



National Library
of Canada

Bibliothèque nationale
du Canada

Canadian Theses Service

Services des thèses canadiennes

Ottawa, Canada
K1A 0N4

CANADIAN THESES

THÈSES CANADIENNES

NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30. Please read the authorization forms which accompany this thesis.

**THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED**

AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30. Veuillez prendre connaissance des formules d'autorisation qui accompagnent cette thèse.

**LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE**

Canada

PROSECUTORIAL DECISION-MAKING

AND SENTENCING DISPARITY:

AN EXPLORATORY STUDY

by

Carolina T. Giliberti

Submitted to the School of Graduate Studies and Research
of the University of Ottawa
in partial fulfillment of the requirements
for the degree of Master of Arts (Criminology)

1983

ACKNOWLEDGEMENTS

The planning and execution of this study would not have been possibly without the support and expertise of a number of individuals. I would like to thank: officials from the Department of Justice, with special appreciation to Judge Guy Goulard; the prosecutors who participated in this study; Dr. I. Waller, University of Ottawa, Department of Criminology; Shirley Tam and Rama Rai; and my family.

ABSTRACT

In Canada, as in most Western societies, the 'criminal justice system' is a highly visible social institution. Even though the fundamental principles of justice are grounded in normative cultural values, the actual operation of the justice system is often times the subject of heated discussion and debate. In recent years, mounting pressures for reforms to the justice system have stemmed from a growing concern that the policies and procedures for the dispensation of justice do not always reflect the underlying principles of fairness and equity. In this context, the issue of 'sentencing disparity' has been of paramount concern to academicians, policy-makers and researchers.

In accordance with the objectives of equity and fair treatment, there is an implicit, if not explicit, expectation that 'similar offenders convicted of similar offenses will receive similar dispositions'. Even though judicial discretion must be allowed to play an important role in the selection of an appropriate sentence, (individualized sentencing) the exercise of such

discretionary powers should not result in unwarranted variations in sentencing practices.

Using various research orientations, almost all of the literature on sentencing disparity is limited to examining and analyzing judicial decision-making. While the judge is seen to act alone in pronouncing sentence, the dynamics of the trial process involve two other key actors, Crown Counsel and defence counsel. Recognizing that the information and the viewpoints presented by these two actors in submissions to sentence could influence judicial decision-making, it is unfortunate that interests in sentencing disparity have not also focused on exploring how decisions made by Crown Counsel and defence counsel might contribute to sentencing disparity. A logical starting point for such an examination would be to assess the extent to which either of these actors might demonstrate unwarranted variations in their own sentencing decisions when asked to play the role of a judge.

In establishing the terms of reference for our study, it was useful to start by reviewing some of the numerous studies on judicial decision-making. Research in the early 60's focused on measuring the nature and extent of

variations in sentencing decisions. While the methodologies used in these studies have been wide ranging (survey and attitudinal research as well as small group experimentation) the research objectives have a common base; the primary aim was to systematically measure and analyze sentence disparity and attempt to isolate the factors which appear to influence sentencing decisions.

In 1980, the Federal Ministry of the Solicitor General, Canada, conducted a study entitled "Beyond the Black Box: A Study in Judicial Decision-Making" with the objective of gathering data pertaining to the issue of sentence disparity. A sample of Provincial Court Judges from across Canada were given five hypothetical cases and asked to assign an appropriate sentence to each. In addition, they were asked to comment on their sentencing objectives and identify the important attributes of each case.

Our study utilizes essentially the same methodology in that a sample of prosecutors were asked to make certain decisions about hypothetical cases. However, rather than focusing on the dynamics of judicial decision-making, we chose to explore prosecutors' views on sentencing. In executing the study, 234 respondents were

asked to consider the facts on the same standard case set. They were asked to: (a) comment on the "facts of the case" relevant to the submission to sentence; (b) assign a sentence; (c) identify important sentencing objectives; (d) rank order relevant facts; and, (e) comment on the adequacy of present correctional facilities.

Chapters I and II present an overview of issues and questions pertaining to research on sentencing disparity together with a brief summary of the main research findings. As a supplementary exercise, we present a further review of literature which explores measures for reducing unwarranted disparity.

Chapter III outlines the methodology for our study. As mentioned above, the survey method used for this study is only one of a variety of research strategies used in this area. Part of our discussion also examines the limitations of our approach.

