and lower sentences. A large number of studies shows no relationship between the rate of acquittals and/or the severity of the sentence and legal representation.²² Some studies arrive at an even more disconcerting conclusion, namely that under certain conditions legal representation has an adverse affect on the sentence.²³

As is the case with most of the literature in this area, the above-mentioned conclusions are largely based on American data, although there are a few Canadian studies.

Several studies provide information on the relationship between legal representation and the sentence which cannot directly answer the central question: Does legal counsel contribute to a lower sentence? Thus Andry indicates that in his sample only 32% of those sentenced to jail were represented by legal counsel. He also presents evidence that

there is a higher proportion of legal representation among recidivists than among first time offenders.²⁴ The Canadian Civil Liberties study states that 20% of those represented by counsel were found not guilty as opposed to 9% among the unrepresented accused.²⁵ Similarly Zander finds a higher proportion of custodial sentences among those not represented by legal counsel.²⁶ However, data of this nature cannot accurately assess the contribution of the legal counsel to the sentence since it lacks the necessary controls, (a similar assessment can be made of such studies as Hogarth and Schmeiser)²⁷ such as legal variables and or matching populations. Frequently studies find that there is a relationship between the plea and legal representation. Zander finds a higher level of not guilty pleas among those represented by counsel, however, his data does not show the effect of the plea on the sentence.²⁸ Atkinson and Newman shed further light on the matter by stating that "...the presence of counsel is not related to a finding of not guilty..."²⁹ Thus the importance of Zander's findings with respect to the relationship between the plea and representation from the perspective of its impact on the sentence is doubtful. Legal scholars who find some evidence supporting the notion that legal counsel contributes to lower sentences and/or acquittals tend to be very cautious. Thus Oaks and Lehman are at best capable of stating that "...it (the data) suggests, although it does not

establish, that there may be significant differences in the type and length of sentence imposed on defendants with different representation".³⁰ Atkinson and Newman reach a similar conclusion.³¹ It seems ironic that on the basis of such limited and inconclusive evidence one of the most important reforms in the area of criminal justice in Canada has been introduced, since it has been assumed that increased legal representation will provide tangible benefits to indigent offenders. Increased legal representation of indigent offenders has been made available in practically all jurisdictions through the various provincial systems of legal aid.³² This development has come about largely because of pressure coming primarily from lawyers.³³

To Serve the Court or to Serve the Client?

Gradually an alternative view of the role and impact of the legal counsel on the trial is emerging from the literature. There is a hint of a departure from the traditional view of the counsel for the accused in the Task Force Report on the Courts (which in its entirety is committed to more legal representation particularly for the indigent defendant). The Task Force unwittingly said in passing that "the importance of the counsel also proceeds from values transcending the interests of any individual defendant. Counsel is needed to maintain effective and efficient criminal justice".³⁴ A.S. Blumberg, a defence lawyer turned sociologist, provides the most devastating evidence of the difference between the normative prescription and the actual behaviour of the defense counsel.³⁵

Blumberg views the court as a closed community of lawyers, prosecutors and judges, where "the client is a secondary figure...as in certain other bureaucratic settings."³⁶ The defense counsel in this setting is "...enmeshed in the authority, discipline and perspective of the court organization."³⁷ His objectives are: to act as a facilitator for the court (in moving his client swiftly through the necessary steps); to "cool the client" (i.e. to prevent any outbursts on his part); and finally to assist in the ultimate goal of the "efficiency of production."³⁸ In another study Blumberg finds that the defense counsel actively encourages defendants to plea guilty.³⁹ This notion of the defense counsel assisting the court rather than his client is further reinforced as a result of the work of several other scholars.⁴⁰ T. Church also finds the court to be a bureaucratic rather than an adversary structure and provides evidence of legal counsel avoiding conflict.⁴¹ Similarly, A.S. Trebach finds that lawyers assist the court and the prosecutor in fast decisions.⁴² Perhaps the most cynical picture of the defense counsel is painted by L.S. Mohr, who points out the community of interest between the judge, the prosecutor and the defense counsel. In his view, the judge is primarily interested in the smooth processing of a large number of cases, the prosecutor is interested in a maximum number of guilty pleas (less work) and the legal counsel is primarily interested in a speedy trial

(due to the fact that he is paid on a per trial basis).⁴³ In this view the three actors exercise the same pressures on the defendants in order to maximize their goals.⁴⁴ A somewhat similar portrait emerges from O. Carlen's study of the Magistrates Courts. He views the courts as an organization based on an exchange of information and mutual support among important players. The defendant is the only 'non-sharer' or outsider. All the important actors view the formal steps in the trial as a part of a necessary ritual to be dealt with as quickly as possible.⁴⁵ Partial evidence supporting some of these views comes from Canadian studies such as those undertaken by Grossman and Hartnagel,⁴⁶ which indicate the role which the defense counsel plays in increasing the number of guilty pleas in the name of speed and efficiency. M. Friedland provides further support for these views in his statement that "...he (the judge) is generally more concerned with clearing the docket than in giving a full and complete hearing."⁴⁷

There is even one study which expressly provides some evidence that in traffic court those represented by legal counsel receive more severe sentences.⁴⁸ All of the above studies which show evidence of the legal counsel encouraging defendants to plea guilty, over-utilize plea bargaining and have efficiency and non-conflict as primary goals; which is likely to contribute, at least in some instances, to harsher or undeserved sentences. Perhaps with more studies,

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this rather isolated conclusion that "in the lower court, with unambiguous cases and pressure for production, the judges' obligation to consider only legally relevant criteria very well nullify any such advantage (of legal counsel)",⁴⁹ will become the accepted view.

Thus in terms of the impact of legal representation as a stressor on the court, there is evidence pointing in two directions. On the one hand, the presence of legal counsel can have a stress reducing effect, providing the counsel acts in a manner resulting in time-saving; using some of the various means which have been described. On the other hand, the presence of legal counsel might lead to additional time expenditure. The additional utilization of the court's time might be viewed as having a purely symbolic nature and perhaps therefore be considered an unnecessary part of the trial. In such instances, the legal counsel could have a stress inducing effect which might result in various expressions of judicial displeasure, including the more severe treatment of the accused.

DATA ANALYSIS

Analysis of the Total Population

The data reveals that a very large percentage of the population appeared in court without the assistance of legal counsel, as the following table illustrates:

Table No. 5-1

Representation in Court		
	%	N
Lawyer on Retainer	13.74	164
Legal Aid	13.73	162
No Representation	72.53	877

At first glance the figure of 72.53% of the population under study showing no representation seems very high; however similar results have been noted in other jurisdictions.⁵⁰ It is surprising though that a study conducted by the Canadian Civil Liberties Association in five cities a year earlier shows a much higher level of representation before Winnipeg Magistrates' courts. The results reported in that study show only 54.51% of the accused as not represented. This discrepancy is particularly surprising since the legal aid budget increased significantly between 1970 and 1971. Out of the five cities which were examined by the Canadian Civil Liberties Association

(Toronto, Montreal, Halifax, Winnipeg and Vancouver) the percentage of unrepresented defendants was reported to be highest in Winnipeg.⁵¹ The significance of the findings of the Canadian Civil Liberties Association study is difficult to assess, as it does not provide sufficient information about the population under examination.⁵²

The patterns of representation show some interesting characteristics. There is virtually no difference in the level of representation between those who are unemployed (48.5%) and those who hold jobs (51.5%). The only socio-economic status variable which shows significant differences in the type and level of legal representation is ethnicity. Native offenders are the heaviest users of legal aid. English and Eastern European offenders are the most likely to retain counsel. The latter is the ethnic group which shows the highest level of representation (41.2%). (See table 5-2).

The high level of utilization of legal aid by native offenders (natives constituted 26.3% of all those represented by legal aid counsel) might be explained by the fact that it is the only ethnic group in Winnipeg possessing an organization (the Indian and Metis Friendship Centre) which has as one of its objectives the provision of assistance to offenders. In addition, a unique aspect of the Winnipeg court is the presence of a native translator-advisor who works very closely with Legal Aid. The fact that Ukrainian offenders

Table No. 5-2

(column percentages)

LEGAL REPRESENTATION BY ETHNICITY

Representation

Ethnicity

ENGLISH	NATIVE	EAST EUROPEAN	WEST-SOUTH EUROPEAN	NORTH-CENTRAL EUROPEAN
%	%	%	%	%
12.6%	2.6%	20.2%	10.3%	15.8%
8.8	17.4	21.0	16.9	19.8
78.3	80.0	58.9	72.3	64.4

Counsel on
Retainer

Legal Aid

No
Representation

N 372 230 124 194 101

Chi Square = 51.56433 with 8 degrees of freedom

Significant at .005

have the highest overall level of representation (44.4%) escapes easy interpretation. Perhaps there is some cultural explanation which cannot be readily seen.

The generally low level of representation by either counsel on retainer or legal aid counsel is almost always viewed in the legal literature as evidence of the lack of protection for a fundamental civil right.⁵³ It is also a basis for demands for increased legal representation as a result of the assumption that the interests of the defendant are not adequately protected in the absence of defense counsel.⁵⁴

It is furthermore assumed that it is the indigent offender who is not represented by counsel. The fact that this data shows almost no difference in the representation of the employed versus the unemployed makes this claim somewhat doubtful.

Total Population

In order to assess the impact of the legal counsel on the sentence, similar tests to those utilized in looking at the relationship between the sentence and the socio-economic status of the accused were applied. The relationship between the severity of the sentence and the presence or absence of legal counsel shows some unexpected results. In the categories of the less severe sentences, there is a larger percentage of unrepresented offenders (see table 5-3). The most likely explanation for this is the expectation on the part of the offender of a lower sentence due to the lesser gravity of the

Table No. 5-3

(row percentages)

SEVERITY OF SENTENCE BY LEGAL REPRESENTATION

Total Population

LEGAL REPRESENTATION	Total Population												N
	Low	1 day	2 days	3 days	4-6 days	7-10 days	11-19 days	20-29 days	1-2 months	3-4 months	5-11 months	High 1 year or more	
Lawyer	2.1%	1.4	2.8	12.6	8.4	7.7	11.9	3.5	2.8	13.3	33.6	143	
Legal Aid	2.5%	.6	3.1	3.7	3.1	4.4	1.9	6.2	3.7	17.5	53.1	165	
No Repr.	6.1%	8.5	17.5	12.2	6.1	5.4	6.2	5.6	3.9	13.2	15.3	655	

Chi Square = 172.471

df = 20 significant at .005

crime. As the severity of the sentence increases, so does the proportion of offenders represented by counsel. Contrary to the common mythology among the legal profession, (with one important exception) the differences between a counsel on retainer and a legal aid lawyer are marginal. Only in the case of the most severe sentences are there large differences depending on representation. Those who are not represented constitute 42% of those receiving the most severe sentences, those represented by a legal aid lawyer constitute 35%, and the remaining 23% are represented by counsel on retainer. If these findings are viewed in a slightly different way - combining the two types of representation - the picture takes on a different significance. 58% of those receiving the most severe sentences are represented by counsel. The first observation to be made is that in the category of the most severe sentences the percentage of those represented by counsel is considerably higher than the percentage for the total population. This is perhaps due to the possible expectation on the part of the offenders in question that they are likely to receive harsher sentences, which might make them more likely to seek legal assistance. One can even hypothesize that the presence of legal counsel might act as a signal to the judge that an offence (or its circumstances) is a serious one and that the offender expects severe treatment. This finding also throws some doubt on the claim that the lack of legal representation

leads to harsher sentences.

The differences between various types of representation are more difficult to explain (particularly since the data indicates a fairly even distribution of less severe sentences between clients of counsel on retainer and legal aid.) The legal community would offer as an explanation the existence of greater diligence and skill on the part of the counsels on retainer. This explanation finds some support in the literature although further research is needed before even tentative conclusions can be reached.⁵⁵ This analysis also provides some evidence that the impact of legal counsel on judicial decisions is exaggerated. The data does not as yet provide evidence that judges are under stress as a result of the participation of legal counsel in the decision-making process.

The Relationship Between Representation and the Type of Sentence

The population has also been analysed in terms of the relationship between representation and the type of sentence the accused receives. Although the number of acquittals is very small, there is evidence that the difference in the probability of acquittal depending on the presence or absence of legal counsel is almost totally negligible as can be seen from the following table:

Table No. 5-4
Total Percentages

Legal Representation by Acquittals (Total Population)		
	Acquittals	Sentences
Defendants Represented by Counsel	1% (11)	27.30 (305)
Non-Represented Defendants	0.55% (6)	71.17 (735)
Chi Square = 11.30 dF = 1 significant at .001	1.55 + 98.47 = 100%	

Looking further at the type of sentence the accused receives pending on the representation, it is evident that the clients of counsel on retainer are least likely to receive jail sentences (only 11.7%) and most likely to face fines (45.5%). Legal Aid sees the highest percentage of jail sentences (29.6%). It is very interesting to note that there is a greater similarity in the pattern of sentences for those represented by counsel and those who are not represented at all, than between either of these categories and those who are represented by legal aid (see table 5-5). It is of course difficult to hypothesize about the number of people who would receive harsher sentences such as jail if it were not for the assistance of legal aid counsel. The data indicates that perhaps legal aid is even

Table No. 5-5

(row percentages)

TYPE OF SENTENCE BY LEGAL REPRESENTATION

Total Population

LEGAL REPRESENTATION	ACQUITTAL	PROBATION	PROBATION WITH SUPERVISION	PROBATION PLUS FINE	FINE	TIME	TIME PLUS FINE	N
Lawyer	5.8%	18.8	13.6	3.9	45.5	11.7	.6	154
Legal Aid	1.2%	22.8	24.7	3.7	17.3	29.6	.6	162
No Representation	.9%	13.6	7.1	2.0	57.8	18.1	.6	802

Chi Square = 126.888

df = 12 significant at .005

detrimental to the accused. What can be said with a greater degree of certainty is that the data does not indicate that any special benefits accrue to the accused as a result of being represented by legal aid counsel as opposed to not being represented at all. There is one more area where the sentences received by the accused with legal aid counsel differ from those received by the other two groups. As has been already mentioned, judges are generally more likely to render probationary sentences without supervision as opposed to probationary sentences with supervision. Only in the case of the clients of legal aid does this not hold true. Almost 25% of the legal aid clients are sentenced to probation with supervision. This is a significant departure from the overall trend (only 9.93% of the total number of sentences fall into this category). As the judicial preference for less time-consuming sentences has already been clearly indicated, this might be a potential point of stress. The hypothesis that the legal aid client may suffer harsher penalties due to the imposition on the judges' time should perhaps be further examined.⁵⁶ This is a plausible although only hypothetical explanation (particularly given the evidence from several studies as to the importance judges attach to the speed of 'clearing the docket') for the harsher treatment of the legal aid client. If anything the data reveals potential stress in dealing with legal aid cases. Another possible explanation is that legal aid counsel may handle more 'hopeless' cases than counsel on retainer.

Within the same charges legal aid counsel may assist defendants who can expect, due to the nature of the cases, more severe penalties.

Analysis of the Relationship between Representation and Type of Sentence by Charge

An analysis of the charges did not provide any significant relationship between the representation and the type of sentence received. This conclusion has been reached through separate treatment of legal aid counsel and counsel on retainer as well as by combining the two categories. A separate analysis has been performed treating jail sentences (in each charge) as one category and collapsing all other sentences into one group. The conclusion which has emerged as a result of the latter analysis is also that in terms of representation in particular charges the defendant cannot expect different results depending on representation.

In terms of the strength of sentence, one charge has unexpectedly been identified as increasing the severity of the sentence as a result of the presence of counsel. (see table 5-6). In minor traffic offences, the accused seems to benefit by not having any counsel. The previously reported negative impact of legal aid representation is very pronounced in this instance. Legal aid clients constitute 52.2% of all those receiving the harshest sentences.

An analysis of the relationship between bail granting decisions and legal representation has been performed in order

Table No. 5-6

(row percentages)

MINOR TRAFFIC CHARGES

Severity of the Sentence by Legal Representation

LEGAL REPR.	1 day	2 days	3 days	4-6 days	7-10 days	11-19 days	20-29 days	1-2 months	3-4 months	5-11 months	1 year or more	N
Lawyer	1.9%	3.7	5.6	13.0	5.6	11.1	16.7	31.7	1.9	5.6	31.5	54
Legal Aid	6.5%	2.2	4.3	10.9	.0	8.7	2.2	4.3	.0	8.7	52.2	46
No Repr.	5.1%	7.6	15.7	15.2	7.1	8.6	10.1	4.5	2.0	10.6	13.6	198

Chi Square = 17.926

df = 20 significant at .005

to obtain a better understanding of the role of legal counsel. Bail decisions have in many ways the same consequences as sentencing decisions (see Chapter 6). A negative decision means the denial of freedom, thus one of the goals of the legal counsel is to have his client released from pre-trial custody. The analysis of the total population reveals that the benefits of having legal counsel on retainer are rather marginal. Only 4% more defendants who retained counsel were granted bail than those who were unrepresented. In other words, only 11 more people who were unrepresented were refused bail when compared with those represented by counsel on retainer. This cannot be said to be an impressive record by any stretch of the imagination. Those who were represented by legal aid counsel faced the worst consequences: the rate of refusal of bail for legal aid clients was almost 44%. (see table 5-7). The strong relationship in this respect between cases with a counsel on retainer and those with unrepresented defendants destroys the possible explanation that the very presence of a lawyer indicates to the judge the gravity of the charge and the surrounding circumstances. It is after all not the presence of counsel in general but rather of legal aid counsel in particular which seems to trigger harsher decisions. Unfortunately, there are no studies of judicial attitudes toward legal aid. What is known however is that at least in Manitoba there were no briefs from the magistrates to the government supporting the concept of legal aid.⁵⁷ Furthermore, there

Table No. 5-7
(column percentages)

BAIL BY LEGAL REPRESENTATION

Total Population

BAIL	LAWYER ON RETAINER	LEGAL AID	NOT REPRESENTED
	%	%	%
Granted	79.13%	56.32%	75.14%
Refused	20.87	43.68	24.86

177

87

115

N

Chi Square = 13.81

df = 2 significant at .005

is some evidence that criminal lawyers have a relatively low status⁵⁸ (at the time of this study, Legal Aid was restricted to criminal work whereas counsel on retainer seldom restrict their work to criminal practice). In addition, at least one study suggests that the social distance between the judge and the defense counsel might contribute to the severity of the sentence.⁵⁹ Another possibility is that the establishment of legal aid increased the number of cases consuming a larger amount of time, thus increasing the difficulties in coping with the case load. This may be reflected even in bail decisions. Only in the case of traffic charges have legal aid counsels an excellent record in obtaining bail for their clients (see table 5-8). This finding is however of very limited value and does not contradict the overall interpretation since practically everyone facing such charges is granted bail.

A group of charges which supports the findings from the total population is the category of offences against the person. These are the types of offences where the refusal of bail should occur more often therefore the assistance of counsel is perhaps required to a greater extent. As one would predict on the basis of the above-mentioned findings, legal aid counsel has the least degree of success (see table 5-9). Similar results have been observed in liquor related offences (see table 5-10).