Chapter IV presents a detailed discussion of our results. Some of the major findings are summarized below:

- 1) Respondents demonstrated a respectable degree of consensus concerning the 'nature of sentence' imposed for all five cases.
- 2) Even though they demonstrated this apparent consensus concerning 'Nature of Sentence' particularly with respect to the basic IN-OUT decision, this is shown to deteriorate markedly when the data are analyzed in

relation to the actual QUANTUM of sentence imposed.

- 3) On the basis of our systematic analysis of QUANTUM variations across dispositions, we have concluded that sentencing disparity was observed in all five cases.
- 4) Data pertaining to the selection of relevant case facts used in the submission to sentence produced a wide range of responses. Even though this range is collapsed somewhat, when the prosecutors are asked to rank order the relative importance of case facts for their sentencing decision, there does not appear to be a high level of agreement.
- 5) To further explore prosecutorial decision-making, respondents were asked to identify the specific legal objectives which guided their sentencing decision. The most striking finding from these data is that both general and/or specific deterrence were cited as important legal principles even though the cases represented very different kinds of offenses.
- 6) The questionnaire included a single item which asked respondents to comment on the 'adequacy of present correctional facilities and treatment resources.' A clear majority expressed the opinion that there was no apparent need for reform in this area. Those that indicated that there was a need for change, only provided some very general suggestions.

As we mentioned above, our study was formulated on the basis of a comprehensive review of the literature on sentencing disparity with a view to building on previous research. As a follow-up to this building process, we felt it was important to examine our results in relation to the research findings from the 1980 study conducted by the

(bx)

Federal Ministry of the Solicitor General. This material is presented in Chapter V.

From the outset, our study was not intended and should not be seen to provide any sort of measure or assessment of the extent to which prosecutors do in fact influence judicial decision-making. Nevertheless, our findings showed that a sample of prosecutors were no less disparate in their sentencing practices than a sample of judges. Chapter VI presents a brief discussion of our main conclusions, proposals for enhancing follow-up research based on our study and suggestions for further examination of the potential interaction between prosecutorial and judicial decision-making.

TABLE OF CONTENTS

Page No

Acknowledgements(iii)

Abstract(iv)

List of Tables(xiv)

List of Figures(xix)

Introduction(xxi)

Chapter

I. A Review of The Literature on Sentencing Disparity

1. Disparity: The Issue and The Concern 1

2. Review of Relevant Literature 5

3. Extra - Legal Variables 8

4. Personality of Judge 11

5. Legal Variables 17

6. Sentencing Models 20

7. Recent Studies Focusing on Sentencing Disparity 34

8. Appeal Court Study 34

9. Analysis of Sentencing Disparity in Five Canadian Communities 39

10. Summary 43

TABLE OF CONTENTS

(continued)

	<u>Page No</u>
II. <u>Methods for Reducing Unwarranted Sentence Variation</u>	46
1. Sentencing Councils	47
2. Sentencing Institutes	51
3. Flat Sentencing	53
4. Presumptive Sentencing	56
5. Appellate Review	58
6. Sentencing Guidelines	61
7. Summary	70
III. <u>Methodology</u>	73
1. Beyond the Black Box: A Study of Judicial Decision-Making	74
2. Selection of Cases	76
3. Present Research: Subjects and Administration of the Questionnaire	77
4. Simulated Cases	79
5. Limitations of the Method Employed	83
6. Statistical Procedures	87
7. Summary	89
IV. <u>Results</u>	92
1. <u>Section I</u> <u>Socio-demographic Characteristics of the Data</u>	92

TABLE OF CONTENTS

(continued)

	<u>Page No</u>
IV. <u>Results</u> (cont'd)	
2. <u>Section II</u> Analysis of Sentencing Disparity	99
3. Case 1 - Assault Causing Bodily Harm	102
4. Case 2 - Impaired Driving	108
5. Case 3 - Break and Enter	115
6. Case 4 - Armed Robbery - First Defendant - John J.	121
- Second Defendant- Michael M.	126
7. Case 5 - Theft over \$200.00	131
8. Summary	139
9. <u>Section III</u> Case Facts Relevant to Sentencing Decision	147
10. The legal Objectives cited as being Relevant to Sentencing Decisions	153
11. The Adequacy of Post Court Resources and Correctional facilities	155
12. <u>Section IV</u> Relationships explored in the data	158
13. Chapter Summary	164

TABLE OF CONTENTS

(continued)