The only instance where legal aid counsel has a

Table No. 5-8
(column percentages)
TRAFFIC OFFENCES
Bail by Legal Representation

BAIL	LAWYER ON RETAINER	LEGAL AID	NOT REPRESENTED
	%	%	%
Granted	97.22%	100.00%	91.11%
Refused	2.77	0.00	8.88

45

3

36

N

Chi Square = 30.240

df = 2 significant at .001

Table No. 5-9

(column percentages)

OFFENCES AGAINST PERSON

Bail by Legal Representation

BAIL	LAWYER ON RETAINER	LEGAL AID	NOT REPRESENTED
	%	%	%
Granted	62.50%	51.85%	56.66%
Refused	37.50	48.14	43.33

N 24 27 30

Chi Square = 76.880

df = 2 significant at .005

Table No. 5-10

(column percentages)

LIQUOR RELATED OFFENCES

Bail by Legal Representation

BAIL	LAWYER ON RETAINER	LEGAL AID	NOT REPRESENTED
	%	%	%
Granted	71.42%	37.50%	52.38%
Refused	28.57	62.50	47.61

N

Chi Square = 44.139

dF = 2 significant at .005

better record in obtaining bail than those who are not represented are offences against property. The difference is rather small and still compares unfavourably with the results of counsel on retainer (see table 5-11).

Conclusions

The data provides little or no evidence supporting the almost 'sacred' position in the legal literature that legal counsel improves the position of the defendant. The roots of this position can be traced to the traditional model of a criminal trial, well portrayed in the case of *Powell v. Alabama*.⁶⁰ According to the traditional model, the criminal trial is a highly balanced decision-making process based on complex rules of evidence with a very skillful cross-examination of witnesses requiring a high degree of expertise. The model of a trial and the role of the defense counsel emerging from this study is a very different one. With 78% of the cases taking no more than seven minutes (see table 6-25), 95% of the accused pleading guilty (see table 6-7), and only 2.9% of the cases having any witnesses for the defense there doesn't seem to be much need for the "volumes on the complexities of the rules of evidence and on techniques for cross-examination."⁶¹ The learned judge in the case of *Powell v. Alabama* said that "even the intelligent and educated layman" needs counsel when on trial.⁶² The very poorly educated population in this study seems to have better

Table No. 5-11

OFFENCES AGAINST PROPERTY

Bail by Legal Representation

BAIL	LAWYER ON RETAINER	LEGAL AID	NOT REPRESENTED
	%	%	%
Granted	73.68%	69.23%	64.70%
Refused	26.31	30.76	35.29

N 19 13 34

Chi Square = 23.853

dF = 2 significant at .005

chances with no legal counsel. With legal counsel the defendants spend a longer time before the judge (see table 6-27) but this might be the most significant benefit they get for their (or the taxpayers') money. Furthermore, whether this is even a benefit is highly questionable, for as A. Friedland states, judges tend to be more annoyed than anything else by counsel activities prolonging the trial.⁶³

There is also evidence that there is differentiation between counsel on retainer and legal aid representation. The roots of this evidence of stress are unclear. In the author's opinion, the most plausible explanation for this discrepancy lies in the imposition on the courts' time. If there was no legal aid, this group of defendants would not be represented. Perhaps the judges see no need for legal aid and through sentencing show their perhaps unconscious displeasure. Perhaps after all Canadian courts were right in not being "...prepared to give great effect to the 'right to counsel' clauses."⁶⁴

1. Task Force on Administration of Justice, op.cit., Task Force Report: The Courts, p. 52.

2. Regina v. Ballegeer (1969) 1.D.L.R. (3d) 76.

3. Powell v. Alabama, 287 U.S. 45. 68-69 (1932).

4. Regina v. Ballegeer, op.cit., at 74.

5. See i.e. W.S. Tarnopolsky, The Canadian Bill of Rights, (Toronto: McClelland and Stewart Ltd., 1975), 2nd Ed., in particular Chapter VII and the literature cited in this chapter.

See also,

B. Donnelly, "Right to Counsel", Criminal Law Quarterly, 1968-69, p. 18.

also,

J.S. Leon, "Rights, Fairness and Effectiveness in Canada and the U.S.: Counsel and Client in the Criminal Process", Criminal Law Quarterly, Vol. 20, No. 1, 1977.

6. Among the most important U.S. decisions in this area are (other than the already mentioned Powell v. Alabama)

Gideon v. Wainwright, (1963), 372 U.S. 335.

Escobedo v. Illinois, (1965), 378 U.S. 478.

Miranda v. Arizona, (1967), 384 U.S. 436.

Among the most important Canadian cases we find;

Regina v. Wray, (1971), S. CR. 272

Regina v. Curr, (1972), SRC 889

Re Walsh and Jorden (1962), 31 DLR (2nd) 88

Regina v. Piper (1968) 66 DLR at 739-40

Regina v. Ballegeer, op.cit.

O'Connor v. The Queen, (1966) S.C.R. 619

7. Gideon v. Wainwright, Ibid.

8. Escobedo v. Illinois, op.cit., f. 6.

9. Miranda v. Arizona, op.cit., f. 6.

10. See W.S. Tarnopolsky, op.cit., p. 229.

11. See i.e. E.J. Ratushny, "Is There A Right Against Self-Crimination in Canada", McGill Law Journal, Vol. 19, 1973, p. 1.

Also, R.C. Gibson, "Illegally Obtained Evidence", University of Toronto Faculty of Law Review, Vol. 31, 1973, p. 23.

Also, G.E. Parker, "Further Extension of the Right to Counsel", Criminal Law Quarterly, Vol. 10, 1968, p. 267.

For extensive treatment see W.S. Tarnopolsky, op.cit., Chapter VII.

12. See i.e. E.J. Ratushny, "Statements of an Accused: Some Loose Strands", Criminal Law Quarterly, Vol. 12, 1971-72, p. 306.

13. See i.e. M. Zander, "Unrepresented Defendants in the Criminal Courts", Criminal Law Review, 1969, p. 633.

Also, M. Zander, "Unrepresented Defendants in Magistrates' Courts", New Law Journal, 1972, p. 104.

14. See i.e. The Task Force on Administration of Justice, op.cit., "Providing Counsel for Defendants Unable to Obtain Adequate Representation", p. 59 and the literature cited under this heading.

15. J.E. Carlin and J. Howard, "Legal Representation and Class Justice", U.C.L.A. Law Review, Vol. 12, 1965, p. 386.

16. J.E. Carlin and J. Howard, op.cit., pp. 337-350.

Similarly L.H. Mayhew, "Institution of Representation: Civil Justice and the Public", Law and Society Review, Vol. 9, no. 3, 1975.

17. See i.e. S.S. Nagel, The Legal Process From A Behavioral Perspective, op.cit., in general see the literature in Chapter 2.

18. The Canadian Civil Liberties study gives percentages of those represented as 56.60%, p. 84.

See Canadian Civil Liberties Association, op.cit., p. 84.

J. Hogarth has also reported a fairly high level of representation; 44%.

See J. Hogarth, Sentencing As A Human Process, op.cit., p. 270, on the other end M. Mileski reports only 16% as represented, see M. Mileski, op.cit., p. 473-476.

19. To the best of my knowledge there is only one such study in Canada - The Canadian Civil Liberties Association, op.cit., which claims to have evidence that legal counsel contributes to a higher level of acquittals (the figure provided - 20% - is however suspect since it is higher than in most studies. Secondly, the information in this study is not sufficient to make any such judgements at all.
20. R. Hood and R. Sparks, Key Issues in Criminology, (New York: McGraw-Hill, 1970), in particular chapter 5.
21. See J.D. D'Esposito, "Sentencing Disparity: Causes and Cures", Journal of Criminal Law, Criminology and Police Science, vol. 69, 1969.

S.K. Jaffary, op.cit.

A. Friedland, "Magistrates' Court: Functioning and Facilities", Criminal Law Quarterly, Vol. 11, 1968-69, p. 52.

J. Hogarth, Sentencing As A Human Process, op.cit.
22. See i.e. A.S. Blumberg, Criminal Justice, (Chicago: Quadrangle Books, 1967).
23. See D. Jaros and R.I. Mendelsohn, "The Judicial Role and Sentencing Behaviour", Midwestern Journal of Political Science, Vol. IX, no. 4, 1967, p. 471.
24. R.G. Andry, The Short Term Prisoner, (London: Stevens and Sons, 1963).
25. The Canadian Civil Liberties Association, op.cit., p. 36.
26. M. Zander, "Unrepresented Defendants in the Criminal Courts", Criminal Law Review, 1969, p. 644.
27. J. Hogarth, op.cit., and D. Schmeiser, op.cit.
28. M. Zander, op.cit., p. 632.
29. D.N. Atkinson and D.A. Newman, "Judicial Attitudes and Defendant Attributes: Some Consequences for Municipal Court Decision-Making", Journal of Public

Law, Vol. 19, 1968, p. 48.

30. D.H. Oaks and W. Lehman, "The Criminal Process of Cook County and the Indigent Defendant", University of Illinois Law Forum, 1969, p. 719.
31. D.N. Atkinson and D.A. Newman, op.cit.
32. By now each and every province has a system of Legal Aid.
33. See i.e. A.S. Blumberg, "Legal Services in California", Law and Society Review, Vol. 2, no. 15, 1967, p. 421.
Also, "The Community Legal Services Report", Law Society of Upper Canada, 1972.
34. The Task Force Report: The Courts, op.cit., p. 52.
35. A.S. Blumberg, "The Practice of Law as Confidence Game, Organization Co-optation of a Profession", Law and Society Review, Vol. 1, no. 2, 1967, p. 15.
36. Ibid.
37. Ibid., p. 31.
38. Ibid., p. 31.
39. A.S. Blumberg, "Criminal Justice", op.cit.
40. See i.e. M. Mileski, op.cit.
41. T. Church, Jr., "Plea Bargains, Concessions and the Courts: Analysis of a Quasi-experiment", Law and Society Review, Vol. 10, no. 3, 1976.
42. A.S. Trebach, The Rationing of Justice, (Rutgers: University Press, 1964).

See also, B. Alschuler, "The Defense Attorney's Role In Plea Bargaining", Yale Law Journal, Vol. 84, 1179/1975, p. 579.
43. L.S. Mohr, "Organizations, Decisions and Courts", Law and Society Review, Vol. 10, no. 4, 1976.
44. This point is also made by C.R. Saunders, "Caught In The Con Game: The Yenny White Drug Users Contact With The Legal System", Law and Society Review, Vol. 9, no. 2, 1975.
45. O. Carlen, "Magistrates' Courts: A Game Theoretic

Analysis", The Sociological Review, Vol. 23, no. 2, May, 1975.

46. See B. Grossman, The Prosecutor, (Toronto: University of Toronto Press, 1969).

Also, T.H. Hartnagel, "Plea Negotiations in Canada", Canadian Journal of Criminology and Corrections, Vol. 17, January, 1975, p. 45.

47. M. Friedland, op.cit., p. 65.

48. D. Jaros and R.I. Mendelsohn, op.cit., p. 484.

49. Ibid., p. 484.

50. See i.e. Maureen Mileski, op.cit.; M. Zander, op.cit.; and S.S. Nagel, op.cit.

51. Canadian Civil Liberties Association, op.cit., p. 84.

52. Even the total number of cases (266) seems too low for the city of Winnipeg over what is reported to be a "one month" period. Furthermore, since the inter-relationships between variables were not analysed, no conclusions can be reached.

53. See W.S. Tarnopolsky, op.cit., chapter VII.

54. See footnote 6.

55. For a critique of this position see, A.S. Blumberg, Criminal Justice, op.cit.

Also the famous critique of criminal lawyers by Chief Justice Burger found in L.D. Khan, "Specialization in Criminal Law", Harvard Law Review, Vol. 83, 1973, p. 252.

56. There is some evidence that "non-cooperative" behaviour meets with harsher treatment.

See i.e. C.R. Saunders, op.cit., M. Mileski, op.cit., O. Carlen, op.cit.

57. The Winnipeg Magistrates have been known to collectively petition the government on several matters ranging from changes in certain statutes to their own remuneration and pensions.

58. See A.S. Blumberg, Criminal Justice, op.cit.

Also, A.S. Blumberg, "The Criminal Court: An Organizational Analysis", op.cit.

59. A.D. Castberg, "The Ethnic Factor in Criminal Sentencing", Western Political Quarterly, Vol. 24, no. 3, Sept. 1971, p. 430.

60. See Powell v. Alabama, op.cit.

61. Task Force Report: The Courts, op.cit., p. 53.

62. Powell v. Alabama, op.cit., p. 69.

63. M. Friedland, op.cit., p. 65.

64. W.S. Tarnopolsky, op.cit., p. 246.

CHAPTER VI

FURTHER ASPECTS OF STRESS AND SENTENCING

INTRODUCTION

The literature critical of the courts identifies five additional areas where evidence of stress and the ability of the courts to cope should likely be found. These areas are sentencing of repeaters, plea, bail granting, the time element, and finally the disparity in sentencing between individual judges. An evaluation of each of these areas should provide a better understanding of the operation of the court, and should also provide fairly extensive evidence of the presence or absence of stress and of the ability of the structure to cope with the demands placed upon it. The way in which courts deal with large numbers of recidivists, the way pleas are handled, the type of bail decisions which are made, the way the volume of cases is handled and finally an analysis of the sentencing variance between individual judges should help to complete the picture of the sentencing process.

SENTENCING OF REPEATERS

Introduction

Most studies of recidivism concentrate on an analysis of the characteristics of recidivists. The general conclusions are that recidivism is most closely associated with youth, a history of previous trouble with the law, an urban background in socially and economically disadvantaged segments of society,

and some element of personal anomie.¹ Such findings, although important, have no bearing on this study. There is however a point of connection since most of the authors use the data indicating a high rate of recidivism to criticize the sentencing process, and/or to demonstrate the futility of the types of sentences utilized by judges. A typical critique is found in a study by Walker:

What must be emphasized is that there is yet no empirical evidence which points conclusively, or even persuasively, to the existence of a large number of offenders for whom on any given occasion the sentencer has open to him one and only one effective choice. The common assumption that most offenders fall into this group, and that the right choice can be discovered by a process of diagnosis before sentence, is probably the result of thinking of penal treatment as analogous to medical or psychiatric treatment, or more precisely to an idealized version of it, in which diagnosis invariably precedes and points unerringly to the remedy. In other words, the diagnostic approach to sentencing may well be based on a fallacious model; and even if not, is largely impractical in our present state of knowledge.²

The notion of the court as a 'revolving door' has been developed to a large extent as a result of studying the rates of recidivism.³

A much less frequent approach is to study the impact of the previous record on sentencing decisions. The general assumption is that offenders with previous records are more likely to receive more severe sentences. Although the evidence is not readily available, what evidence there is, with only a few exceptions, seems to support this obvious hypothesis.

Thus Glaser found that "offenders with prior imprisonment generally get longer sentences".⁴ According to Cormier offenders with a record feel that they are sentenced on the basis of their pasts:

There is wide-spread feeling among recidivists that they are being sentenced on their record (and this is confirmed by our data). Since the criminal record is now accurate and available to the judges prior to sentencing, a shift has taken place from the punishment of the offender to punishment on the basis of the record. Offenders complain that this method of sentencing disregards their present personality and circumstances which may be changed considerably since their last conviction.⁵

Babst and Mannering note that probation is less likely than a jail sentence where the accused has a previous record.⁶ These findings are by no means unanimous. The research of Carney is directly contradictory: "On the average, the recidivists were incarcerated for seven and one thirds months less than non-recidivists."⁷

Due to the preoccupation with building predictive models of possible future criminal behaviour and/or evaluating various rates of recidivism pending on the type and severity of the sentence, the area of judicial treatment of recidivists, with the few exceptions cited above, is to a large extent ignored.⁸ This study attempts to explore more closely the types of sentences received by repeaters and to examine the simple hypothesis that repeaters receive more severe sentences than non-repeaters. Since the previous record of the offender is

one of the few items of information the judge has about the offender, the way it is utilized should reveal some information as to the consistency of the courts and their ability to cope with information as well as the extent to which that information is used.

Data Analysis

a) Total Population

More than half of the population under study have a record of previous convictions (55.3%) (see table 6-1), a frightening piece of information in itself. Moreover, 38.9% of those with a previous record have a history of previous convictions for indictable criminal offences, with large numbers showing a pattern of similar offences (71%) (See tables 6-2 and 6-3). Given the relatively young ages of the population under study, the prevalence and the extensiveness of previous involvement with the law is alarming. These findings are very similar to those obtained by Cousineau and Veevers, who in 1969 found that:

more than four thousand persons were committed to penitentiaries in Canada in 1969, and of these only one in five was being imprisoned for the first time. Of the recidivists, more than half had not only been in a correctional institution before, but had done time on a sentence long enough to warrant commitment to a federal institution. The recidivists had not only been previously incarcerated, but had been so many times. Two-thirds of the men admitted had been incarcerated on more than one previous occasion, and over half had three or more previous convictions. 9

Table No. 6-1

Total Number of Previous Convictions

Previous Conviction	N	%
None	456	44.7
One or two Convictions	240	23.5
Three to Five Convictions	185	18.1
Six and More Convictions	140	13.7
	1021	100.0

Table No. 6-2

Patterns of Recidivism

Previous Convictions	N	%
No Previous Conviction	451	43.5
Non-Criminal - Non-Related	27	2.6
Non-Criminal - Related	155	15.0
Criminal - Non-Related	136	13.1
Criminal + Non-Criminal - Non-Related	7	.7
Criminal - Related	205	19.8
Criminal + Non-Criminal - Related	55	5.3

Table No. 6-3

Related and Unrelated Convictions

PREVIOUS CONVICTIONS	N	%
Not Related Convictions	171	29.0
Related	419	71.0

The analysis of the total population reveals that in sentencing decisions, the judges totally ignore the relationship between the present offence and the difference in the number of previous offences. Although there is a significant relationship between the severity and type of sentence and the patterns of related and unrelated previous offences, the judges use this relationship only to a limited extent. The relationship between the severity of the sentence and the number of previous convictions reveals that judges (with minor exceptions) penalize more severely those with a previous record than those without a record. Those with a previous criminal record constitute 60.8% of all those who receive the most severe sentences (see table 6-4) and an almost identical percentage, 61.8%, of those who receive the mildest sentences have no previous record. This finding is not at all surprising. What is more interesting but has yet to receive the attention of scholars is the fact that the data indicates that judges make very little distinction between recidivists with very extensive previous records (five or more previous offences) and those with rather limited records. Furthermore, in some instances there are more offenders with limited records than offenders with extensive records in the categories of the more severe offences. What seems to emerge is a pattern of judicial simplification of the complexity of previous records into two categories, the absence of a previous record, and the presence of one. This might have an impact on

Table No. 6-4

(Row Percentages)

Number of Previous Convictions by Severity of the Sentence

Total Population

Number of Previous Convictions	1	2	3	4	5	6	7	8	9	10	11	N
N	5.8%	7.2	12.5	10.0	3.3	6.1	8.3	1.7	.8	20.8	23.3	360
1 - 2	3.0%	7.3	11.2	12.9	7.8	7.3	11.6	4.7	4.7	6.9	22.4	232
3 - 4	2.3%	5.7	16.6	11.4	8.0	5.1	6.3	8.6	8.0	5.7	22.3	175
5	1.6%	4.7	7.8	7.8	7.0	3.1	1.6	8.5	9.3	18.6	30.2	129

Chi Square = 105.894

df = 33 significant at .005

the speed with which the dispositions are reached. If the judges were to attempt to distinguish between the various patterns of previous offences including the number of, type of, and intervals between previous convictions, their ability to quickly dispose of cases would be seriously impaired.

The analysis of the total population from the perspective of the type of sentence received, controlling for previous record, indicates fairly consistent treatment. Those without a previous record are much more likely to receive probationary sentences.¹⁰ As the gravity of previous offences increases so does the probability of incarceration (see table 6-5). At this point however judicial consistency breaks down. Looking at jail sentences alone, only 20% of the accused with the most 'damaging' previous records of related criminal and non-criminal convictions were sentenced to jail as opposed to 52.8% of those with previous records of lesser gravity. Similar discrepancies can be observed in probationary sentences as well as in probationary sentences with supervision.

b) Analysis of Charges

An analysis of charges basically supports the above findings. In major theft offences, the same general relationship of an increased probability of incarceration with an increase in the gravity of the previous record can be observed. There is also some evidence of judicial reluctance to incarcerate first time offenders. In probationary sentences however,

Table No. 6-5

(Row Percentages)

Patterns of Recidivism by Type of Sentence

Total Population

Previous Convictions	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	Time Plus Fine	N
No Previous Conviction	0.6%	26.4	10.2	10.1	46.4	6.1	.2	360
Non-Criminal - Un-Related	.0%	10.3	6.9	.0	48.3	34.5	.0	29
Non-Criminal - Related	0.7%	3.0	3.0	.0	81.6	10.3	1.4	136
Criminal - Un-Related	2.3%	10.8	19.4	6.2	34.9	24.9	1.5	129
Criminal & Non-Criminal - Un-Related	.0%	16.7	.0	.0	66.6	16.7	.0	6
Criminal - Related	.5%	11.1	15.6	2	23.8	47	.0	198
Criminal & Non-Criminal - Not Related	.0%	10.5	2.1	4.0	52	29.2	2.1	48

Chi Square = 275.880

dF = 36 significant at .005

one finds more offenders with a more serious record than offenders with a less extensive one. In cases of minor theft, the general pattern of treating first-time offenders less severely is repeated (see table 6-6). The already reported inconsistency of treating the more complex patterns of previous records is again revealed. An analysis of traffic offences, crimes against property and crimes against persons further confirms that the introduction of control for charges does not substantially change the findings based on an analysis of the total population.

Conclusion

The data analysis consistently indicates that the basic differentiation in judicial decision-making in terms of the treatment of previous record is made by dividing the population into those with a previous record and those without. The judges ignore to a large extent even the sheer number of previous convictions and are sensitive to one specific category of offenders, namely those with a record of previous criminal and related offences. This process is understandable since the data indicates that the number of offenders with previous convictions is very high, and the various patterns of previous offences complex and difficult to distinguish in a short time. Thus given the commitment to fast decisions it seems that the judges are doing their best in a very quick assessment of the offender's past. A more sophisticated

Table No. 6-6
(Row Percentages)

Theft Under \$50

Patterns of Recidivism by Type of Sentence

Previous Convictions	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	N
No Previous Convictions	.0%	57.8	11.3	7.0	14.0	9.9	71
Non-Criminal - Un-Related	.0%	40.0	20.0	.0	20.0	20.0	5
Non-Criminal - Related	.0%	.0	.0	.0	.0	100.0	1
Criminal - Un-Related	8.4%	8.4	25.0	8.4	16.6	33.2	12
Criminal - Related	.0%	7.8	45.5	14.3	33.3	51.5	41
Criminal & Non-Criminal Related	.0%	9.8	24.4	2.4	19.5	43.9	9

Chi Square = 54.106

df = 25 significant at .005

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treatment of the previous records of offenders could be possible in one of two ways; either by devoting more time to each and every case or through legislative guidance as to the treatment of the previous record in sentencing. It is also obvious that the judges pay little attention to the literature on recidivism and in particular to the studies that indicate the types of sentences most likely to increase or decrease the future criminal behaviour of recidivists.¹¹ From the point of view of stability of the structure the manner in which the court deals with the previous record seems to be satisfactory given the constraints of time.

PLEA

Introduction

In a convincing argument discussed in chapter two, A.S. Blumberg indicates that the entry of a guilty plea is to the advantage of all the important actors in the trial.¹² Evidence that the defendant is even encouraged to enter a guilty plea can also be found in the literature.¹³ Such a plea also reduces both the length of the trial and the function of the judge significantly. In the case of an entry of a guilty plea, the judge usually has to assess only the severity of the sentence. As he does not have to deal with competing demands, the level of conflict is significantly reduced. The entry of a guilty plea reduces the amount of work to be done by both the Crown and (if present) the defense counsel as well as the judge.

The outcome of a trial, at least in its basic terms, is already accepted by all involved. Thus large numbers of guilty pleas should have stress reducing properties. This section will analyse the effect of plea on the sentencing process. The impact of plea on the type of sentence will be examined in order to determine the importance and the use of plea information by the court.

Data Analysis

a) Total Population

In the case of the Winnipeg Magistrate Court the percentage of guilty pleas is extremely high;

Table 6-7

PLEA	N	%
Guilty	1135	94.9
Not Guilty	61	5.1

The judges are therefore in a fairly enviable position. The data cannot give an indication whether the very high percentage of guilty pleas is due only to the very efficient work of the various police forces and/or crown attorneys or also due to assistance from the barristers. The structure of penalties might also be a contributing factor, particularly in the case of minor traffic offences. The 'offenders' dilemma in such

cases is a difficult one indeed. On the one hand, the entry of a guilty plea might bring a verdict of a fine whereas on the other hand a plea of not guilty does not guarantee an acquittal, but consumes times and carries possible additional costs. From the perspective of the court, the high percentage of guilty pleas contributes positively to the court's ability to cope with the volume of cases and thus has stress reducing properties.

The data indicates that the entry of a not guilty plea serves two purposes. First of all, (as one would expect) the rate of acquittal among those who pled not guilty is much higher than among those who pled guilty. Of those who were acquitted, 82.3% entered a plea of not guilty. (see table 6-8). In other words, of those who entered a not guilty plea, 24.6% were acquitted. As the overall rate of acquittals for cases coming into trial is only 1.7%, the magnitude of this finding is reduced in importance. The second result produced by a not guilty plea is totally unexpected on the basis of the findings of previous studies on sentencing. The analysis of the relationship between the plea and the sentence produced results indicating the less severe treatment of offenders found guilty who pled not guilty than those who pled guilty (see table 6-8).

b) Analysis by Charge

In an analysis by charge, of those who received jail sentences, those who pled not guilty were less likely to

Table No. 6-8

(Row Percentages)

Total Population

Plea By Type of Sentence

Plea	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	Time Plus Fine	N
Guilty	.3%	16.3	11.1	2.5	49.3	19.8	.6	962
Not Guilty	24.6%	5.3	7.0	3.5	50.9	8.8	.0	57

Chi Square = 198.683

dP = 6 significant at .005

Note: 22.95% of those who plea not guilty are acquitted.

receive jail sentences (11.6%) than those who pled guilty (20.4%). In most instances the not guilty pleas produced more fine sentences (see tables 6-9 - 14). A possible explanation for this finding is that those who plead not guilty might have mitigating circumstances in their particular cases.¹⁴ Thus the not guilty plea might be an attempt on the part of the defendant to bring to the attention of the judge the elements of the case which could result in a lower sentence.

Conclusion

It is possible that the not guilty plea frequently takes on a new meaning, and that it should read 'less guilty'. Since the trials of those who plead not guilty take longer, the judge is able to assess the evidence and the defendant more thoroughly.

As the data analysis indicates an extremely low proportion of not guilty pleas, the net effect of plea on the court structure has to be to its advantage. The high proportion of guilty pleas has stress reducing properties both in terms of time requirements as well as in a demand reduction effect. The analysis also indicates a high degree of consistency in treating the not guilty pleas, particularly in so far as not guilty pleas result in a much lower proportion of jail sentences. The finding (unreported by previous research) that not guilty pleas result in less severe sentences deserves further examination.

Table No. 6-9

(Row Percentages)

Theft Under \$50

Plea By Type Of Sentence

Plea	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	N
Guilty	.0%	39.7	15.6	5.0	16.3	23.4	141
Not Guilty	33.3%	22.2	11.1	.0	22.2	11.1	9

Chi Square = 48.969

df = 5 significant at .005

Table No. 6-10

(Row Percentages)

Theft Over \$50

Plea By Type Of Sentence

Plea	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	Time Plus Fine	N
Guilty	.0%	23.3	19.8	6.0	5.2	44.8	.9	116
Not Guilty	33.3%	.0	16.7	.0	16.7	33.3	.0	6

Chi Square = 41.990

df = 5 significant at .005

Table No. 6-11

(Row Percentages)

Traffic Offences

Plea By Type Of Sentence

Plea	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	Time Plus Fine	N
Guilty	.6%	.0	.0	1.2	93.6	3.5	1.2	172
Not Guilty	22.7%	.0	.0	.0	77.3	.0	.0	22

Chi Square = 32.776

dF = 6 significant at .005

Table No. 6-12

(Row Percentages)

Liquor Related Offences

Plea By Type of Sentence

Plea	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	N
Guilty	.0%	16.2	18.9	.9	36.9	27.0	111
Not Guilty	.0%	.0	25.0	50.0	.0	25.0	4

Chi Square = 37.885

dF = 5 significant at .005

Table No. 6-13

(Row Percentages)

Crimes Against Person

Plea By Type Of Sentence

Plea	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	N
Guilty	.0%	38.2	17.1	4.7	13.5	26.5	170
Not Guilty	33.3%	22.2	11.1	.0	22.2	11.1	8

Chi Square = 59.103

df = 5 significant at .005

Table No. 6-14

(Row Percentages)

Miscellaneous Charges

Plea By Type Of Sentence

Plea	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	N
Guilty	.6%	17.0	21.0	2.3	30.7	28.4	176
Not Guilty	20.0%	10.0	10.0	20.0	20.0	20.0	10

Chi Square = 32.813

dF = 5 significant at .005

BAIL GRANTING DECISIONS

Introduction

Bail decisions are the second most important decisions made by the judges. Although the refusal of bail does not change the legal presumption of innocence, de facto, the consequences seem to imply that the defendant is labelled guilty. From the point of view of the accused the pre-trial custody is as much a denial of freedom as that resulting from the final disposition. Furthermore the refusal of bail should indicate the gravity of the offence and/or a negative evaluation of the defendant. One can reasonably expect a higher rate of conviction and perhaps more severe sentences when bail is refused. Thus the examination of bail granting decisions should provide some indication of the presence or absence of stress and the ability of the courts to handle stress.

The literature devoted specifically to an examination of bail granting decisions (other than a discussion of the normative aspects) is rather limited, although there is an extensive treatment of Canadian practices. Dean Friedland's Detention Before Trial is the most exhaustive treatment of the subject in any jurisdiction.¹⁵ This study is extremely important as it has led to a radical change in the pertinent legislation.¹⁶ The findings revealed in this book have served to destroy some of the commonly held assumptions about bail granting. Friedland found that 92% of those charged were initially arrested.¹⁷ Of these, only 12% were bailed from

the police station, 4% were bailed from jail on the same or subsequent day, and 84% of those arrested, or 77% of those charged, remained in custody until their first appearance in court.¹⁸ Not surprisingly, in cases of driving offences, the accused was most frequently released on his own recognizance. This finding of pre-trial custody is even more important since those in custody are more likely to plead guilty.¹⁹ Friedland found that 40.4% of those in custody pled guilty, as opposed to 29.8% of those bailed and summoned. Furthermore 95% of those in custody who pled guilty had no lawyer.²⁰ Friedland claims an association between the low education of the accused and guilty pleas,²¹ (However there is some doubt as to whether this relationship is statistically significant). Friedland also found that those who pled not guilty were less likely to be tried at their first court appearance.

Friedland discovered that the conviction rate in summary conviction cases was 79% in comparison to 72% for indictable offences. In summary conviction cases where bail was granted, 68% were cases in which the accused was released on his own recognizance, in 29% of the cases bail was set, and in 3% of the cases there was no mention of bail, or bail was not granted. The corresponding figures for indictable offences were 18%, 66% and 16% respectively. Although the reasons for this difference are not necessarily due to variance in the severity of the offences, Friedland offers no other explanation.²²

The chances of an accused being released on his own recognizance were found to vary highly from charge to charge. An accused was most likely to be released on his own recognizance for a driving offence (92%) followed by gambling charges, (58%) offences against the public order (55%), vagrancy (20%), sexual offences against the same sex (17%), and least likely to be granted such a release as a result of a charge of sexual assault against a woman (8%).²³ Interestingly, the socio-economic implications of these findings are not mentioned by Friedland.

There is a noticeable pattern of consistent delay in the great majority of cases where the accused pled not guilty.²⁴ As Friedland notes,

The delays also tend to create confusion in the orderly handling of cases by 'cluttering up' court calendars and clerk's dockets, and resultant overcrowding in the court room, corridors, city hall cells, and vehicles transferring accused persons to court.²⁵

As to the relationship between custody and outcome, Friedland states that "(t)he results do not necessarily prove a causal connection, but they do lend statistical support to the common sense conclusion that such a relationship exists."²⁶ Those not in custody had a lower conviction rate (53% to 59%) and a higher acquittal rate (47% as compared to 41%) compared to those in custody.²⁷ (The rate of acquittals reported by Friedland is significantly higher than that reported by other studies.) The relationship is increased when bail is set at \$500.00.²⁸ When previous convictions are considered, the

same relationship is again maintained, although it is not as uniform.²⁹ Friedland himself admits that the numbers are too small to warrant drawing any firm inferences.³⁰

In looking at the area of legal representation and custody Friedland states,

A major reason why custody unfavourably affects the finding of guilt or innocence is the difficulty which presently exists for a person in custody in obtaining legal counsel. In this study it was found that accused persons in custody who pleaded not guilty were not represented by counsel in proportionately as many cases as those persons not in custody. Coupled with this are figures which tend to support the conclusion that an accused who has a lawyer is more likely to be acquitted than an accused who has no lawyer.³¹

However, as has already been mentioned, 95% of those who pled guilty had no lawyer, thus it appears that the sample of not guilty pleas was too small to draw any conclusions.³²

Friedland found that persons who were refused bail and not represented had a conviction rate of 65%. Persons kept in custody who were represented had a conviction rate of 54%.

Among those not in custody and not represented 62% were convicted.³³

There are some problems in assessing the importance of Friedland's findings. As the majority of his analysis is based only on those cases where bail was granted, valid comparisons cannot be made with cases where bail was refused. A more serious criticism is that in most instances (although Friedland states that chi square has been applied throughout)

the supporting tables report relationships which do not appear to be statistically significant. (This is particularly true in chapters 3 and 6).³⁴ Furthermore, the reported rates of acquittals are so high (contrary to the results of other studies)³⁵ that it seems likely that the population under study was somewhat skewed.

Another extensive examination of bail granting decisions is found in the work of Zander.³⁶ Out of a population of 597, bail was granted in 65% of all cases. Significantly, the proportion granted bail varied from one court to another and depended upon the type of hearing.³⁷ Another critical finding which is contrary to popular belief was that bail was granted to many persons charged with the more serious offences.³⁸ Zander also discovered that there were no statistically significant differences in terms of those who were granted bail, based on whether or not the accused had legal counsel. However, in cases where the police were opposed to granting bail, the accused who was represented had an impressively better chance of being granted bail.

The legally represented defendant obtained bail in 31% of 49 cases, compared with 16% of 77 cases where he was unrepresented. The represented defendant therefore, appeared to have almost twice as much chance as one who was unrepresented of persuading the court to grant him bail in the face of police opposition.³⁹

The police's most common objections "were the fact of previous convictions, no fixed abode, further enquiries to be made and

the fact that the defendant had previously served a prison or Borstal sentence." ⁴⁰ A further interesting finding emerging from Zander's study was that out of the 390 cases where bail was granted, conditions were imposed by the magistrate in 23% of the cases. ⁴¹ However, again there were differences between the courts in terms of the conditions imposed. Zander also observed that in 60% of the cases where bail was granted, the accused was granted bail on his own recognizance and that in another 34% of the cases, the accused was allowed bail on his own recognizance together with some sureties. ⁴² In analysing the amounts required by the courts for such sureties, Zander was amazed at the;

relatively high proportion of cases in which sureties in large sums were ordered. In ⁴⁷ out of the 150 cases in which sureties were ordered the amount was over £ 100, and in 25 (17%) it was over £ 250. The great majority of the cases where sureties of more than £ 100 were ordered appeared to be the more serious kinds of cases - theft or handling of large sums, forgery, possession of offensive weapons, drugs, burglary. ⁴³

Another key finding was that "the average length of time taken on the bail decision, in the 525 cases for which an estimate was given, was 2 minutes, 55 seconds". ⁴⁴

Since the introduction of the Bail Reform Act, proclaimed on January 3rd, 1972, studies such as those of Zander and Friedland no longer have direct application to bail granting decisions. ⁴⁵ The Act has introduced a fairly precise set of statutory guidelines as to arrest and bail procedures.

As Scollin states; "The general objects of these guidelines are, to avoid unnecessary arrests; if the accused is arrested, to ensure early pre-trial release; if the accused is not released, to avoid a long delay in bringing him to trial; and if he is convicted at trial and appeals, to encourage release pending appeal."⁴⁶ Scollin also underlines the means for ensuring that these objectives are met:

To achieve these objects the amendments introduced the concept of police duty not to arrest; police duty to release; statutory preference of summons to warrant for arrest; automatic consideration of bail by a justice; release on written undertaking, limited statutory grounds for detention; statutory recognition that the onus is on the Crown; virtual abandonment of 'cash' bail; and statutory formulation of the grounds for release pending appeal.⁴⁷

Data Analysis

The data indicates that bail was granted in 71.8% of the cases (see table 6-15) which shows a remarkable change from the results obtained by Friedland less than a decade earlier. The difference is perhaps a result of judicial anticipation of the forthcoming legislation (The Bail Reform Act).

a) The Total Population

The Analysis of the total population surprisingly reveals no significant relationship between the overall severity of the sentence and the granting or refusal of bail. Although in a particular type of sentence there is a statistical relationship between bail granting and the severity of the

Table No. 6-15

Bail Granting Decisions

	%	N
Bail Granted	19.7	222
Accused Released on His Own Recognizance	4.5	51
Bail Refused	9.5	107
Case Disposed at the First Hearing	66.2	785

71.8%

28.2%

sentence. Those who were refused bail received longer probationary sentences, longer jail sentences but lower fines (see tables 6-16 - 18). These relationships indicate that the expected seriousness of the offence at the initial stage of bail granting is confirmed by the later disposition. The lower fines received by those who were refused bail can perhaps be explained by the possibility that the judge, at the disposition, takes into account the pre-trial custody. (See table 6-18).

The data did not show any relationship between bail granting and socio-economic status variables with the exception of one. The only such variable which correlates highly with bail decisions is ethnicity. Native offenders are least likely to face refusal of bail (see table 6-19). This however can be explained by the exceptionally high rate of liquor related offences in this group of defendants which in turn has a higher than average percentage of positive bail decisions.