	<u>Page No</u>
V. <u>Discussion of Findings and Relationship to Other Research</u>	
1. Synthesis of Research Findings: Case 1	172
2. Synthesis of Research Findings: Case 2	175
3. Synthesis of Research Findings: Case 3	178
4. Synthesis of Research Findings: Case 4	181
5. Synthesis of Research Findings: Case 5	184
6. Summary	187
VI. <u>Conclusions and Suggestions for Further Research</u>	194
<u>Appendix A</u> Description of Standard Case Set and Related Documents	A-1
<u>Appendix B</u> Selected Data Tables	B-1
<u>Appendix C</u> Distribution of Respondents' Socio-demographic Characteristics by Nature of Sentence Given	C-1
<u>Bibliography</u>	

LIST OF TABLES

	<u>Page No</u>
<u>TABLE 1</u> Distribution Of Respondents By Age	94
<u>TABLE 2</u> Distribution Of Respondents By Length of Experience as a Prosecutor	96
<u>TABLE 3</u> Distribution Of Respondents By Nature Of Post-secondary Education Prior To Entering Law School	98
<u>TABLE 4</u> Distribution Of Dispositions By Sentence Type: Case 1 (Assault Causing Bodily Harm)	103
<u>TABLE 5</u> Distribution Of QUANTUM Sentence Components For Case 1 (Assault Causing Bodily Harm)	105
<u>TABLE 6</u> Distribution Of Dispositions By Sentence Type: Case 2 (Impaired Driving)	109
<u>TABLE 7</u> Distribution Of QUANTUM Sentence Components For Case 1 (Impaired Driving)	112
<u>TABLE 8</u> Distribution Of Dispositions By Sentence Type: Case 3 (Break and Enter)	116
<u>TABLE 9</u> Distribution Of QUANTUM Sentence Components For Case 3 (Break and Enter)	118
<u>TABLE 10</u> Distribution Of Dispositions By Sentence Type: Case 4 (First Defendant - John J.)	122
<u>TABLE 11</u> QUANTUM Distribution Of Incarceral Sentences for Case 4 - First Defendant - John J.	124
<u>TABLE 12</u> Distribution Of Dispositions By Sentence Type: Case 4 (Second Defendant - Michael M.)	127

LIST OF TABLES
(continued)

		<u>Page No</u>
<u>TABLE 13</u>	QUANTUM Distribution Of Incarceral Sentences For Case 4 - Second Defendant - Michael M.	128
<u>TABLE 14</u>	Distribution Of Dispositions By Sentence Type: Case 5 (Theft Over \$200.00)	132
<u>TABLE 15</u>	Distribution Of QUANTUM Sentence Components For Case 5 (Theft Over \$200.00)	134
<u>TABLE 16</u>	Distribution Of Respondents' Sentencing Decisions By Sentence Type and Case	140
<u>TABLE 17</u>	Respondents' Sentencing Decisions: Least Severe And Most Severe Dispositions Imposed By Case	142
<u>TABLE 18</u>	Summary Of Observed Disparity: By Case	144
<u>TABLE 19</u>	Distribution Of Offender Characteristics Identified As Relevant To Submissions To Sentence - By Case	148
<u>TABLE 20</u>	Distribution Of Offender Characteristics Identified As Relevant To Submissions To Sentence - By Case	149
<u>TABLE 21</u>	Distribution Of Legal Objectives Identified As Relevant To Sentencing Decisions: By Case	154
<u>TABLE 22</u>	Adequacy Of Existing Resources To Deal With Offender In This Particular Offence: Case One Through five	156
<u>TABLE 23</u>	Distribution Of Minimum And Maximum Sentences Imposed : By Case And Respondent Group	188
<u>TABLE 24</u>	Distribution Of Most Important "Case Facts": By And Case Respondent Group	189
<u>TABLE 25</u>	Distribution Of "Legal Objectives": By Case And Respondent Group	190

LIST OF TABLES
(continued)

Appendix B

TABLE B-1 Distribution of Respondents by Geographical LocationB-1

TABLE B-2 Distribution of Respondents By Nature Of Legal Experience Prior To Becoming A Crown PresecutorB-2

TABLE B-3 Distribution of Case Fact Rankings; Case 1 (Assault Causing Bodily Harm)B-3