The analysis of the type of sentence and bail decisions produced the expected results. Cases where bail was granted produced the highest percentage of acquittals (46.70%) (see table 6-20). On the other end of the spectrum, 39% of those who were refused bail received jail sentences. Furthermore, cases where bail was refused produced, in the final disposition, the highest proportion of probationary sentences with supervision (30%) of those refused bail ended with this type of sentence. Thus this study provides further

Table No. 6-16
Total Population
Bail Granting By Length Of Probation

Bail	N	%	Probation in Days (Mean)
Granted	90	31.9	486
Refused	43	15.2	565
Accused Released on his Own Recognizance	9	3.2	280
Case Disposed at First Hearing.	140	49.6	397

$P (3, 278) = 7.901 \cdot \text{prob} < .01$

Table No. 6-17

Total Population

Bail Granting By Jail Sentences in Days

Bail	N	%	Days
Granted	33	15.8	221
Refused	49	23.4	428
Accused Released on His Own Recognizance	1		90
Case Disposed at First Hearing	127	60.8	130

 $F(2, 206) = 11.628$ probability $< .01$

Table No. 6-18

Total Population
Bail Granting By Fines In Dollars

Bail	N	%	Fine In Dollars
Granted	97	19.4	115
Refused	21	4.2	60
Accused Released on His Own Recognizance	40	8.0	108
Case Disposed at First Hearing	342	68.4	73

F (3, 496) = 12.165 probability < .01

Table No. 6-19

(Column Percentages)

Total Population

Bail Granting By Ethnicity

Bail	Ethnicity									
	English	French	Indian & Metis	Ukrainian	Polish	Scandinavian	German	Italian	Austrian	Dutch
Granted	20.0%	23.1%	9.0%	28.4%	25.0%	20.0%	29.2%	20.0%	50.0%	22.2%
Refused	9.7	8.1	5.9	20.3	10.0	32.0	10.4	10.0	20.0	11.1
Accused Released on His Own Recognizance	.8	.6	.9	4.1	.0	.0	.0	.0	.0	.0
Case Disposed at First Hearing	69.4	68.2	84.2	47.3	65.0	48.0	60.4	70.0	30.0	66.7
N	360	173	222	74	20	25	48	10	10	9

Chi Square = 75.02692 with 27 degrees of freedom

Statistics significant at .005

Table No. 6-20

(Row Percentages)

Total Population

Bail Granting By Type of Sentence

Bail	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time	Time Plus Fine	N
Granted	3.3%	23.9	14.1	4.2	41.3	13.1	.0	213
Refused	1.0%	9.0	30.0	4.0	17.0	39.0	.0	100
Accused Released on His Own Recognizance	3.9%	11.8	3.9	2.0	76.5	2.0	.0	49
Case Disposed After First Hearing	.8%	14.5	7.6	1.5	54.9	19.6	1.0	592

Chi Square = 140.803

df = 18 significant at .005

confirmation of the Friedland findings.

Thus the analysis of the total population shows that judges generally make final sentencing decisions which are congruent with the initial assessment with respect to bail. Nevertheless, one must note that in the final outcome, 61% of those who were refused bail did not deserve (in judicial assessment) the penalty of denial of freedom. Although most of those refused bail did receive harsher sentences, only 39% received jail sentences. As has already been mentioned, it is possible that the judges consider the pre-trial custody as a part of the punishment in the final disposition. However, an assessment of this possibility is beyond the scope of this study. Bail refusal decisions seem to act as a message to the judge indicating that the case might deserve more severe treatment, as is confirmed by table 6-20.

Judges behave in a consistent manner, giving longer jail sentences and longer probations frequently reinforced by supervision in those cases where bail was refused. If they were having problems coping with stress, one would expect more erratic behaviour than is manifested by the data. As the data also indicates that pre-trial custody is taken into consideration in sentencing dispositions, a picture of institutional consistency in the directional handling of bail decisions is also manifested. Decisions are reached quickly and efficiently, and the fact that denials of bail and the final disposition frequently come from two different judges also reflects consistency.

b) Analysis of Charges

An analysis of charges provides further evidence of the consistent handling of bail decisions with the number of refusals increasing with the gravity of the offence. In the four largest categories of charges, the pattern of refusals corresponds to the nature of the offence: in minor traffic charges bail was refused in only 4.2% of the cases; in major traffic charges that figure is increased to 8.3%; in minor theft to 28.6% and finally in major theft to a high of 45.4%.

Some bail decisions in other charges seem questionable,⁴⁸ but the small number of cases and the lack of recorded reasons for granting or refusing bail makes it difficult to comment.

An analysis of charges provides additional evidence in support of the above observations. In liquor related offences 31.8% of probationary sentences with supervision were administered to those who were refused bail. The corresponding figure for those who were granted bail is 4.5% (see table 6-21). Those who were refused bail were also more likely to receive jail sentences. In terms of fines, those who were refused bail paid only about half the amount in fines compared to those who were granted bail (see table 6-22). In the case of minor theft (see table 6-23) those who were granted bail had probations shorter by 77 days. Finally, in cases of offences against persons, the combined time plus fine sentences, were an average of 428 days longer in cases where bail was refused (see table 6-24).

Table No. 6-21

(Column Percentages)

Liquor Related Offences

Bail Granting By Type Of Sentence

Bail	Acquittal	Probation	Probation With Supervision	Probation Plus Fine	Fine	Time
Granted	.0%	17.6%	4.5%	66.7%	21.1%	3.2%
Refused	.0	17.6	31.8	33.3	7.9	6.5
Accused Released on His Own Recognizance	.0	.0	.0	.0	2.6	3.2
Case Disposed at First Hearing	.0	64.7	63.6	.0	68.4	87.1

Chi Square = 241.210

df = 15 significant at .005

Table No. 6-22

Liquor Related Offences
Bail Granting By Fines (in Dollars)

Bail	N	%	Fine in Dollars
Granted	23	10.0	63
Refused	4	1.7	32
Accused Released on His Own Recognizance	4	1.7	30
Case Disposed at First Hearing	199	86.5	38

 $F(3, 206) = 2.821$
 $\text{Prob.} < .05$

Table No. 6-23

Theft Under \$50

Bail Granting By Length Of Probation

Bail	N	%	Probation In Days
Granted	21	25.6	437
Refused	7	8.5	514
Accused Released on His Own Recognizance	5	6.1	216
Case Disposed at First Hearing	49	59.8	297

F(3,78) = 4.506

Prob. < 01

Table No. 6-24

Offences Against Person

Bail Granting By Time Plus Fine (in Days)

Bail	N	%	Sentence in Days
Granted	15	22.7	141
Refused	15	22.7	569
Case Disposed at First Hearing	36	54.5	243

$F(2,63) = 5.621$
 Prob. < 01

Conclusions

The manner in which the court utilizes bail decisions in sentencing is very consistent. Those who are denied bail generally receive more severe sentences. In an examination of the type of sentences from the perspective of bail decisions the relationship is also clear. The refusal of bail highly increases the probability of time sentences and longer probationary sentences with a greater likelihood of conditions being attached to the suspended sentence. Even in the case of fine sentences there is an adjustment for pre-trial custody which is manifested in lower fines. One is necessarily impressed by the ability of the courts to handle all of these elements given the speed of the proceedings. The consistent treatment of bail as a factor in the final disposition provides further evidence of the ability of the courts to cope with potentially stressful inputs. The ability to deliver fast decisions with the correct assessment of various elements is considered by stress psychologists as either evidence of the lack of stress or of the successful handling of stressful conditions.⁴⁹

THE TIME FACTOR

Introduction

Many students of sentencing have noted the ever increasing pressure of the caseload.⁵⁰ The reader is reminded that some of the speculations as to the lack of stability, or of the inability of the courts to cope with stress, are based precisely on the prediction of the future inability of the institution to handle the volume of business. For example, the Attorney General of Ontario warns that "The case load crisis facing the courts of this province has the potential to seriously undermine the quality of justice in Ontario".⁵¹ Although somewhat overdramatized the following statement is characteristic of this issue: "in many jurisdictions it still appears that despite heroic efforts court time is simply not available".⁵² Few studies furnish specific indication of the methods the courts use in coping with the necessity for quick decisions. Many of these methods have already been discussed⁵³ and the emerging observation is that the courts possess a variety of techniques for reducing the amount of time spent on each case which although not as important as the delay, in the pre-trial period are nevertheless of great importance.

The literature on the courts gives some indication as to how much time is spent by the courts in deciding cases. Maureen Mileski provides one of the few assessments of the time involved in reaching judicial decisions. In her study of the lower criminal court she estimates that decisions were

reached in 72% of cases under study in one minute or less and in only 6% of the cases over four minutes was taken to reach a decision.⁵⁴ The Canadian Civil Liberties Association's study also provides estimates of the amount of time involved. In the cases of "327 accused persons...228 or almost 70% took less than 20 minutes to process. Over 35% of these cases took less than 10 minutes. Only 18 accused had a trial longer than one hour." ⁵⁵ Unfortunately this data is not broken by city so one cannot assess the results obtained from Winnipeg in the Canadian Civil Liberties Association Study.

Generally, the literature recognizes the need for speedy decisions and the efforts of the courts to reach them. The courts are viewed as encouraging and even rewarding the efforts on the part of all actors to save time, and as punishing or discouraging time-consuming elements of the trial.⁵⁶

Data Analysis

The duration of the cases observed in this study falls somewhere between the findings reported by M. Mileski and the Canadian Civil Liberties Association Study. Judicial decisions were reached in one minute in only 15.1% of the cases, it took less than six minutes to determine 79.9% of the cases, and only 2.5% took thirty-five minutes or more. The court spent a total of 104.5 hours in sentencing 1,197 defendants, and therefore took an average of 5.2 minutes per defendant (see table 6-25). Over a three month period, the judges spent

Number of Cases

Time in
Minutes

DURATION OF EACH CASE

0 - 6 minutes = 80%

Table No. 6-25

approximately 12% of their working time in hearing cases. Given that there are the necessary breaks between cases, interruptions, etc., this figure can be conservatively raised to 56.3% of the total working hours of the judges. The time spent on hearing cases by individual judges amounts to 6,764 minutes per judge per year. These figures represent the exact amount of time spent on hearing cases (from the time the case is called to the pronouncement of the sentence). The estimates for similar courts in California (Municipal Courts) are significantly higher and amount to an average "judge year value" of 60,000 minutes.⁵⁷ The comparable estimate for all courts in Canada has been made at 30,000 minutes.⁵⁸ Both of these estimates are arrived at by estimating the time the judge should spend in the courtroom which of course is considerably longer than the exact amount of time spent on hearing cases. If only 2 minutes per case (for interruptions, coffee breaks, etc.) is added to the total time we still end up with only 77,153 judge year value. This means that the Manitoba court still has a significant reserve of time which can be utilized in coping with an increased case load if one is to accept these estimates as valid.

Further evidence that the courts are handling the pressure of time in a satisfactory manner is indicated by the fact that a high percentage - 81.9%, of cases are dealt with in one sitting. (see table 6-26). It is self-evident that the

Table No. 6-26
Number of Appearances till Sentence

Number of Appearances		Number of Cases	%
	1.	783	81.9%
	2.	76	7.9
	3.	47	4.9
	4.	25	2.6
	5.	11	1.2
	6.	5	.5
	7.	4	.4
	8.	5	.5

Total 1,197

100.0

number of appearances increases the time spent on a per sentence basis. The likelihood of disposing of a case in one sitting decreases with the addition of the defense counsel, witnesses and not guilty pleas. (Lawyers are notorious for asking for adjournments, witnesses might have problems in appearing, not guilty pleas are more time consuming due to the need to first establish guilt or innocence thus all of these factors contribute to the consumption of time). In most cases, the arresting officers had the witness box practically all to themselves. This situation is undesirable from the point of view of the defendant.⁵⁹ A policeman, due to his identification with the prosecution,⁶⁰ most likely can be classified as a biased witness who has "preconceived notions of his role as being important to one side and may 'slant' testimony or deliberately lie in order that 'his side' may win."⁶¹ In only 2.9% of the cases under study were witnesses called for the defense - in 35 cases. The Crown was almost equally accomodating, calling witnesses in only 4% of all cases - in 48. This is of course of great assistance to the court in disposing with matters expeditiously. Police officers are trained in giving evidence, and their evidence is prepared in written form and delivered as efficiently as possible. The lack of witnesses in most of the trials means that no time is spent on cross-examination, or on determining which of the witnesses are more reliable. These factors all serve to reduce possible stress due to the pressures of time.

There is no conflict between the facts as seen by the Crown and by the defense. The demands on the court are also reduced.

The elements which contribute significantly to the length of a trial are:

- a) the number of appearances,
- b) legal representation,
- c) severity of the sentence in general, and
- d) reaching jail sentences and jail sentences plus fine sentences (see table 6-27).

These findings are important as they indicate the elements that can and do increase the time spent per case, and that the court is capable of coping with the additional time pressure. Since most of the cases are dealt with at first hearing, and since there is a prevalence of fine and probationary sentences and generally less severe sentences, one can assume that a further increase of caseload will have the same characteristics. The only element which contributes to longer trials that is beyond judicial control is legal representation. As has already been stated, the accused may even pay a price for legal representation in the form of more severe sentences. Lawyers contribute to the length of trial and the length in turn correlates with the severity of the sentence.

Conclusions

There is every indication that the court is well equipped to cope with the demand for fast outputs. There is ample evidence that the court consistently and successfully manipulates the time reducing elements. The picture portrayed is far from that of a structure incapable of coping with stress, which should show signs of the inability to control the process,

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OF/DE

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Table No. 6-27

Length of Trial By Selected Variables

(Tau Beta)

By	Length of Trial	N
Number of Appearances	.24	921
Years Since Last Conviction	.08	550
Number of Previous Convictions	.06	988
Severity of Sentence	.14*	963
Fines	.03	522
Probation	.03	280
Time Sentence	.22*	210
Time + Fine	.18*	
Pre-Trial Custody	.00	361
Legal Representation	.36*	1144

* significant at .001

in the form of erratic behaviour, and other signs of the failure to successfully cope with stressful demands.

THE JUDGE

Introduction

Most studies of sentencing fail to assess the differences in the sentencing behaviour of individual judges.⁶² The few studies which do provide some information about the degree of variance in sentencing between judges are not sufficient to draw general conclusions. Hood, who attempts such a comparison on a relatively large scale, ends up by concluding that it is impossible to determine whether the reported variance in sentencing should be attributed to individual judges themselves or to the geographical areas in which the judges work.⁶³ In Canada two studies report a significant variance in the sentencing behaviour of individual judges.

K. Jobson, in a study of sentencing in Halifax and Cape Breton, found a variance in the number of fine sentences between magistrates (this study lacks some of the necessary controls, such as for previous convictions, thus the findings lack some authority). He also found a difference in the rates of imprisonment in the two cities. Unfortunately, his study makes no comparisons between individual magistrates.⁶⁴

John Hogarth states that there are significant differences among "magistrates in the sentences they impose."⁶⁵ Since his study was primarily designed to establish links between the attitudes and behaviour of judges, it provides an explanation for the discrepancies rather than an assessment of the magnitude of the differences. Furthermore, as the magistrates were from various courts it is impossible to

determine the consistency of the magistrates from a particular court. Hogarth's main conclusion is that "the frequent use of both very short and very long institutional sentences is associated with a simpler and more rapid way of dealing with information."⁶⁶ In addition, Hogarth warns that inconsistencies in sentencing are "repugnant to the average man's sense of justice if such differences are allowed to persist".⁶⁷

This study will attempt to assess the hypothesis that individual justices vary significantly in their sentencing decisions.

Data Analysis

Contrary to the expectations resulting from a review of the literature, very little evidence was found in support of the hypothesis that individual judges vary significantly in their sentencing decisions. An analysis of variance in the type and severity of sentencing by individual judges on the basis of socio-economic status, previous record, legal representation and plea of the accused failed to show any significant differences both in terms of an analysis of the total population and an analysis by charge. The only evidence indicating significant differences was obtained in the analysis of the severity of the sentence in the former and in the case of one charge in the latter.

The analysis of the relationship between the sentencing judge and the severity of the sentence indicates a

rather small amount of variance (see table 6-28). Over the whole range of sentences, from 'light to most severe' between the largest and smallest percentages of cases in each of the eleven categories, the variance amounted to $\pm 5.8\%$. Only at one point of the scale (9), Judge C varied from the average by more than 5%. In this case the variance was $+9.3\%$. It is also impossible to 'label' individual judges as harsh or lenient, since Judge A, who had the highest percentage of the most severe sentences, also had the highest percentage of least severe sentences.

A panel of three experienced criminal lawyers with extensive criminal practice was asked to rank Judges A, B and C in terms of the severity of sentences which could be expected from each of them. The lawyers unanimously agreed that Judge C was by far the most 'lenient' and Judge A the most severe. They were also unsure whether the gap, or difference between the sentencing patterns of Judges A and B would be as great as the gaps between Judges A and C or Judges B and C. The data, both in terms of the whole population and in the one charge in which statistically significant results were obtained does not support this contention.

In the analysis by charge the variance was also rather small. Only in minor traffic offences were statistically significant differences between judges observed (see table 6-29). Over the whole scale, the average variance between high and low percentages of sentences was $\pm 8.6\%$. The single greatest

Table No. 6-28a

(row percentages)

Severity of Sentence by Judges

Total Population

High

Low

Magistrate	1	2	3	4	5	6	7	8	9	10	11	N
A	8.1%	8.5	13.5	8.0	4.5	7.2	3.1	3.6	2.2	11.2	30.0	223
B	6.2%	9.4	14.0	10.4	10.1	3.3	4.9	4.6	3.9	9.4	23.8	307
C	1.5%	1.1	10.7	11.0	4.4	4.8	9.6	6.2	4.0	24.3	22.4	272
Average	5.1%	6.4	12.7	10.0	6.6	4.9	6.0	4.9	3.5	15.0	25.1	

Chi Square = 85.397

dF = 20 significant at .001

Table No. 6-28b

Severity of Sentence by Judges

Table No. 6-29a

(row percentages)

Severity of Sentence by Judges.

Minor Traffic Offences

	Low										High	
	1	2	3	4	5	6	7	8	9	10	11	N
Magistrate												
A	6.5%	9.7	16.1	8.6	3.2	12.9	5.4	3.2	1.1	7.5	25.8	93
B	9.2%	10.0	15.0	13.3	14.2	6.7	5.8	1.7	.0	6.7	17.5	120
C	1.8%	.0	10.8	15.3	7.2	3.6	18.0	3.6	1.8	17.1	20.7	111
Average	5.9%	6.5	13.9	12.7	8.6	7.4	9.9	2.8	.9	10.5	21.0	

Chi Square = 52.235

dF = 20 significant at .001

Table No. 6-29b

Severity of Sentence by Judges (cont.)

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difference in any specific category of severity amounts to 8.1%. Ironically enough the most noticeable difference between the three judges occurred at the low end of the scale with Judge C having the smallest percentage of such decisions.