TABLE B-4 Distribution of Case Fact Rankings; Case 2 (Impaired Driving)B-4

TABLE B-5 Distribution of Case Fact Rankings; Case 3 (Break and Enter)B-5

TABLE B-6 Distribution of Case Fact Rankings; Case 4 (Armed Robbery)B-6

TABLE B-7 Distribution of Case Fact Rankings; Case 5 (Theft over \$200.00)B-7

Appendix C

Table C-1 Distribution of Respondents by Age and Sentence Type (Short In, Long In): Case 1 - Assault Causing Bodily HarmC-1

Table C-2 Distribution of Respondents by Number of Years spent in Legal Practice and Sentence Type (Short In, Long In) Case 1 - Assault Causing Bodily HarmC-2

Table C-3 Distribution of Respondents by Number of Years Experienced as a Prosecutor and Sentence Type (Short In, Long In) Case 1 - Assault Causing Bodily HarmC-3

Table C-4 Distribution of Respondents by Type of Education and Sentence Type (Short In, Long In) Case 1 - Assault Causing Bodily HarmC-4

LIST OF TABLES
(continued)

Page No.

Appendix C

<u>Table C-5</u>	Distribution of Respondents by Age and Sentence Type (Short In, Long In): Case 2 - Impaired Driving	C-5
<u>Table C-6</u>	Distribution of Respondents by Number of Years spent in Legal Practice and Sentence Type (Short In, Long In) Case 2 - Impaired Driving	C-6
<u>Table C-7</u>	Distribution of Respondents by Number of Years Experienced as a Prosecutor and Sentence Type (Short In, Long In) Case 2 - Impaired Driving	C-7
<u>Table C-8</u>	Distribution of Respondents by Type of Education and Sentence Type (Short In, Long In) Case 2 - Impaired Driving	C-8
<u>Table C-9</u>	Distribution of Respondents by Age and Sentence Type (Out, In plus Out): Case 3 - Break and Enter	C-9
<u>Table C-10</u>	Distribution of Respondents by Number of Years spent in Legal Practice and Sentence Type (In, In plus Out) Case 3 - Break and Enter	C-10
<u>Table C-11</u>	Distribution of Respondents by Number of Years Experienced as a Prosecutor and Sentence Type (In, In plus Out) Case 3 - Break and Enter	C-11
<u>Table C-12</u>	Distribution of Respondents by Type of Education and Sentence Type (In, In plus Out) Case 3 - Break and Enter	C-12
<u>Table C-13</u>	Distribution of Respondents by Number of Years spent in Legal Practice and Sentence Type Case 4 - Armed Robbery (Michael M)	C-13
<u>Table C-14</u>	Distribution of Respondents by Number of Years Experienced as a Prosecutor and Sentence Type Case 4 - Armed Robbery (Michael M)	C-14

LIST OF TABLES
(continued)

Page No

Appendix C

Table C-15 Distribution of Respondents by Type of Education and Sentence Type Case 4 - Armed Robbery (Michael M)C-15

Table C-16 Distribution of Respondents by Number of Years spent in Legal Practice and Sentence Type Case 4 - Armed Robbery (John J)C-16

Table C-17 Distribution of Respondents by Number of Years Experienced as a Prosecutor and Sentence Type Case 4 - Armed Robbery (John J)C-17

Table C-18 Distribution of Respondents by Type of Education and Sentence Type Case 4 - Armed Robbery (John J)C-18

Table C-19 Distribution of Respondents by Age and Sentence Type (Short In, Long In): Case 5 - Theft over \$200C-19

Table C-20 Distribution of Respondents by Number of Years spent in Legal Practice and Sentence Type (Short In, Long In) Case 5 - Theft over \$200C-20

Table C-21 Distribution of Respondents by Number of Years Experienced as a Prosecutor and Sentence Type (Short In, Long In) Case 5 - Theft over \$200C-21

Table C-22 Distribution of Respondents by Type of Education and Sentence Type (Short In, Long In) Case 5 - Theft over \$200C-22

LIST OF FIGURES

Page No

<u>FIGURE 1</u>	Schematic Distribution Of Sentencing Data - As An Increment Or Decrement of The Modal Category: Case 2	106
<u>FIGURE 2</u>	Schematic Distribution Of Sentencing Data - As An Increment Or Decrement Of The Modal Category: Case 2	113
<u>FIGURE 3</u>	Schematic Distribution Of Sentencing Data - As An Increment Or Decrement Of The Modal Category: Case 3	119
<u>FIGURE 4</u>	Schematic Distribution Of Sentencing Data - As An Increment Or Decrement Of The Modal Category: Case 5	136

Leaf xx omitted in page numbering

INTRODUCTION

"May I ask you also in your own progress in the law, not to rely over much on legality - on the technical rules of law - but ever to seek those things which are right and true; for there alone will you find the road to justice."