A possible explanation for the misperceptions of the panel (which by the way were not noted by Judge C himself) is perhaps found in the different manners in which Judges A and C deliver sentences - an observation of the researcher not registered in the data. Judge A, even when delivering a relatively 'mild' sentence, frequently does so with 'harsh' words toward the defendant. He also occasionally shows impatience with the defense counsel. Judge C on the other hand is sometimes even apologetic toward the defendant, using phrases such as "I have no choice but...". His manner is always polite and full of respect for everyone involved in the trial.

Conclusion

Of greatest significance are the negative findings. Given the wide range of sentences to choose from with little or no legislative guidelines, the sentences imposed appear to be remarkably similar. Any differences observed, with the two noted exceptions, are not significant. These findings reinforce and further justify the "institutional" or structural interpretation of the court. They also illustrate that one more source of criticism of the courts is without warrant. The similarity of judicial responses should serve to add

strength to an institution which relies so heavily on individuals who make decisions with practically no external control. Finding explanations for the similarity of behaviour is more difficult. In other jurisdictions there have been attempts at bringing uniformity into the system. For example, in Ontario, Judge Bigelow attempted to introduce a clear-cut guideline for imposing fines.⁶⁸ However, no such overt attempts have been made in the Winnipeg Magistrate's Court. A possible explanation is that the small size of the Winnipeg Court increases the amount of personal contact among judges which in turn leads to similar sentencing policies. In addition, if judges were to impose drastically different sentences for similar offences, they would most likely find themselves subject to strong personal criticism from the media, the legal community and other observers of the courts. The relative uniformity of the sentencing practices of judges enhances the stability of the structure.

CONCLUSIONS

An analysis of some of the main features of the decision-making process of the courts produced no evidence of the inability to cope with stress. The courts produce outputs with remarkable speed and consistency. This is possible to a large extent due to an efficient information-filtering process. Particularly in the manner in which the courts handle the previous record of the defendant, it is evident that the court simplifies and utilized only parts of the available information. As has been stated, the judges distinguish only between three categories of offenders. It can be readily seen that a more elaborate treatment of previous record is possible, however this would necessitate a greater expansion of time per sentencing decision. Given that judges do not keep a record of their decisions, it is very unlikely that they could process the information resulting from the previous record of the offender in a more complex manner without so doing. If judges were to attempt a more complex analysis of the previous record, this would create an additional source of stress, and perhaps generate new demands for consistency.

Contrary to the opinion shared by the legal profession and many other studies, the sentencing process bears little or no stamp of the individual judge. The sentencing process, at least in the Winnipeg Magistrates' Court takes on institutional characteristics, rather than revealing differentiated decisions coming from a collection of judges each with his own sentencing policy. Perhaps even the observed similarity in sentencing

practices can be viewed as a means of reducing stress or the anticipation of stressful demands based on significantly different sentencing practices of individual judges. At no point in the analysis did evidence emerge supporting the view that the court is facing a potential crisis situation.

1. See i.e. R.W. England, "Post Probationary Recidivism", in L. Radzinowicz and M.E. Wolfgang, op.cit.

Also, B.M. Cormier, et.al., "The Persistent Offender", Canadian Journal of Corrections, Vol. 5, 1966, pp. 256-257.

S. Bayer, B.M. Cormier and L. Grad, "Statistics on Criminal Processes", Canadian Journal of Corrections, Vol. 8, 1966, pp. 104-118.

C. Blackler, "Primary Recidivism in Adult Men", British Journal of Corrections, Vol. 8, 1968, pp. 154-155.

D. Glazer and V.O. Leary, "Personal Characteristics Related to Parole Recidivism", in D. Dressler, ed., Reading in Criminology and Penology, (New York: Columbia University Press, 1962).
2. N. Walker, Crime and Punishment in Britain, (Edinburgh: University Press, 1968), p. 258.
3. See i.e. S. Griffin, "The Revolving Door. A Functional Interpretation", The Canadian Review of Sociology and Anthropology, Vol. 3, 1966, pp. 154-166.
4. D. Glazer, "How Many Prisoners Return", in L. Radzinowicz and M.E. Wolfgang, op.cit., Vol. 3, p. 203.
5. B. Cormier, "The Persistent Offender and His Sentence: A Problem for Law and Psychiatry", Canadian Psychiatric Association Journal, Vol. 9, 1964, p. 465.
6. D.V. Babst and J.W. Mannering, "Probation versus Imprisonment", in L. Radzinowicz and M.E. Wolfgang, eds., op.cit., p. 224.
7. F.J. Carney, "Predicting Recidivism in a Medium Security Correctional Institution", Journal of Criminal Law, Criminology and Police Science, Vol. 58, 1967, p. 341.
8. Many students of recidivism advocate utilization of prediction tables which in their opinion would assist judges in making "right" decisions with respect to recidivists.

See i.e. G.F. David, "A Study of Adult Probation Violation Rates By Means of The Cohort Approach", Journal of Criminal Law, Criminology and Police Science, Vol. 55, 1967, p. 70.

Also, T. Grygier, "Probation or Imprisonment: A Statistical Recipe for Judicial Decisions", Chitty's Law Journal, Vol. 19, 1971, p. 57.

9. P.S. Cousineau and J.E. Veevers, "Incarceration As A Response to Crime, The Utilization of Canadian Prisons", Canadian Journal of Corrections, Vol. 14, 1972, pp. 13-14.

Similarly, A.M. Kirkpatrick, "Prisons and Their Products", Canadian Journal of Corrections, Vol. 4, 1961-62, p. 163.
10. For comparison and discussion of the literature see D.V. Babst and J.W. Mannering, op.cit., p. 224.
11. See footnote 8.
12. See the literature discussed in chapter one in particular work of A.S. Blumberg. For discussion of this point see Chapter 5 on legal counsel and sentencing.
13. See chapter on legal counsel and sentencing.
14. In one particular case the sole reason for defendant's not guilty plea was that he was never before in "any trouble with the law".
15. M. Friedland, Detention Before Trial, (Toronto: University of Toronto Press, 1965).

For review of this book see N. Rankin, University of Pennsylvania Law Review, 1966, p. 780.

Also, B.M. Barker, Manitoba Law Journal, Vol. 2, 1967, p. 153.
16. The Bail Reform Act of 1971.
17. M. Friedland, op.cit., p. 46.
18. Ibid., p. 182.
19. Ibid., p. 60.
20. Ibid., pp. 51-52.
21. Ibid., p. 73.
22. Ibid., p. 78.

23. Ibid., p. 79.
24. Ibid., pp. 85-86.
25. Ibid., p. 85.
26. Ibid., p. 110.
27. Ibid., p. 113.
28. Ibid., p. 115.
29. Ibid., p. 114.
30. Ibid., p. 118.
31. Ibid., p. 115.
32. Ibid., p. 52.
33. Ibid., p. 118.
34. I have re-tested tables in these chapters and none of the relationships were significant at .01.
35. See i.e. M. Mileski, op.cit.
36. M. Zander, "A Study of Bail Decision in London Magistrates' Courts", Criminal Law Review, 1971, p. 19.
37. Ibid., table 2 on p. 193.
38. Ibid., table 3 on p. 193.
39. Ibid., p. 194.
40. Ibid., p. 197.
41. Ibid., p. 198.
42. Ibid., p. 199.
43. Ibid., p. 204.
44. Ibid., p. 207.
45. For discussion of the Bail Reform Act see i.e. C.M. Powell, Arrest and Bail in Canada, (Toronto: Butterworths, 1972).

Also, S. Scollin, The Bail Reform Act, (Toronto: The Carswell Co. Ltd., 1972).

Also, J. McIntosh, "The Bail Reform Act", Saskatchewan Law Review, Vol. 36, 1971-72, p. 434.

46. S. Scollin, op.cit., p. 3.
47. Ibid., p. 3.
48. i.e. Granting of bail in offences against persons in 50% of cases.
49. See the literature discussed in chapter two.
50. A.S. Miller, "Public Confidence in the Judiciary: Some Notes and Reflections", Law and Contemporary Problems, Vol. 35, 1970, p. 82.
51. Ontario Ministry of the Attorney General, White Paper On Courts Administration, Ontario, 1976, p. 1.
52. H.R. Uviller, "Pleading Guilty: A Critique of Four Models", Law and Contemporary Problems, Vol. 36, 1971, p. 105.
53. See the literature in chapters two and four.
54. See M. Mileski, op.cit.
55. See The Canadian Civil Liberties Study, op.cit., pp. 38-39.
56. See the literature discussed in chapter two.
57. Manning, "Judgeship Criteria", found in S. Shetreet, "The Limits of Expeditious Justice", Paper for conference on Expeditious Justice, October, 1978, and pp. 89-91.
58. S. Shetreet, op.cit., pp. 88-98.
59. W.K. Katsaris, Evidence and Procedure in the Administration of Justice, (New York: John Wiley & Sons, 1975), pp. 132-135.
60. D.L. Horowitz, The Courts and Social Policy, (Washington, D.C.: Brookings Institute, 1971), p. 220.
61. W.K. Katsaris, op.cit., pp. 132-135.
62. See i.e. S.K. Jaffary, Sentencing of Adults in Canada, op.cit., in particular p. 103.

63. R. Hood, Sentencing in Magistrates' Courts: A Study In Variation in Policy, (London: Stevens, 1962).
64. K.B. Jobson, "Fines", op.cit., p. 641.
65. J. Hogarth, op.cit., p. 386.
66. J. Hogarth, op.cit., p. 339.
67. J. Hogarth, op.cit., p. 386.
68. See K.B. Jobson, op.cit., p. 641.

CHAPTER VII

CONCLUSIONS

In order to conduct a study designed to measure the sentencing performance of a lower criminal court, a search of the pertinent literature has been undertaken. That such a study was called for finds support in the statement of one of the foremost Canadian authorities in the field; who stated that in Canada, "the only empirical study (of sentencing) of significance that has so far been reported is that by Stewart Jaffary".¹ This study was however based on public records which, given the state of statistics in this field, renders it of limited reliability and utility.² Although some studies have been undertaken since the above remark was made, as has been reported in the discussion of the literature, these studies are far from conclusive, and as yet not widely known. The subdiscipline in Canada (as the search of the literature confirms) is in an embryonic stage; only in the areas of judicial attitudes and bail granting are there full monographic studies.³ The remainder of the Canadian literature consists of isolated case studies which examine specific problems usually without attempts at integration of the data or a theoretical evaluation of the information.

The first body of literature under examination, consisting of studies of the goals of sentencing, revealed a total lack of consensus on all but one point. Various groups of scholars describe or prescribe for the courts, goals ranging from the rehabilitation of the offender to

retribution through various intermediary options, discussed in some detail in chapter one. The point on which most scholars agree, and for which there is ample empirical evidence, is that none of the commonly stated goals is fulfilled. Judicial decisions neither deter, nor rehabilitate, and are not even sufficiently punitive to satisfy the 'eye for an eye' principle. In the light of such conclusions it seemed inappropriate (and repetitive) to utilize any of these goals as a yardstick against which the sentencing outputs of the court could be measured. The trends of study in this field of judicial behaviour seem to follow recurring patterns: the 1960's were dominated by the notion of rehabilitation, and there are already signs that the notions of individual deterrence and retribution are becoming popular again.

It is somewhat surprising that, given the relative poverty of information, there is a body of information which makes very general predictions as to the future of the courts. Some students of judicial behaviour predict in the strongest possible terms that the courts are facing a crisis situation which is perhaps already beyond control and definitely requiring immediate action. The notion that the courts are facing 'doomsday' comes from a variety of sources and ideological positions, and from diametrically opposed concerns. The various charges made, and the evidence for this position have been examined, and the discussion has been limited to the most frequent and serious ones. The charge that the courts

treat offenders differently on the basis of their social status, class, ethnicity and other measures of social stratification emerges as a powerful one. This charge is repeatedly stated in the literature and has to be considered most seriously since, if well founded, it is aimed at the very concept of judicial impartiality. A thorough examination of the literature has led to the discovery that this charge is much easier to state than to demonstrate with empirical support. The present literature does not permit any conclusion on that subject. If anything, there is perhaps more evidence against the charge than there is support. In this area once again most of the evidence, both for and against, comes from studies outside Canada.

A corollary charge against the lower criminal courts emerging from a review of the literature is that of differential treatment of the offender based on the presence or absence of legal representation. In this area, as has been demonstrated by the discussion of the literature (chapter one), the impact of the decisions of the United States Supreme Court and the influence of American literature is particularly obvious. An examination of the Canadian literature revealed very few empirical studies devoted to this problem. The literature in general is again inconclusive hence no categorical statements can be made at this time.

The third major charge against the courts comes from the literature which discusses the ability of the courts to cope with the volume of business. According to many

critics, the courts are incapable of handling an increasing caseload, and hence facing a crisis situation on this account.

There is a great need to further examine the validity of the charge that the courts are facing a crisis situation, a claim made by some Canadian scholars. Such an examination should be based on Canadian data. That more extensive study is necessary is further confirmed by the fact that this charge has come from such reputable sources as the Minister of Justice and the Law Reform Commission of Canada. The language and authority of many of the critics is such that there is no doubt as to the seriousness of their charges and predictions.

As a result of the picture emerging from a review of the literature and given the nature of the particular structure under examination an analysis of a lower criminal court based on stress theory seemed most appropriate. Although stress theory has been primarily developed by psychologists, some of the most prominent political scientists have found it a useful tool in the analysis of political institutions. The Provincial Court is a court where the decisions are always made by one judge alone. Thus it is a structure which acts primarily, although not exclusively, in the context of individual behaviour. Therefore the usage of literature focussing on the behaviour of the individual under stress, or in other words in a crisis situation seemed even more appropriate. Stress theory allowed for the development of an understanding of the symptoms identifying crisis

as well as the identification of the symptoms of coping with stress, or conversely, the failure to cope with stress which in biological organisms leads to the ultimate crisis, namely death. What has clearly been determined by psychologists of stress (and supported by political scientists using this framework) is that the symptoms of stress are unidirectional. Therefore if the evidence arising from various observations is not congruent, then the presence of severe stress cannot be assumed. Both political scientists and psychologists are once again in agreement in stating that the best evidence of stress comes from an examination of the level of outputs.

An organism or structure under stress might even become incapable of basic behavioural responses and thus hasten its own demise. This point is of particular importance since it is not necessarily the gravity of outputs which provide that evidence but the congruency of outputs per se. Furthermore, some of the predictions as to the future of courts are based precisely on this premise. Psychologists have also developed a large catalogue of initial conditions which might have either stress producing properties or act as aids to the court enhancing the ability of the courts to cope with and adapt to stress. When the courts are examined from this perspective, the initial conclusion is that they have an impressive range of defences against stress. The norms developed over centuries providing for many of the legal protections of the courts have remarkable stress preventing

or reducing qualities, as has been indicated in chapter two. Perhaps no other political structure possesses such a well developed system of norms preventing it from both internal and external stress as well as providing it with a wide range of coping mechanisms. In the light of the application of stress theory, predictions of the failure of the courts become suspect, and require more substantial evidence than that which is provided by the various critics.

In search of further evidence of stress, this study has attempted an evaluation of the sentencing process in one Magistrate's Court, located in the city of Winnipeg. The two major claims against the courts which have been identified in the literature have been examined, namely differential treatment of the offender who has a low socio-economic status and differential treatment on the basis of representation.

The analysis of the differential treatment of offenders depending on their socio-economic status encountered some difficulties due to the size of the Winnipeg sample, which could have been overcome with the study of a much larger population. The prevalence of poverty or low socio-economic status makes it difficult to examine the charges of discrimination. For example, in a population of over 1,000 accused, only forty people who attended university were found; hence it is difficult to compare the treatment of those who attended university as opposed to those who didn't. The depressing finding, similar to the reports which have emerged from other jurisdictions where the problem has been examined, is the general

profile of the population which day after day appears before the judges. The lack of employment, low educational and occupational skills, and the history of social and legal problems of the population in question has to be stated and restated if for no other reason than to bring it to the attention of the society. Offenders pay for their crimes with that currency of which they appear to have more. Those with jobs or slightly higher social status pay with money. The unemployed and those on welfare pay with their time. These findings repeat themselves from one group of charges to another. Evidence of more severe sentences for the poorer offenders was also found, although the differences are of small magnitude. These findings should be treated with extreme caution, particularly as they lose their importance in a multivariant context. Interpreting the differences in sentencing patterns is not necessarily simple. It could be that the reported differences result from negative attitudes held by judges (who, in terms of their own personal characteristics, are the antitheses of the people whom they sentence) toward offenders with lower socio-economic status. The differences could also be due to attempts on the part of the judges to cut back their workload and save time. Perhaps the likelihood of the unemployed person not paying a fine or breaking the terms of probation is greater (or perceived as such by the judge) than the employed person. In order not to have to deal with the case again, the judge may sentence the unemployed criminal to jail in the first place. There

is also no knowledge available as to the perceptions of the different offenders regarding the severity of the sentence. A uniform treatment which assumes jail sentences to be harsher by definition might not be accurate in all cases.⁴ This area is one requiring a great deal more research before any firm conclusions can be reached. The necessary controls for various legal determinants dictate that such studies could only be conducted with large populations. They would also have to be based on data collected directly by researchers since there are no statistics on crime available which permit a study of socio-economic status and sentencing. The fact that judges are consistently not very harsh in their sentencing practices, combined with the difficulty in analysing the problem and the general lack of conclusive evidence led to the following conclusion. The modest differentiation in the sentencing of offenders of various socio-economic backgrounds is not sufficient to declare a state of crisis. To the contrary, if the 'time saving' hypothesis has some validity, the resulting interpretation of differential sentencing can be construed as evidence of coping responses. One positive finding in this area is that the specific charge of discrimination against the Native offenders was by no means confirmed. If anything there is evidence to the contrary as at some points of the analysis, evidence of slightly more lenient treatment of native offenders was discovered.

A. The analysis of the charges against the courts which

are based on the claim that those who can afford to retain counsel receive differential treatment, produced some interesting and unexpected results. The legal literature and case law leaves not a shade of doubt as to the value of legal counsel. It is after all, 'only the fool who has himself for counsel'. The right to counsel is considered so crucial that it has found its way to the American Constitution and in a modified version is enshrined in the Canadian Bill of Rights. It is not surprising that one does not find any question as to the impact of counsel on sentencing in the legal literature. Social scientists indicate a conflicting notion of the legal counsel as a member of a team.⁵ The team consists of everybody but the defendant and the primary contribution of the lawyer in this analysis is to assist the court in the efficient 'processing' of the accused. This view of the function of the counsel, if confirmed, would lead to a reduction of stress - through increases in guilty pleas, the assurance of correct responses, and the general speeding up of the proceedings. The counsel as viewed by the legal literature has, to the contrary, stress inducing properties. The role of the counsel is to prolong proceedings, constitute a threat of an appeal in case of judicial error and force the judge to choose between different interpretations of the facts and the law. The empirical evidence for either proposition is rather scarce. If there is more evidence supporting the view of the counsel as reducing stress, it is only because the alternative proposition has been accepted

per se, and with only a few exceptions, has not been examined. The data analysis provided some evidence indicating that the benefits accruing to the offender from retaining a counsel might be rather limited and perhaps even detrimental. Neither the rate of acquittal nor the differences in severity or type of sentence provide clear evidence of lighter sentences for represented defendants. To the contrary, some evidence was found in the Winnipeg study indicating that in certain cases defendants without counsel were perhaps better off. What was again surprising was that an analysis separating those represented by counsel on retainer and legal aid counsel revealed marked differences in the ensuing sentencing patterns. The legal aid counsel obtained by far inferior results. These findings deserve some attention and require further investigation. Their importance is increased by the fact that there is a trend toward universal lexicare. If further research would support this as yet isolated conclusion, the expectations of and expenditures on legal aid might be questionable. The data also leave some doubt as to the extent to which lawyers have to utilize their knowledge and skills in routine trials. There is no question resulting from the data analysis that legal counsel does introduce a certain amount of stress. This is most likely due to the fact that as a result of the presence of legal counsel, the court proceedings take longer. Further explanation for the evidence of stress might be found in judicial attitudes toward legal aid, as elegantly expressed

by the Lord Chief Justice of England: "I find it really inescapable that the increasing length of these trials is in some way connected with the greater freedom of the purse".⁶ Much research is needed to authoritatively assess the impact of the counsel on the court, and the benefits accruing to the defendant as a result of legal representation. Judicial attitudes toward counsel in general and legal aid counsel in particular should also be examined.

In order to acquire a further understanding of the possible crisis facing the courts, stress theory dictated that an examination of the filtering and utilization of information was necessary. If the courts are under stress of any magnitude, then there should be ample evidence of the inability to systematically select information and then treat it with any degree of consistency. To this end, the judicial treatment of various inputs and the resulting effects on the sentencing process outputs have been examined.

A history of past criminal behaviour is perhaps the most important information about the accused available to the sentencing judge. The defendants are obliging in this respect since so many of them have in their relatively short lives accumulated an extensive record of previous crimes. The literature on recidivism pays little attention to the treatment of the previous record as an input in sentencing decisions. Understandably, the literature focusses primarily on a description of the conditions leading to, and patterns

of repeated criminal behaviour. Most studies report that, as expected, repeaters receive harsher sentences than non-repeaters. This study of a lower criminal court attempts to analyse the relationship between various patterns and the number of previous convictions. The stress literature indicated that stress would be manifested by the inability to cope consistently with the information about the previous record. The results of this study indicate that the court does utilize the information about the criminal record of the offender in a remarkably consistent manner. In order to do so however, the judges simplify to some extent the various patterns of previous offences. The judges seem to divide the population into three major categories: those without a criminal record; those with a record; and finally those with a record of related criminal offences. In this manner they can assess the record with considerable speed and consistency, without having to distinguish between a large number of confusing patterns. If judges were to attempt a more complex analysis of the record, the time spent per case would have to increase considerably.

Another important element of the sentencing process to be analysed in the Winnipeg study was the plea of the accused. The literature has indicated that guilty pleas facilitate judicial decisions and therefore have a time saving effect. Thus the fact revealed by the data that an extremely large proportion of defendants pleaded guilty has been treated as evidence of the successful adaptation of the Winnipeg Magistrate's Court to

stress. Guilty pleas are disposed of more quickly and the trial as a rule is less complex. The recent increase in plea bargaining is a development in the same direction, resulting in considerable time saving by the courts. An unexpected and previously unreported finding is the relationship between the not-guilty plea and less severe sentences for those who are found guilty. This is another area requiring further examination since it is a development certainly not within the traditional notion of the not guilty plea. Perhaps it indicates that judges are in need of simpler clues regarding the gravity of the offence, as they seem to treat the not guilty plea as an indicator of mitigating circumstances. Traditionally, cues have been provided by the Crown in the cases of the more 'spectacular' trials, however in routine cases, the Crown does not indicate the relative gravity of the offence. Perhaps a mandatory pre-sentence report could provide some of the desired information, although the considerable expense of the introduction of this method makes such a development an unlikely proposition. As in many other instances, the very low level of acquittals made a study of the impact of the plea somewhat difficult, thus only in the most general terms can it be said that, as expected, the not guilty pleas resulted in more acquittals. On the whole, the prevalence of guilty pleas has stress-reducing properties and definitely assists the judges in coping with the volume of business.

The impact of bail granting decisions on the sentence was examined in order to provide further cues as to the presence or absence of stress. It was assumed that cases where bail was refused should end in relatively more severe sentences. The analysis of bail granting decisions in the Winnipeg study further confirms the findings of consistency in judicial behaviour. As was expected, the judges treat more severely those who were refused bail (although in some instances this might be questionable since the grounds for bail refusal might have nothing whatsoever to do with the offence). From the perspective of stability the importance lies in the clear evidence of consistency. A negative bail decision at the time of trial serves as a cue to the sentencing judge that the case might deserve greater attention, thus assisting the judge in the information gathering process.

Special attention has been paid to the analysis of sentencing from the perspective of time expenditure. The literature review has indicated that the speed with which decisions are reached is increasingly becoming of over-riding importance in the light of the increasing caseload. If the court is capable of reducing the effects of potentially time-consuming elements, one can assume that the courts are coping satisfactorily with potential stress. The major elements which contribute to the length of the trial in this case study have been identified as the number of appearances, the presence of legal counsel, and reaching the more severe sentencing

decisions in general and in time and time plus fine sentences specifically. On the whole, it was found that the Winnipeg court handles cases with considerable speed. The average case took 5.2 minutes. Given that a large proportion of that time is devoted to matters which can be referred to as ritualistic (i.e. reading of the charge, entry of plea, etc.) the sentencing process is very efficient. Given the time framework in which the court operates, the normative model of the sentencing process becomes somewhat questionable. One can also have doubts as to whether the judges do consider the elaborate checklist of sentencing criteria which emerges from the study of judicial attitudes. The Winnipeg data also indicated that the judges avoided as far as possible those elements which are time consuming. Most cases were disposed of at first hearing, the percentage of the most severe sentences, consisting of time and time plus fine, was very small. Only one element which serves to increase the length of trial, namely the presence of legal counsel, seemed to introduce considerable stress into the operation of the court. Given the time framework of the average trial, it once again appears that lawyers should be forced to re-examine the basic components of the normative model of the trial; otherwise the improvements which they propose will be at best of marginal utility.

Finally, consideration has been given to the individual judge. In this instance, stress psychology is directly applicable since strictly individual behaviour is

being examined. The literature has led the researcher to believe that significant variation in the sentencing practices of individual judges is to be expected. This study attempted to compare the sentencing patterns of various judges in one court. Unfortunately, only three judges could be taken into consideration. In all but one dimension of the trial, no significant differences between judges were found. The only analysis which provided some evidence of differential sentencing showed small differences between judges in terms of the severity of the sentences they impose. This finding is important but requires much further research before any definite conclusions can be reached. The findings of similarity in the sentencing patterns of different judges is explainable on the basis of the overall picture of the trial which has emerged from this study. In a trial which is characterized by a commitment to fast decisions and the filtering of information in a manner in which complex information is reduced to simple terms, there is less room for idiosyncratic individual behaviour. It is more likely that sentencing carries primarily an institutional imprint determined largely by the primary concern of the structure, namely the production of an adequate level of outputs.

Given that this data was collected in 1971, there is some doubt as to the possible changes in the intervening period. In order to assess the current relevance of the data and given the fact that no recent data for Manitoba is

available, the increase in caseload has been calculated on the basis of Ontario figures⁷ (which have to be higher due to a larger urban population). The annual increase of the caseload for provincial courts is approximately 7.7%, and for the individual judge, approximately 6.4%. From this it can be extrapolated that a similar study undertaken today would examine 1,750 cases. For the three judges who have been studied in greater detail, this would mean an additional two cases per sitting. Given the findings which have emerged from a detailed analysis of the length of trial, this increase would not result in much variance, as it would only mean an average of an additional eleven minutes per sitting.

Another change which has taken place in the intervening period which is perhaps of greater significance is the increase of the legal aid budget and ensuing services, but the new Conservative administration in Manitoba is rapidly countering the effects of this change and has already announced the significant reduction of expenditures on legal aid. These considerations lead one to believe that the results today would be relatively similar, with perhaps more stress occurring as a result of the presence of legal aid counsel.

In conclusion, as the Law Reform Commission of Canada has stated, "at the present there is confusion and controversy about the function of courts and the criminal law".⁸

In the midst of this confusion, the Winnipeg

Magistrate's Court seems to be going calmly about its business and disposing of cases in a highly consistent manner. The examination of the basic tenets of the sentencing process revealed no evidence of major stress; certainly nothing in the operation of the court provided evidence of the court as being unable to cope adequately with considerable stress. It is not unreasonable to assume that other provincial courts are acting in a similar manner, although, as has been stated in chapter 3, the reader is cautioned against the dangers of generalizing on the basis of the data from one lower criminal court.

1. J. Hogarth, op.cit., p. 9.
2. For discussion of this point see J. Hogarth, op.cit., pp. 9-10. Also the literature on the lack of the relevant and reliable data discussed in Chapter One.
3. J. Hogarth, op.cit., and M.L. Friedland, Detention Before Trial, op.cit.
4. Justice Morrow in a public lecture stated that in some remote settlements in the Northwest Territories a jail sentenced is looked at with envy. University of Manitoba Forum, May 7, 1975.
5. For discussion of this point see Chapter Five.
6. Lord Widgery, The Times (London), November 1, 1977 found in S. Shetreet, op.cit., p. 20.

Similar point has been raised by The Ontario Law Reform Commission, Report on Administration of Ontario Courts, 1973, Part III.

Also in Justice Today Report - by The Ministry of Justice, Quebec, 1974.

7. Ontario Court Statistics, Annual Report, Fiscal Year 1976/77, pp. 64-65.
8. See footnote 170, Chapter One.

APPENDIX A

D	REMAND	BAIL	RELEASED ON OWN RECOGNIZANCE	R
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COURT: A ___ B ___ C ___ D ___ JUDGE _____ DATE _____ MORN. ___ APT. ___

CHARGE OR CHARGES: _____ NAME OR CASE # _____

NAME OR CASE # _____

PLEA: GUILTY ___ NOT GUILTY ___ OCCUPATION _____ UNEMPLOYED _____

PREVIOUS CONVICTIONS: YES ___ NO ___ REPRESENTATION: YES ___ NO ___

IF YES: _____ SEX: M ___ F ___ AGE _____

APPROX. EXACT

MARITAL STATUS: SINGLE _____

MARRIED _____

WIDOW _____

ACQUITTAL _____ SENTENCE _____

FINE _____

TIME _____

RESTITUTION _____

PROBATION _____

COURT ORDER _____

DURATION OF CASE _____

LIQUOR IN THE CASE:

YES _____

NO _____

EDUCATION: GRADE _____

OTHER TRAINING _____

INCOME OR WELFARE _____

CHILDREN _____

RACE: WHITE _____

RED _____

BLACK _____

YELLOW _____

ETHNICITY: _____

WITNESSES: YES _____

NO _____

APPENDIX B

Minor Traffic Offences.

Major Traffic Offences.

Theft Under \$50.

Theft Over \$50.

Offences Against Person.

Liquor Related Offences.

APPENDIX C

Severity of Sentence

0. 1 day
1. 2 days
2. 3 days
3. 4-6 days
4. 7-10 days
5. 11-19 days
6. 20-29 days
7. 1-2 months
8. 3-4 months
9. 5-11 months
10. 1 year or more

APPENDIX D

Type of Sentence

Acquittal

Probation

Probation with Supervision

Probation plus Fine

Fine

Time

Time plus Fine

APPENDIX E

Previous Convictions

None

1-2 Previous convictions

3-5 Previous convictions

Six and over

APPENDIX F

Type of Previous Convictions

No Previous Convictions

Non-Criminal - Non-Related

Non-Criminal - Related

Criminal and Non-Criminal - Non-Related

Criminal - Related

Criminal and Non-Criminal - Related

APPENDIX G

Income

\$8 - 10,000

\$6 - 8,000

Student

Unemployed, single on welfare

Married, no children on welfare

Married, children on welfare

APPENDIX H

Ethnicity

Anglo

French

Indian and Metis

Ukrainian

Polish

Scandinavian

German

Italian

Austrian

Dutch

APPENDIX I

Ethnicity

Anglo

Native

East European

West South European^b

North Central European

BIBLIOGRAPHY

ARTICLES

- Alschuler, B., "The Defense Attorney's Role in Plea Bargaining", Yale Law Journal, no. 84, 1975, p. 1179.
- Andenaes, J., "Does Punishment Deter Crime", Criminal Law Quarterly, Vol. 11, 1968-69, p. 76.
- Atkinson, D.N. and Newman, D.A., "Judicial Attitudes and Defendant's Attributes: Some Consequences for Municipal Court Decision-Making", Journal of Public Law, Vol. 19, 1968, p. 48.
- Baab, G.W. and Ferguson, W.R., Jr., "Texas Sentencing Practices: A Statistical Study", Texas Law Review, Vol. 45, no. 3, 1967, p. 496.
- Ball, J.C., "Some Deterrence Concepts in Criminology and Law", Journal of Criminal Law, Vol. 40, 1965-66, p. 347.
- Barton, P.G., "The Power of the Crown to Proceed by Indictment or Summary Conviction", The Criminal Law Quarterly, Vol. 14, 1971-72, p. 101.
- Bayer, S., Cormier, B.M., and Grad, L., "Statistics on Criminal Processes", Canadian Journal of Corrections, Vol. 8, 1966, pp. 104-119.
- Becker, T.L., "Inquiry Into A School of Thought in the Judicial Behavior Movement", Midwestern Journal of Political Science, Vol. 7, no. 3, 1963, p. 254.
- Bennett, S.E., and Inchfaber, A.J., "The Social-Structural Sources of Law and Order Policies", American Journal of Political Science, Vol. 14, no. 3, 1975, p. 419.
- Berkun, M.M., Bielek, H.M., Kern, R.P., and Yegi, K., "Experimental Studies of Psychological Stress in Men", Psychological Monograph, No. 76, p. 534.
- Bienvenue, R.M. and Latif, A.H., "Arrest, Disposition and Recidivism: A Comparison of Indians and Whites", Canadian Journal of Criminology and Corrections, Vol. 16, no. 1, 1974, p. 105.
- Black, D.J., "Production of Crime Rates", American Sociological Review, Vol. 35, August, 1970, p. 733.

- Black, L.C., Jr., "An Impression of the Late Chief Justice", Harvard Law Review, Vol. 88, no. 1, 1974, p. 1.
- Blacker, C., "Primary Recidivism in Adult Men", British Journal of Corrections, Vol. 8, 1968, p. 140.
- Blumberg, A.S., "The Practice of Law as Confidence Game, Organizational Cooptation of a Profession", Law and Society Review, Vol. 1, no. 2, 1967, p. 15.
- Blumberg, A.S., "Legal Services in California", Law and Society Review, Vol. 2, 1967, A, p. 15.
- Boyd, N., "An Examination of Probation", The Criminal Law Quarterly, Vol. 20, no. 3, 1978, p. 355.
- Bowers, W.J. and Salem, R.G., "Severity of Fiscal Sanctions as a Repressive Response to Deviant Behavior", Law and Society Review, Vol. 6, no. 3, 1972, p. 427.
- Box, S. and Ford, J., "The Facts Don't Fit: On The Relationship Between Social Class and Criminal Behavior", Sociological Review, Vol. 19, no. 1, 1971, p. 31.
- Box, S. and Russell, K., "Politics of Discreditability: Disarming Complaints Against the Police", Sociological Review, Vol. 23, no. 2, May, 1975, p. 315.
- Boydell, C.L. and Connidis, I.A., "The Administration of Criminal Justice: Continuity versus Conflict", Canadian Journal of Criminology and Corrections, Vol. 16, 1974, p. 14.
- Brenan, W. Jr., "Chief Justice Warren", Harvard Law Review, Vol. 88, no. 1, 1974, p. 6.
- Brown, A.J., "Cognitive Development and Willingness to Comply With the Law", American Journal of Political Science, Vol. 18, no. 3, 1974, p. 583.
- Brown, D.W., "Adolescent Attitudes and Lawful Behavior", Public Opinion Quarterly, Vol. 38, no. 1, 1974, p. 98.
- Bytheway, W.R. and May, D.R., "On Fitting the Facts of Social Class and Criminal Behavior: A Rejoinder to Box and Ford", Sociological Review, Vol. 19, no. 4, 1971, p. 585.
- Caldwell, R.G., "The Deterrent Influence of Corporal Punishment Upon Prisoners Who Have Been Whipped", American Sociological Review, Vol. 9, no. 2, 1944, p. 171.

- Carlen, P., "Magistrates' Courts: A Game Theoretic Analysis", Sociological Review, Vol. 23, no. 2, 1975, p. 347.
- Carlin, J.E., Howard, J., and Messinger, S.L., "Civil Justice and the Poor: Issues for Sociological Research", Law and Society Review, Vol. 1, no. 1, 1966, p. 9.
- Carlson, K.A., "Some Characteristics of Recidivists in an Ontario Institution for Adult Male First-Incarcerates", Canadian Journal of Criminology and Corrections, Vol. 15, no. 4, 1973, p. 277.
- Carlin, J.E. and Howard, J., "Legal Representation and Class Justice", U.C.L.A. Law Review, Vol. 12, 1965, p. 279.
- Carter, R.H. and Wilkins, L.T., "Some Factors in Sentencing Policy", Journal of Criminal Law and Police Science, Vol. 58, 1967, p. 503.
- Casper, J.D., "Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment", Law and Society Review, Vol. 12, no. 2, 1978, p. 237.
- Castberg, A.D., "The Ethnic Factor in Criminal Sentencing", Western Political Quarterly, Vol. 24, no. 3, 1971, p. 425.
- Casy, G., "The Supreme Court and Myth: An Empirical Investigation", Law and Society Review, Vol. 8, no. 3, 1974, p. 385.
- Church, T. Jr., "Plea Bargains, Concessions and the Courts: Analysis of a Quasi-experiment", Law and Society Review, Vol. 10, no. 3, 1976, p. 377.
- Canadian Correctional Association, "Brief on the Women Offenders", Canadian Journal of Criminology and Corrections, Vol. 7, no. 1, 1965.
- Canadian Criminology and Corrections Association, "Towards a New Criminal Law for Canada", Canadian Criminology and Corrections Association, 1973, p. 25.
- Cheffins, C., "The Supreme Court of Canada: The Quiet Court in an Unquiet Country", Osgoode Hall Law Journal, Vol. 4, 1966, p. 259.
- Chester, C.R., "The Effect of Recidivism on Property Crime", Crime and Delinquency, Vol. 23, 1977, p. 272.