(Sir Alfred Denning 1955:6)

The above quotation is especially relevant to the sentencing stage of the justice process. In many instances, particularly when sentencing involves a long period of incarceration, decisions made at this stage are by their very nature climatic. The resulting social and monetary costs to individual offenders, their families and society at large are potentially far reaching. Recognizing this, it is generally agreed that sentencing cannot and should not constitute merely a simple application of legal rules. Instead, it must be conceived of as a complex exercise guided predominantly by the principles of fairness and discretion.

In light of the inherent uncertainties engendered by the sentencing process, one can argue that it perhaps represents the least rational component of the criminal justice system. Decision-making throughout the court process and sentencing is sometimes neither clearly nor consistently articulated.

In this context, we can then ask; who are the key actors responsible for influencing the dispensation of justice? And, in turn, how do various actors seek to directly affect and influence the process.

Consider the 'roles' each actor plays in the courtroom; the task of the defence counsel is to pre-empt the criminal process such that the accused need never face sentencing. Alternatively, the mandate of Crown Counsel is to present fairly and objectively the case for prosecution as representing the vested interests of the state and the public. The primary role of the judge is as an 'impartial trier of fact.'

The judiciary must attempt to balance the many and often competing and sometimes conflicting interests and rights of the offender, the victim and the state. After a

determination of guilt, the judge is charged with pronouncing sentence. Even at this stage however, Crown Counsel and defence counsel may seek to influence the judge's decision.

In passing sentence, the judge may be seen to have a further duty in striking an appropriate balance between certain sentencing principles or corrections philosophy (reflecting public and state interests) and the needs and rights of the offender.

The Canadian Criminal Code sets out only broad guidelines to assist judges in the sentencing process. Specifically, in relation to a limited number of offenses, it establishes the parameters of maximum and minimum penalties. Shorn of its imagery, the Criminal Code falls short of serving the judiciary as a functional decision-making tool for sentencing and, accordingly, judges have the power to exercise broad discretion. At a practical level, judges must often rely on their personal and professional experience with some knowledge about available correctional and treatment facilities to assist their choice of dispositions.

It should be emphasized that judges often have a variety of sentencing options at their disposal. Conviction for the offense of Theft Under \$200.00 provides a good example of this. The judge's choices range from a conditional discharge to a maximum of 2 years in prison. Between these extremes, his disposition can involve a fine, probation, restitution, jail or any combination of these components. The only potential controls over judges' exercise of discretion (within the range of minimum and maximum penalties set out in the criminal code) lies in the process of appeal. However, even here, the notion of sentencing disparity can be somewhat of a 'two-way street' in that provisions exist for both Crown Counsel and defence counsel to appeal a particular sentence.

Such a magnitude of discretion permits the judge to take into account a variety of offense and offender characteristics in his sentencing decision. Proponents of broad discretionary powers for the judiciary, as well as other actors in the system such as Crown Counsel and police, argue that this is beneficial in that it permits 'individualized treatment' of persons coming into conflict

with the law. Conversely, it can be argued that the existing discretionary powers of Crown Counsel and judges result in unjustifiable disparity in the treatment of offenders.

The potential for disparity, justifiable or not, at the sentencing stage is reflected quite clearly in our example of sentencing options for the Criminal Code offense of Theft Under \$200.00. Examining the exercise of discretion and the potential for unjustifiable disparity in the treatment of offenders should, however, not be limited to scrutinizing the behaviour of judges. Recognizing that many individuals charged with an offense are never prosecuted or are tried on a lesser charge, suggests that the discretionary powers of Crown Counsel should be given equal attention when examining the issue of disparity. Furthermore, because the role of Crown Counsel as representing the state and the public interests permits them to 'speak to sentence', it is important that research on sentencing disparity encompass this group as well as the judiciary. Short of providing an understanding of how prosecutors directly affect judges' choice of sentences,

empirical studies should focus on documenting the 'dynamics' of prosecutorial decision-making to at least the same extent as research has tried to shed light on judges decision-making. What are the relevant variables and, how does each appear to influence prosecutors' decisions.