- Cockerill, R.W., "Probation Effectiveness in Alberta", Canadian Journal of Criminology and Corrections, Vol. 17, 1975, p. 284.
- Cohen, A. and Hodges, H. (Jr.), "Characteristics of the Lower Blue-Collar Class", Social Problems, Vol. 10, 1963, p. 303.
- Cole, G.F., "The Decision to Prosecute", Law and Society Review, Vol. 4, 1970, p. 331.
- Cormier, D.M. & Associates, "Some Psychological Aspects of Criminal Partnership", Canadian Journal of Corrections, Vol. 3, 1961-62, p. 445.
- Cormier, B., "The Persistent Offender and His Sentence: A Problem for Law and Psychiatry", Canadian Psychiatry Association Journal, Vol. 9, 1964, p. 465.
- Cormier, B.M. et. al., "The Persistent Offender and His Family", McGill Law Journal, Vol. 13, 1967, p. 607.
- Cook, B.B., "Public Opinion and Federal Judicial Policy", American Journal of Political Science, Vol. 21, no. 3, 1977, p. 567.
- Cook, P.J., "Punishment and Crime: A Critique of Current Findings Concerning the Preventive Effects of Punishment", Law and Contemporary Problems, 1977, p. 164.
- Cousineau, D.F. and Veevers, J.E., "Incarceration as a Response to Crime: The Utilization of Canadian Prisons", Canadian Journal of Criminology and Corrections, Vol. 14, no. 1, 1972, pp. 10-31.
- David, G.F., "A Study of Adult Probation Violation Rate By Means of The Cohort Approach", Journal of Criminal Law, Criminology and Police Science, Vol. 55, 1967, p. 70.
- D'Esposito, C.D., "Sentencing Disparity: Causes and Cures", Journal of Criminal Law, Criminology and Police Science, Vol. 69, 1969, p. 182.
- Dill, F., "Discretion, Exchange and Social Control: Bail Bondsmen in Criminal Court", Law and Society Review, Vol. 9, no. 4, 1975, p. 639.
- Dillman, D.A. and Christenson, J.A., "Towards the Assessment

of Public Values", Public Opinion Quarterly, Vol. 38, no. 2, 1974, p. 206.

Dolbeare, K.M. and Hammond, P.E., "The Political Party Basis of Attitudes Towards The Supreme Court", Public Opinion Quarterly, Vol. 32, 1968, p. 16.

Dolleshal, E., "Rate and Length of Imprisonment", Crime and Delinquency, Vol. 23, no. 1, 1977, p. 31.

Donnelly, B., "Right to Counsel", Criminal Law Quarterly, Vol. 12, 1968-69, p. 18.

Ducat, C.R. and Flango, V.E., "Towards an Integration of Public Law and Judicial Behavior", The Journal of Politics, Vol. 39, no. 1, 1977, p. 41.

Downs, W.T., "Wanted a Balanced System of Justice", Crime and Delinquency, Vol. 15, no. 2, 1969, p. 193.

Erskine, H., "The Polls - Capital Punishment", Public Opinion Quarterly, Vol. 34, no. 2, 1970, p. 290.

Erskine, H., "The Polls: Control of Violence and Crime from 1954 till 1974", Public Opinion Quarterly, Vol. 38, no. 3, 1974, p. 490.

Erskine, H., "The Polls: Politics and Law and Order", Public Opinion Quarterly, Vol. 38, no. 4, 1974, p. 623.

Erskine, H., "The Polls - Causes of Crime", Public Opinion Quarterly, Vol. 38, no. 2, 1974, p. 288.

Farber, I.E. and Spence, K.W., "Effects of Anxiety, Stress, and Task Variables on Reaction Time", Journal of Personality and Social Psychology, Vol. 25, 1956, p. 1.

Farris, J.L., "Sentencing", Criminal Law Quarterly, Vol. 18, 1976, p. 421.

Feeley, M., "Two Models of the Criminal Justice System: An Organizational Perspective", Law and Society Review, Vol. 7, 1973, p. 407.

Ferguson, G.A., "The Role of Judge in Plea Bargaining", Criminal Law Quarterly, Vol. 15, 1972-73, p. 26.

Finkelstein, M.O., "A Statistical Analysis of Guilty Plea Practices in the Federal Courts", Harvard Law Review, Vol. 89, no. 2, 1975, p. 293.

- Fishman, G., "Youthful Offenders in Israel", Journal of Social Policy, Vol. 7, 1978, p. 57.
- Forsland, M.A., "Age, Occupation, and Conviction Rates of White and Negro Males: A Case Study", Social Science Journal, Vol. 6, 1969, p. 41.
- Frankel, M.E., "Lawlessness in Sentencing", University of Cincinnati Law Review, Vol. 41, 1972, p. 1.
- Friedman, L.A. and Percival, R.V., "A Tale of Two Courts: Litigation in Alameda and San Benito Counties", Law and Society Review, Vol. 10, no. 1, 1975, p. 267.
- Friedland, M.L., "Magistrates' Court: Functioning and Facilities", Criminal Law Quarterly, Vol. 11, no. 1, 1968, p. 52.
- Funkhouser, G.R., "The Issues of the Sixties: An Exploratory Study in the Dynamics of Public Opinion", Public Opinion Quarterly, Vol. 37, 1973, p. 62.
- Galanter, M., "Why the 'Haves' Come Out Ahead: Speculation on the Limit of Legal Change", Law and Society Review, Vol. 9, no. 1, 1974, p. 95.
- George, B.J., Jr., "Reform of the State Criminal Law and Procedure", Law and Contemporary Problems, Vol. 42, 1977, p. 63.
- Gibson, R.C., "Illegally Obtained Evidence", University of Toronto Faculty of Law Review, Vol. 31, 1973, p. 23.
- Giffen, P.J., "The Revolving Door, A Functional Interpretation", Canadian Review of Sociology and Anthropology, Vol. 3, 1966, pp. 154-166.
- Giles, M.W., "Lawyers and the Supreme Court: A Comparative Look at Some Attitudinal Linkages", The Journal of Politics, Vol. 35, no. 1, 1973, p. 480.
- Giles, M.W. and Welher, T.G., "Judicial Policy-Making and Southern School Segregation", Journal of Politics, Vol. 37, no. 4, 1975, p. 917.
- Glueck, S., "The Sentencing Problem", Federal Probation, Vol. 20, 1956, p. 20.
- Glueck, S., "Predictive Devices and the Individualization of Justice", Law and Contemporary Problems, Vol. 23, 1958, p. 461.

Green, E., "Inter and Intra Racial Crime Relative to Sentencing", Journal of Criminal Law, Criminology and Police Science, Vol. 55, 1964, p. 348.

Greenberg, D.F., "The Incapacitative Effect of Imprisonment: Some Estimates", Law and Society, Vol. 9, no. 4, 1975, p. 541.

Grygier, T., "Probation or Imprisonment a Statistical Recipe for Judicial Decisions", Chitty's Law Journal, Vol. 19, Feb. 1971, p. 57.

Hagan, J., "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint", Law and Society Review, Vol. 8, no. 1, 1973, p. 357.

Halleck, S.L., "Is Rehabilitation Dead?", Crime and Delinquency, Vol. 23, 1977, p. 372.

Hann, R.G., "Decision Making in The Canadian Criminal Court System: A Systems Analysis", Centre of Criminology, University of Toronto, Toronto, 1973.

Hartnagel, T.H., "Plea Negotiations in Canada", Canadian Journal of Criminology and Corrections, Vol. 17, no. 1, 1975, p. 45.

Harvard Law Review, "Discrimination Against the Poor and the Fourteenth Amendment", Harvard Law Review, Vol. 81, no. 1, 1967, p. 435.

Harvard Law Review, "The Supreme Court: 1968 Term", Harvard Law Review, Vol. 83, no. 1, 1969, p. 62.

Harvard Law Review, "The Unconstitutionality of Plea Bargaining", Harvard Law Review, Vol. 83, no. 1, 1970, p. 1387.

Harvard Law Review, "Plea Bargaining and the Transformation of the Criminal Process", Harvard Law Review, Vol. 90, no. 3, 1977, p. 564.

Hodge, R.W., Siegel, P.M. and Rossi, P.H., "Occupational Prestige in the U.S.: 1925-63", American Journal of Sociology, Vol. 70, 1964, p. 286.

Hogarth, J., "Criminal Justice, The Criminal Court in Sentencing", Canadian Journal of Corrections, Vol. 12, 1970, p. 186.

Inkeles, A. and Rossi, P.H., "National Comparisons of Occupational Prestige", American Journal of Sociology, Vol. 61, 1956, p. 329.

- Jacobs, H., "Black and White Perceptions of Justice in the City", Law and Society Review, Vol. 6, no. 1, 1971, p. 69.
- Jaffary, S.K., "Criminal Behaviour and Learning Theory", Journal of Criminal Law, Vol. 56, 1965.
- Jaros, D. and Mendelsohn, R.I., "The Judicial Role and Sentencing Behavior", Midwestern Journal of Political Science, Vol. 11, no. 4, 1967, p. 471.
- Jeffery, C.R., "Criminal Behaviour and Learning Theory", Journal of Criminal Law, Criminology and Police Science, Vol. 56, no. 3, 1965, p. 294.
- Jobson, K.B., "Imprisonment", Ottawa Law Review, Vol. 4, 1971, p. 421.
- Jobson, K.B., "Fines", McGill Law Journal, Vol. 16, 1970, p. 633.
- Jobson, K.B., "Dismantling the System", Canadian Journal of Criminology and Corrections, Vol. 19, no. 3, 1977, p. 254.
- Kahn, M.H. and Davidson Kahn, L., "Specialization in Criminal Law", Harvard Law Review, Vol. 83, 1973, p. 252.
- Kessel, J.H., "Public Perceptions of the Supreme Court", Midwestern Journal of Political Science, Vol. 10, no. 2, 1966, p. 167.
- Kirkpatrick, A.M., "Prisons and Their Products", Canadian Journal of Corrections, Vol. 4, 1962, pp. 160-178.
- Klein, A.D., "Plea Bargaining", Criminal Law Quarterly, Vol. 14, 1972, p. 289.
- Koza, P. and Doob, A.N., "Police Attitudes Toward The Bail Reform Act", The Criminal Law Quarterly, Vol. 19, 1976-77, p. 405.
- Landreville, P., "Population Carcérale Feminine an Canada", Canadian Journal of Criminology and Corrections, Vol. 11, no. 1, 1969, pp. 1-25.
- Law Society of Upper Canada, "The Community Legal Services Report", Law Society of Upper Canada, Toronto, 1972.
- Leon, J.S., "Rights, Fairness and Effectiveness in Canada

and the U.S.: Counsel and Client in the Criminal Process", Criminal Law Quarterly, Vol. 20, no. 1, 1977, p. 29.

MacKaay, E., "The Paths of Justice: A Study of the Operation of the Criminal Courts in Montreal", Groupe de Recherche en Jurimetrie, Faculte de Droit, Universite de Montreal, Montreal, 1976.

Maclean's, "Law and Order on the March", Maclean's, October 2, 1978, pp. 26-28.

Maltz, M.D., "Crime Statistics: A Historical Perspective", Crime and Delinquency, Vol. 23, no. 1, 1977, p. 32.

Mather, L.H., "Some Determinants of the Method of Case Disposition: Decision-Making By Public Defenders in Los Angeles", Law and Society Review, Vol. 8, 1974, p. 187.

Mayhew, L.H., "Institution of Representation: Civil Justice and the Public", Law and Society Review, Vol. 9, no. 3, 1975, p. 401.

McIntosh, J., "The Bail Reform Act", Saskatchewan Law Review, Vol. 36, 1971-72, p. 438.

Mead, G.H., "The Psychology of Punitive Justice", American Journal of Sociology, Vol. 23, no. 5, 1918, p. 577.

Melicherick, S., "Employment Problems of Foreigner Offenders", National Probation and Parole Association Journal, Vol. 1, 1956, p. 30.

Menninger, K., "The Criminal Law System", Nebraska Law Review, Vol. 45, 1966, p. 22.

Mewett, A.W., "Law Enforcement and the Conflict of Values", Criminal Law Quarterly, Vol. 12, 1969-70, p. 179.

Mileski, M., "Courtroom Encounters: An Observation Study of the Lower Criminal Court", Law and Society Review, Vol. 6, 1970-71, p. 473.

Miller, A.S., "Public Confidence in the Judiciary: Some Notes and Reflections", Law and Contemporary Problems, Vol. 35, 1970, p. 69.

Mohr, L.B., "Organizations, Decisions and Courts", Law and Society Review, Vol. 10, no. 4, 1976, p. 621.

Morris, N.R., "Impediments to Penal Reform", University of Chicago Law Review, Vol. 33, 1965-66, p. 627.

Morton, J.D., "The Crisis in Criminal Law", The W.M. Martin

Lectures, University of Saskatchewan, January 23-25, 1963

- Monzingo, J.E., "Economic Analysis of the Criminal Justice System", Crime and Delinquency, Vol. 23, no. 2, 1977, p. 260.
- Normandeau, A., "Canadian Criminal Statistics: Not Again!", Canadian Journal of Criminology and Corrections, Vol. 12, no. 3, 1970, pp. 198-206.
- Oaks, D.H. and Lehman, W., "The Criminal Process of Cook County and the Indigent Defendant", University of Illinois Law Forum, 1969, p. 719.
- Omlin, L.E. and Remington, F.Y., "Sentencing Structure: It's Effect Upon Systems for the Administration of Criminal Justice", Law and Contemporary Problems, Vol. 23, 1958, p. 495.
- Parker, G.E., "Further Extension of the Right to Counsel", Criminal Law Quarterly, Vol. 10, 1968, p. 267.
- Pettit, D.E., "A Study of Aspirations Among Three Cultural Groups of Prisoners", Canadian Journal of Criminology and Corrections, Vol. 7, no. 1, 1965, pp. 112-116.
- Phillips, L. and Voity, H.L., Jr., "An Economical Analysis of the Deterrent Effect of Law Enforcement on Criminal Activity", Journal of Criminal Law and Political Science, Vol. 63, 1972, p. 330.
- Pierce, W.H., "Reintegration of the Offender into the Community: New Resources and Perspectives", Canadian Journal of Corrections, Vol. 12, 1970, p. 466.
- Price, R.P., "The Forgotten Female Offender", Crime and Delinquency, Vol. 23, no. 2, p. 101.
- Portnoy, V., "Employment of Former Criminals", Cornell Law Review, Vol. 55, 1969, p. 306.
- Prothro, J.W. and Griff, C.M., "Fundamental Principles of Democracy: Bases of Agreement and Disagreement", Journal of Politics, Vol. 24, 1960, p. 276.
- Ratushny, E.J., "Statements of an Accused: Some Loose Strands", Criminal Law Quarterly, Vol. 14, 1972, p. 306.
- Ratushny, E.J., "Is There A Right Against Self-Crimination

- in Canada", McGill Law Journal, Vol. 19, 1973, p. 1.
- Ribordy, F.X., "Conflits des Cultures et Criminalité de Migrants Italiens", Canadian Journal of Criminology and Corrections, Vol. 13, no. 1, 1971, p. 24.
- Ross, H.L., "The Neutralization of Severe Penalties: Some Traffic Law Studies", Law and Society Review, Vol. 10, no. 3, 1976, p. 403.
- Russell, P., "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Program for Reform", Osgoode Hall Law Journal, Vol. 6, 1968, p. 1.
- Russell, P., "The Supreme Court of Canada as a Bilingual and Bicultural Institution", Royal Commission on Bilingualism and Biculturalism, Queen's Printer, Ottawa, 1969.
- Russell, P., "How do Judges Decide?: Ideology v. Science", The Canadian Forum, April 6, 1972.
- Salem, R.S., and Bowers, W.J., "Severity of Formal Sanctions as a Deterrent to Deviant Behavior", Law and Society Review, Vol. 5, no. 1, 1970, p. 21.
- Sanders, C.R., "Caught in the Con-game: The Young White Drug Users Contact With the Legal System", Law and Society Review, Vol. 9, no. 2, 1975, p. 197.
- Schafer, Justice., "Federalism and State Criminal Procedure", Harvard Law Review, Vol. 70, 1956, p. 1.
- Schubert, G., "The 1960 Term of the Supreme Court: A Psychological Analysis", American Political Science Review, Vol. 56, no. 2, 1962, p. 90.
- Schubert, G., "Behavioral Jurisprudence", Law and Society Review, Vol. 2, no. 3, 1968, p. 407.
- Schwartz, L.B., "Reform of the Federal Criminal Laws: Issues, Tactics and Prospects", Law and Contemporary Problems, Vol. 41, no. 1, 1977, p. 1.
- Seing, A., "Indians and the Law", The Canadian Corrections Association, Queen's Printers, Ottawa, 1967, pp. 42-65.
- Shapiro, D.L., "Mr. Justice Rehnquist: A Preliminary View", Harvard Law Review, Vol. 90, no. 2, 1976, p. 293.

- Shetreet, S., "The Limits of Expeditious Justice", (Background Paper), Conference on Expeditious Justice, Edmonton, Alberta, October 19-21, 1978.
- Skogan, W.G., "Dimensions of the Dark Figure of Unreported Crime", Crime and Delinquency, Vol. 23, no. 1, 1977, p. 41.
- Somit, A., Tanenhaus, J. and Wilke, W., "Aspects of Judicial Sentencing Behavior", University of Pittsburgh Law Review, 1959-60, p. 613.
- Spaeth, H.J., "Judicial Power as a Variable Motivating Supreme Court Behavior", Midwestern Journal of Political Science, Vol. 6, 1962, p. 54.
- Spaeth, H.J., "The Judicial Restraint of Mr. Justice Frankfurter: Myth and Reality", Midwestern Journal of Political Science, Vol. 8, no. 1, 1964, p. 22.
- Spaeth, H.J., Meltz, D.B., Rathjen, G. and Haselswerdt, M.V., "Is Justice Blind: An Empirical Investigation of a Normative Ideal", Law and Society Review, Vol. 7, no. 1, 1972, p. 119.
- Spitzer, S., "Punishment and Social Organization: A Study on the Control of Crime: A Quantitative Approach", Law and Society Review, Vol. 9, no. 4, 1975, p. 613.
- Storey, A.G. and Sainty, G.E., "Personality Characteristics of Prisoners Compared with Non-Prisoners", Canadian Journal of Corrections, Vol. 9, 1967, pp. 306-312.
- Sudnow, D., "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office", Social Problems, no. 12, 1965, p. 255.
- Sweet, D.H., "Cultural Bias in the American Legal System", Law and Society Review, Vol. 4, no. 1, 1969, p. 79.
- Teeven, J.J., "Deterrent Effect of Punishment Subjective Measures", Canadian Journal of Criminology and Corrections, Vol. 18, no. 2, April, 1976, p. 152.
- Teeven, J.J., Jr., "Deterrent Effects of Punishment The Canadian Case", Canadian Journal of Criminology and Corrections, Vol. 14, no. 1, 1972, p. 68.
- Thorsell, B.A. and Klemke, L.W., "The Labeling Process: Reinforcement and Deterrent", Law and Society Review,

Vol. 6, no. 3, 1972, p. 393.

- Tieger, J.H., "Police Discretion and Discriminatory Enforcement", Duke Law Journal, 1971, p. 717.
- Tittle, C.R. and Logan, C.H., "Sanctions and Deviance: Evidence and Remaining Questions", Law and Society Review, Vol. 7, no. 3, 1973, p. 371.
- Turner, J., "Justice for The Poor: The Courts, The Poor and the Administration of Justice", Canadian Journal of Corrections, Vol. 12, 1970, p. 1.
- Ulmer, S.S., "Dissent Behavior and the Social Background of Supreme Court Justices", The Journal of Politics, Vol. 32, no. 3, 1970, p. 580.
- Ulmer, S.S., "Social Background as an Indicator to the Vote of Supreme Court Justices in Criminal Cases: 47/56 Terms", American Journal of Political Science, Vol. 17, no. 3, 1973, p. 622.
- Ungs, T.D. and Baas, L.R., "Judicial Role Perceptions: A Q Technique Study of Ohio Judges", Law and Society Review, Vol. 6, no. 3, 1972, p. 343.
- Uviller, H.R., "Pleading Guilty: A Critique of Four Models", Law and Contemporary Problems, Vol. 41, no. 1, 1977, p. 102.
- Waller, L. and Chan, J., "Prison Use: A Canadian and International Comparison", Criminal Law Quarterly, Vol. 17, 1971-75, p. 47.
- Wardwell, W.I., "The Reduction of Strain in Marginal Social Roles", American Journal of Sociology, Vol. 61, 1955, pp. 16-25.
- Weiler, P.C., "Two Models of Judicial Decision-Making", Canadian Bar Review, Vol. 46, 1968, p. 406.
- Wilkins, J. and Jeffries, F., "Due Process Safeguards and Canadian Criminal Justice: A Critique", Criminal Law Quarterly, Vol. 14, 1971-72, p. 220.
- Zander, M., "Unrepresented Defendants in the Criminal Courts", Criminal Law Review, 1969, p. 632.
- Zander, M., "Unrepresented Defendants in Magistrate Courts", New Law Journal, no. 23, 1972, p. 122.

Zander, M., "Study of Bail Custody Decisions in London Magistrates' Courts", Criminal Law Review, 1971, p. 191.

Zeisel, H., "Methodological Problems in Studies of Sentencing", Law and Society Review, Vol. 3, no. 4, 1969, p. 621.

BOOKS

Abel, A.S. (ed.), Laskins Canadian Constitutional Law, Carswell, Toronto, 1975.

Almond, G.A. and Coleman (eds.), The Politics of the Developing Areas, Princeton University Press, Princeton, New Jersey, 1960.

Almond, G.A. and Powell, G.B., Comparative Politics: A Developmental Approach, Little, Brown and Co., Boston, 1966.

Almond, I.A. and Verba, S., The Civic Culture, Little, Brown and Co., Boston, 1965.

Andry, R.G., The Short Term Prisoner, Stevens and Sons, London, 1963.

Appley, M.H. and Trumball, R. (eds.), Psychological Stress Issues in Research, Appleton-Century-Crofts, New York, 1967.

Auerbach, C.A. and Garrison, L.K., The Legal Process, Chandler Publishing Co., San Francisco, 1961.

Backman, C.W. and Secord, P.F. (eds.), Problems in Social Psychology, McGraw-Hill, New York, 1966.

Baner, R.A. and Gergen, K.J. (eds.), The Study of Policy Formation, Free Press, New York, 1968.

Barbeau, A., Le Droit Constitutionnel Canadien: Lois, Documents, et Jugements Divers, (fourth edition), The Carswell Co. Ltd., Toronto, 1975.

Beaney, W.M., Right to Counsel in American Courts, University of Michigan Press, Ann Arbor, 1955.

Bellamy, D.J., Pammett, J.H. and Rowat, D.C., Provincial Political Systems, Methuen, Toronto, 1976.

Bickel, A.M., Politics and the Warren Court, Harper and Row, New York, 1965.

- Bing, S.R. and Rosenthal, S., The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston, Little, Brown and Co., Boston, 1970.
- Black, D., The Behavior of Law, Academic Press, New York, 1976.
- Blumberg, A.S., Criminal Justice, Quadrangle Books, Chicago, 1967.
- Box, S., Deviance, Reality and Society, Holt, Reinhart and Winston, London, 1971.
- Canadian Civil Liberties Association, Due Process Safeguards and Canadian Criminal Justice, Canadian Civil Liberties Association, Toronto, 1971.
- Cardozo, B.N., The Nature of The Judicial Process, Yale University Press, New Haven, 1921.
- Carter, L.H., The Limits of Order, Lexington Books, Lexington, Mass., 1974.
- Cartwright, D. and Zander, A. (eds.), Group Dynamics, Harper and Row, New York, 1968.
- Casper, J.D., American Criminal Justice: The Defendant's Perspective, Prentice Hall, Engelwood Cliffs, New Jersey, 1972.
- Cohen, S.A., Due Process of Law: The Canadian System of Criminal Justice, The Carswell Co. Ltd., Toronto, 1977.
- Countryman, V., The Judicial Record of Justice William O. Douglas, Harvard University Press, Cambridge, Massachusetts, 1974.
- Dawson MacGregor, R., The Government of Canada, Revised edition by N. Ward, University of Toronto Press, Toronto, 1966.
- Danelski, D., A Supreme Court Justice Is Appointed, Random House, New York, 1964.
- Dressler, D. (ed.), Criminology and Penology, Columbia University Press, New York, 1962.
- Dume, G.T., Justice Joseph Story and The Rise of The Supreme Court, Simon and Shuster, New York, 1970.
- Durkheim, E., The Rules of Sociological Method, Free Press, Glencoe, 1938.

- Durkheim, E., The Division of Labour in Society, Free Press, Glencoe, 1960.
- Easton, D., A Framework For Political Analysis, Prentice-Hall, Englewood, New York, 1965.
- Eulau, H., Micro-Macro Political Analysis: Accents of Inquiry, Aldine Publishing Co., Chicago, 1969.
- Faulkner, R.K., The Jurisprudence of John Marshall, Princeton University Press, Princeton, New Jersey, 1968.
- Frank, J., Courts on Trial: Myth and Reality in American Justice, Princeton University Press, Princeton, New Jersey, 1950.
- Frankel, M., Criminal Sentences, Hill and Wang, New York, 1973.
- Freund, P.A., Constitutional Law and Other Problems, (Vol. 1-2), Little, Brown and Co., Boston, 1973.
- Freund, P.A., (ed.), History of the Supreme Court of the United States, (Vol. 1-9), The Macmillan Co., New York, 1971..
- Friedland, M.L. (ed.), Courts and Trials: A Multidisciplinary Approach, University of Toronto Press, Toronto, 1975.
- Friedland, M.L., Detention Before Trial, University of Toronto Press, Toronto, 1976.
- Friedland, M.L., Cases and Materials and Criminal Law and Procedure, University of Toronto Press, Toronto, 1970..
- Friedmand, L. and Israel, F.L., The Justices of the United States Supreme Court; Their Lives and Major Opinions, Chelsea House Publishers in association with R.R. Bowker, New York and London, 1969.
- Friedmand, W., Law and Social Change in Great Britain, Stevens and Sons, London, 1951.
- Gace, R.G., The Role of Social Environment In the Induction and Reduction of Anxiety, The Publishing Co., Washington, 1976.
- Gertler, L.O., and Crowley, R.W., Changing Canadian Cities: The Next 25 Years, McClelland and Stewart Ltd., Toronto, 1977.
- Glueck, S. and Glueck, E.T., Five Hundred Criminal Careers, A.A. Knopf, New York, 1930.

- Green, E., Judicial Attitudes Toward Sentencing, Macmillan, London, 1961.
- Gross, N., Mason, W.S. and McEachern, A.W., Exploration in Role Analysis, John Wiley and Sons; New York, 1958.
- Grinker, R.P. and Spiegel, J.P., Men Under Stress, McGraw-Hill, New York, 1945.
- Grossman, B.A., The Prosecutor: An Inquiry Into the Exercise of Discretion, University of Toronto Press, Toronto, 1969.
- Hart, H.L.A., Law, Liberty and Morality, Stanford University Press, Stanford, California, 1963.
- Hart, H.L.A., The Concept of Law, Clarendon Press, Oxford, 1961.
- Hogarth, J., Sentencing As A Human Process, University of Toronto Press, Toronto, 1971.
- Hood, R., Sentencing in Magistrates' Courts: A Study in Variation in Policy, Stewart and Sons, London, 1962.
- Hood, R. and Sparks, R., Key Issues in Criminology, McGraw-Hill, New York, 1970.
- Horowitz, D.L., The Courts and Social Policy, The Brookings Institute, Washington, D.C., 1977.
- Howard, J.W., Jr., Mr. Justice Murphy: A Political Bibliography, Princeton University Press, Princeton, New Jersey, 1969.
- Jackson, P.E., Dissent in The Supreme Court: A Chronology, The University of Oklahoma Press, Norma, Oklahoma, 1969.
- Jacob, H., Justice in American, (second edition), Little, Brown and Co., Boston, 1972.
- Jaffary, S.K., Sentencing of Adults in Canada, University of Toronto Press, Toronto, 1963.
- Jagewardence, C.H.S., The Criminal Justice System in Canada, Ottawa University, Ottawa, Ontario, 1975.
- James, H., Crisis in the Courts, (revised edition), D. McKay Co., New York, 1971.
- Johnson, R.M., The Dynamics of Compliance, Northwestern University Press, Evanston, Ill., 1961.

Katsaris, W.K., Evidence and Procedure in the Administration of Justice, John Wiley & Sons, New York, 1975.

Katz, D. and Khan, R.L., The Social Psychology of Organization, John Wiley and Sons, New York, 1966.

Khan, R.L., Wolfe, D.M., Quinn, R.P., Snoek, J.D. and Rosenthal, R.A., Organizational Stress: Studies in Role Conflict and Ambiguity, John Wiley and Sons, New York, 1964.

Lampert, J.R., Crime, Police, and Race Relations, Oxford University Press, London, 1970.

Lane, R.E., Political Ideology, Free Press, New York, 1968.

Lane, R.E., Political Life, Free Press, Glencoe, New Jersey, 1959.

Lane, R.E., Political Man, Free Press, New York, 1972.

Law School, The University of Chicago, The Supreme Court Review, (Vol. I), The University of Chicago Press, Chicago, 1977.

Lazarus, R.S., Psychological Stress and the Coping Process, McGraw-Hill, New York, 1966.

Lief, A., Representative Opinions of Mr. Justice Holmes, (arranged with introductory notes by the Vanguard Press), The Vanguard Press, New York, 1931.

Macklin, F., The Price of Perfect Justice, Basic Books, New York, 1974.

Mallory, J.R., The Structure of Canadian Government, Macmillan Company of Canada, Toronto, 1971.

Manzer, R., Canada: A Social-Political Report, McGraw-Hill Ryerson Ltd., Toronto, 1974.

MacNaughton-Smith, P., Permission To Be Slightly Free, A Study of The Granting, Refusing and Withdrawing of Parole in Canadian Penitentiaries, Information Canada, Ottawa, 1976.

McCloskey, R.G., The Modern Supreme Court, Harvard University Press, Cambridge, Massachusetts, 1972.

McGrath, J.E. (ed.), Social and Psychological Factors in Stress, Holt, Reinhart and Winston, New York, 1970.

- McGrath, W.T. (ed.), Crime and Its Treatment in Canada,
McMillan of Canada Ltd., Toronto, 1965.
- McWhiney, E., (ed.), The Civil and Common Law in Canada,
Carswell Co. Ltd., Toronto, 1955.
- Merton, R.K., Social Theory and Social Structure, The Free
Press, New York, 1968.
- Mechanic, D., Students Under Stress, A Study in the Social
Psychology of Adaptation, Free Press, New York, 1962.
- Morton, J.D., The Function of Criminal Law in 1962, C.B.C.,
Toronto, 1962.
- Nader, G.A., Cities of Canada: Theoretical, Historical and
Planning Perspectives, MacMillan of Canada, Canada, 1975.
- Nagel, S.S., The Legal Process From A Behavioural Perspective,
The Dorsey Press, Homewood, Illinois, 1969.
- Nagel, S.S. and Neef, M.G., Legal Policy Analysis, Lexington
Books, Lexington, Mass., 1977.
- Newman, D.J., Conviction: The Determination of Guilt or
Innocence Without Trial, Little, Brown & Company,
Boston, 1966.
- Oaks, D.H. and Lehman, W., Criminal Justice and The Indigent,
University of Chicago Press, Chicago, 1968.
- Orfield, D., The Defendant's Rights, Holt, Reinhart and
Winston, New York, 1958.
- Packer, H.L., The Limits of Criminal Sanction, Stanford
University Press, Stanford, 1968.
- Parker, G., An Introduction to Criminal Law, Methuen, Toronto,
1977.
- Pollock, O., The Criminality of Women, A.S. Barnes, New York,
1961.
- Pound, R., Jurisprudence, West Publishing Co., St. Paul's,
Minnesota, 1959.
- Pound, R., An Introduction to the Philosophy of Law, Yale
University Press, New Haven, 1922.
- Powell, Arrest and Bail in Canada, Butterworths, Toronto,
1972.
- Pritchett, C.H., The Roosevelt Court: A Study in Judicial
Politics and Values, 1937-47, Macmillan, New York, 1949.

- Pritchett, C.H., The American Court, McGraw-Hill, New York, 1959.
- Quinney, R. (ed.), Crime and Justice in Society, Little, Brown and Company, Boston, 1969..
- Radzinowicz, L. and King, J., The Growth of Crime: The International Experience, Basic Books, New York, 1977.
- Radzinowicz, L. and Wolfgang, N.E. (eds.), Crime and Justice, Basic Books, New York, 1971.
- Radzinowicz, M. and Wolfgang, N.E. (eds.), Post Probationary Recidivism in Crime and Justice, Basic Books, New York, 1971.
- Rasporich, A.W., and Klassen, H.C. (eds.), Prairie Perspectives 2, Holt, Reinhart and Winston Ltd., Toronto, Montreal, 1973.
- Reasons, C.E. (ed.), The Criminologist: Crime and The Criminal, Goodyear Publishing Co., Palisides, California, 1974.
- Reasons, C.E. and Kuykendall, J.L. (eds.), Race, Crime and Justice, Goodyear Publishing Co., Pacific Palisides, California, 1972.
- Sarason, I.G. and Spielberger, C.D. (eds.), Stress and Anxiety, Hemisphere Publishing Co., Washington, D.C., 1976.
- Schmeiser, D.A., Criminal Law Cases and Comments, Butterworth, Toronto, 1973.
- Schmeiser, D.A., The Native Offender and the Law, Information Canada, Ottawa, 1974.
- Schubert, G.A., Quantitative Analysis of Judicial Behaviour, The Free Press, Glencoe, Illinois, 1959.
- Schubert, G., Judicial Behaviour, Rand McNally and Co., Chicago, 1974.
- Schwartz, R.D. (ed.), Society and the Legal Order, Basic Books, New York, 1970.
- Scollin, S., The Bail Reform Act, The Carswell Co. Ltd., Toronto, 1972.
- Scotch, N. (ed.), Social Stress, Aldine Publishing Co., Chicago, Illinois, 1970.
- Scott, F.R., Civil Liberties and Canadian Federalism, University of Toronto Press, Toronto, 1959.
- Skolnick, J., Justice Without Trial, John Wiley & Sons, New York, 1966.

- Smelser, N.J., Theory of Collective Behaviour, Free Press, New York, 1963.
- Stein, D., Finding the Judges, Exposition Press, Hicksville, New York, 1974.
- Stelter, G.A., and Artibise, A.F.J. (eds.), The Canadian City: Essays in Urban History, McClelland and Stewart Ltd., Toronto, 1977.
- Sutherland, E.H. and Cressey, D.R., Principles of Criminology, (Sixth Edition), Lippincott, Chicago, 1960.
- Sykes, G.M. and Drabek, T.E. (eds.), Law and the Lawless, Random House, New York, 1969.
- Tarnopolsky, W.S., The Canadian Bill of Rights, (Second Edition), McClelland and Stewart Ltd., Toronto, 1975.
- Trebach, A.S., The Rationing of Justice: Constitutional Rights and the Criminal Process, Rutgers University Press, New Jersey, 1964.
- Vold, G.B., Theoretical Criminology, Oxford University Press, New York, 1958.
- Walker, N., Crime and Punishment in Britain, University Press, Edinburgh, 1968.
- Weaver, J.D., Warren The Man, The Court, The Era, Little, Brown and Co., Boston, New York, Toronto, 1967.
- Weiler, P., In The Last Resort, A Critical Study of The Supreme Court of Canada, Carswell/Methuen, Toronto, 1974.
- Welford, A.T. (ed.), Society Problems: A Method Of Study, Basic Books, New York, 1962.
- Whittington, M.S. and Van Loon, R.J., Canadian Political System, McGraw-Hill, Toronto, 1976.
- Wilkins, J.L., Legal Aid in the Criminal Courts, University of Toronto Press, Toronto, 1975.
- Wilson, J.Q., Thinking About Crime, Basic Books, New York, 1975.
- Woolton, W., Crime and the Criminal Law, Stewart and Sons, London, 1963.
- Young, R. (ed.), Approaches to The Study of Politics, Northwestern University Press, Evanston, 1958.

GOVERNMENT PUBLICATIONS

Alberta. Alberta Board of Review, Mr. Justice W.J.C. Kirby, Chairman, "Administration of Justice in the Provincial Courts of Alberta.", Reports nos. 1 and 2, Alberta.

Canada. Canadian Committee on Corrections, Report to the Solicitor General, Queen's Printer, Ottawa, March 31, 1969.

Canada. Canadian Committee on Corrections, "Towards Unity: Criminal Justice and Corrections", Queen's Printer, Ottawa, 1969.

Canada. Information Canada, "The Criminal in Canadian Society: A Perspective on Corrections", Information Canada, Ottawa, 1973.

Canada. Law Reform Commission of Canada, "First Research Program in Criminal Law", Report No. 1, Information Canada, March, 1972.

Canada. Law Reform Commission of Canada, "Do Prisons Deter?", Working Paper No. 1, Information Canada, Ottawa, 1974.

Canada. Law Reform Commission of Canada, "Studies on Sentencing", Working Paper No. 3, Information Canada, Ottawa, 1974.

Canada. Law Reform Commission of Canada, "Working Paper on Diversion", Information Canada, 1975.

Canada. Law Reform Commission of Canada, "Imprisonment and Release", Working Paper No. 2, Information Canada, Ottawa, 1975.

Canada. Law Reform Commission of Canada, "Guidelines, Dispositions and Sentences in the Criminal Law Process", Information Canada, 1976.

Canada. Law Reform Commission of Canada, "Studies on Imprisonment", Minister of Supply and Services, Canada, 1976.

Ontario. Ministry of the Attorney General, "White Paper on Courts Administration", Queen's Printer, Toronto, 1976, p. 1.

Ontario. Task Force on Policing in Ontario, "Report to the Solicitor General", Queen's Printer, Toronto, 1974.

United States. Attorney General, "Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice", Washington, D.C., 1963.

United States. Report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society", United States Government Printing Office, Washington, D.C., 1967.

United States. Report of the President's Commission on Law Enforcement and Administration of Justice, "Task Force Report: The Courts", United States Government Printing Office, Washington, D.C., 1967.

UNPUBLISHED Ph.D. THESES

Blumberg, A.S., "The Criminal Court: An Organizational Analysis", Unpublished Ph.D. University Microfilms, Ann Arbor, Michigan, 1966.

Bowen, D.R., "Explanation of Judicial Voting Behaviour from Sociological Characteristics of Judges", Unpublished Ph.D., University Microfilms, Ann Arbor, Michigan, 1965.

Denman, A.L., "An Analytical Model of the Normative Field of Appellate Judges", Unpublished Ph.D., University Microfilms, Ann Arbor, Michigan, 1967.

Glick, H.R., "Judicial Role Perceptions and Behaviour: A Study of American State Judges", Unpublished Ph.D., University Microfilms, Ann Arbor, Michigan, 1968.

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