A logical starting point for such an inquiry is to assess and possibly build on existing research involving judges.

CHAPTER I

A REVIEW OF THE LITERATURE ON SENTENCE DISPARITY

I. 1 Disparity: The Issue and The Concern

This chapter presents an overview of the issue of sentence disparity together with a discussion of various research studies which have set out to examine the magnitude of the problem and various causal factors. Specifically, we begin with a discussion of why disparity is an issue and go on to outline some of the different research strategies which have been pursued over the past 50 years.

As set out in the British North American Act and re-affirmed in the Constitution Act, 1981, (Part 1, Canadian Charter of Rights and Freedoms, subsection 15.)

"every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

(The Canadian Constitution, 1981
Part 1, Schedule B: 6)

The above quotation suggests implicitly, if not explicitly, that it is a fundamental right of every person living in Canada to be 'treated' equally before the law.

However, considering the broad discretionary powers which can shape judicial sentencing practices, it is not surprising that many professionals as well as laymen argue that this fundamental right appears, at times, to be violated.

The term sentencing disparity refers to situations in which dispositions for very 'similar' cases are markedly disparate. Judgment about case 'similarity' would usually involve an assessment of how comparable cases are in relation to a mix of both offense and offender characteristics. Disparity can occur as a result of inconsistent sentencing practices of an individual judge or divergent sentencing practices across a number of judges.

Justice demands that two individuals convicted of similar offenses, with similar social backgrounds and criminal histories, should receive comparable sentences. Nevertheless, real or perceived disparities in sentencing have led to a weakening of public confidence in the fair and impartial administration of criminal justice. (National Institute of Law Enforcement and Criminal Justice, 1978).

Gottfredson, Wilkins and Hoffman (1971), suggest that unwarranted variations in sentences may produce a number of negative consequences. In addition to being morally offensive to both the offender and the public, such practices may lead to disrespect for the justice system and eventually the law itself. These authors note that sentence disparity is dysfunctional for prison rehabilitation efforts. In comparing his sentence to that of other prisoners, an inmate may feel that he has been treated unfairly or that he is a victim of a judge's prejudice. Based on this perception, real or not, the individual may become a very hostile and uncooperative inmate. The Attica Prison riot of 1971 illustrates, in the extreme, the animosity in prison toward sentencing disparity. One of the 29 demands made by the striking prisoners was the right to have equality in sentencing (Pallas and Barber, 1973).

Gottfredson and Gottfredson (1980) contend that disparity is variation in sentencing that is perceived as inequitable, and hence, unfair and unjust. Equality of sentencing does not mean that the identical sanctions should be applied to all offenders who have committed 'similar' crimes but that the metting out of different punishments should be based on justifiable reasons. "The extent of

4.
disparity in sentencing may be more apparent than real" (Hogarth 1971: 7). He notes that, unequal sentencing for similar offences may result from changes in the rates of certain crime, public opinion, personal characteristics of the offender (such as lack of employment), and circumstances which could effect the selection of a particular sanction (availability of appropriate correctional facilities).

Gottfredson, Wilkins and Hoffman, (1978) agree that some discretion in sentencing is necessary and essential. Justifiable variability in sentencing is crucial in the judicial system because it facilitates individualized sentencing. This approach has been the central feature of corrections which has emphasized rehabilitation. Complete uniformity in sentencing is not only unrealizable but also undesirable.

Hood notes; "The best that could be hoped for is equality of consideration" (Hood 1962: 340). He argues that for relatively similar cases, judges should consider similar factors and have similar reasons for selecting a particular punishment that will be handed out. However, this may lead to crucial problems in establishing concensus about criteria for sentencing. In turn, this involves an attempt to reconcile the sometimes contradictory goals of the criminal justice system (Hogarth, 1971).

Thus, two forms of variation in sentencing can occur: the first is justifiable variation taking into consideration social, criminal and legal variables; the second is unjustifiable variation which is generally referred to as "sentence disparity".

Disparity in sentencing has been an issue of concern for the past 70 years and has been amply demonstrated in a number of studies. Empirical research, in an attempt to understand the sentencing process, has taken a number of forms and examined numerous issues such as: the nature and the extent of variations in the sentencing process; factors affecting sentencing decisions i.e. social (extra legal variables) or legal variables; and different sentencing models explaining disparity. Some research has gone one step further and suggested alternatives to the present legal system.

I. 2 Review of Relevant Literature

Research on the topic of sentencing disparity can be traced back some five decades. However, there does not appear to be a strong cumulative approach reflected in this

area. Rather, individual authors appear to have simply collected data on a range of variables which suited specific opportunities for data collection. Since the research in this field has not systematically focused on a common set of research questions or variables to be measured (together with the fact that studies have been carried out using numerous methodologies and sampling schemes) the resulting literature does not provide a coherent research base. Recognizing this, it is not surprising that our literature review might be seen to be somewhat scattered and unfocused. While the main theme is the identification and measurement of sentence disparity, researchers have selected a wide range of case factors, legal variables, judicial characteristics and offender characteristics in their attempts to explain disparity.

As early as 1933, Gaudet conducted a study of more than 7000 persons sentenced in a New Jersey court by six judges. In examining the distribution of sentences across a large sample of similar cases, he found that judges varied markedly in the extent to which they imposed carceral sentences. As a result, he came to the conclusion that "the criteria for sentences are unevenly and capriciously applied and the primary influence upon sentences is the personality

of the judge; his personality in terms of his social background, education, religion, expressive temperament and social attitudes" (Gaudet 1949: 449). Hogarth (1971) contends that this is a surprising conclusion considering that there was no evidence produced as to these variables affecting sentencing behaviour.

In a study of United States Federal Courts in 1962, Hood and Sparks (1970) observed that the "average sentences of imprisonment ranged from 12.1 months in the northern circuit of New York to 57.6 months in the Southern district of Iowa for similar cases" (Hood and Sparks 1970: 142). Sentence disparity, they concluded, was apparent and warrants attention.

The purpose of Austin and Williams study (1977) was to "gain a relatively pure estimate of the degree of sentencing disparity among the same type of judges within the same state jurisdiction" (Austin and Williams 1977: 307). Data were gathered from 47 Virginia district court judges attending a state judicial conference. After reading the five legal cases, the judges were asked to recommend a verdict, and if appropriate, a sentence. The results indicated that the overall pattern of judges' recommendations for the five cases showed a generally high rate of

agreement on the verdict. However, there were substantial variations in the type of sentence chosen and the magnitude of penalty.

In addition to measuring the degree of disparity in sentencing, social scientists have attempted to explain variations in sentencing patterns by focusing on a mix of "legal" and "extra-legal" variables in their analysis. Green (1961) defined legal variables as being: a) the type of crime committed, b) the number of indictments; c) prior record; and, d) recommendations by supporting agencies. The extra-legal or "legally irrelevant" factors usually include sex, race and place of birth.

I. 3 Extra-Legal Variables

Sellin (1935) conducted a survey of prison population in the United States in 1931. He examined the "racial characteristics" of offenders received from courts and committed to all (sample of 66,600) state and federal prisons and reformatories for adults. He concluded that blacks were given longer sentences than the native whites in only three out of ten offense groups. The foreign-born whites were given longer sentences than either blacks or

native whites for all offenses except liquor law violations. A further conclusion, which Sellin admits is highly debatable, is that race prejudice toward blacks would seem to be greater in the North than in the South.

Johnson (1941) studied the court records of 645 adult homicide offenders in North Carolina, Georgia and Virginia. He concluded that sentencing practices prejudiced blacks, especially those who were charged with killing whites. It should be noted, however, that this study was methodologically oversimplified in that he failed to use control variables, such as prior record of the accused and seriousness of the offense .

Bensing and Schroeder (1960) controlled for the seriousness of the offense when analyzing 662 homicides that occurred in Cleveland from 1947 to 1954. Their findings contradicted Johnson's in that they found no evidence of racial discrimination when seriousness of offense was introduced as a control variable.

Green (1964) analyzed 1,437 cases which were disposed of by conviction in a criminal court in Philadelphia. The focal point of his research was to examine the relationship between sentence severity and "race". In some parts of Green's analysis, this relationship is explored along two separate dimensions; race

of offenders (black versus white) and race of offenders' victims (black versus white). The relative influence of these variables was further analyzed in relation to "legal" characteristics of the case which included offense, offender's prior record and degree of violence involved.

The study detected systematic variations in the severity of sentences imposed on blacks versus whites. Furthermore, these variations became more refined when the variable of "victim race" was included in the analysis. Limiting their analysis to the offender and victim race dimension permitted the researcher to construct an overall rank ordering of sentence severity by race. Green found that cases involving both a black offender and victim received the least severe sentences. Conversely, cases involving a black offender and a white victim received a harsher sentence than those involving a white offender and a white victim.

While these findings suggested that blacks were treated different than whites, a more rigorous analysis of the data weakened this observation. Specifically, controlling for legal factors such as crime and severity of offense showed that differential treatment along the race dimension was reduced. As a result, Green concluded that

even though there were sentencing differences between blacks and whites, they resulted not from racial discrimination, but from actual "legal" differences in the individual case.

I. 4 Personality of Judge

A number of authors such as Blumberg and Smith (1967), Stanton Wheeler (1968), and Jards and Mendelsöhn (1967) believe that the personality of judges play a large role in their sentencing decision.

Blumberg and Smith (1967) suggested that judges exhibit and can be categorized in terms of a "judicial personality." Certain characteristics of a judicial personality are reflected in "roles" the judges seem to play. The research generated data from a sample of 4,363 cases heard in a Central Sessions Court of a metropolitan centre in the United States.

Blumberg articulated the following six types of roles:

- (1) intellectual - Scholar;
- (2) political - Adventurer - Careerist;
- (3) judicial pensioner;
- (4) hatchet man (hard on everyone);

- (5) tyrant - showboat - benevolent despot
(unreliable at one moment, paternalist the next); and,
- (6) routine - hack.

However, even though Blumberg identified these six "judicial personalities" he did not show how these images or roles affect sentencing decisions.

Stanton Wheeler (1968) compared juvenile court judges who wore robes and conducted court proceedings in a very formal manner with those who were very informal in both dress and procedure. He observed that the latter group (informal judges) were far more "professional" in their outlook; this was attributed to them reading more delinquency articles on juveniles. This group was also judged to be more punitive in their attitudes concerning delinquency. Another aspect of the study looked at the extent to which judges from each of the two groups imposed carceral sentences for similar cases. The findings were quite surprising. Cases which were the subject of more severe sanctions were associated with judges in the informal group who; "read more about delinquents, who read from professional journals, who do not wear their robes in court and were more permissive in outlook" (Hood and Sparks 1970:

The authors suggested that the severity of the sanction appears to be directly related to judges' orientation towards a professional, social welfare ideology. These judges view institutions as being either therapeutic or shelters from bad homes. They see their actions as being humanistic rather than punitive. On the other hand, the formal judges saw only "good and bad" children and were utilizing the institutions in extreme cases. Thus, given the same facts, both groups were using a different set of criteria - the professional group were using "need for treatment" and the formal group were using "need for detention".

Jaros and Mendelsohn (1967) conducted a study of "courtroom behaviour" involving three judges hearing cases in Detroit Traffic courts. This research was aimed at observing and systematically documenting defendants' behaviour in court and "judicial role" for a sample of cases. An interesting, and somewhat unique aspect of their work was an examination of the extent to which the individual or personal characteristics of a defendant influence judges' decisions in court. The authors postulated that there was a direct relationship between the level of respect demonstrated by defendants toward the court and the severity of sanctions imposed by judges.

The concept of "respectful" behaviour was defined in 2 ways:

- (1) defendants' manner of dress; and,
- (2) the number of acts which the defendants performed which were perceived by the judge as being either negative or positive.

Data from the study yielded mixed findings concerning the relationship between defendants' characteristics and judges' decisions. First, less well dressed defendants usually received more severe sentences. Among "first offenders" the manner of dress appeared to be a good predictor of whether or not a jail sentence would be imposed; observed differences in the data were statistically significant. However, differences where sentences involved fines did not support this postulate.

The measurement of defendants' actual behavior or "demeanor" involved their performance or non-performance of six "in-appropriate" acts. Here again, the study produced mixed results. Defendants' behavior did not appear to have a significant bearing on judges' propensity to impose jail sentences. Even though the data showed a pattern of the amount of fine decreasing as demeanor improves, differences were not statistically significant.

An additional component of the study examined the relative influence of the defendants' age, race and "status" (measurement by the presence of counsel). None of these variables appeared to account for variations in judges' sentencing decisions.

Overall, Jaros and Mendelsohn's study suggested that some variations in sentencing are related to judges' attitudes toward certain crimes and, accordingly, severity of sanctions imposed depends largely on the personality of the trial judge.

The main strength of the research lies in the authors' analysis of sentencing in relation to legally relevant criteria. Data showed that there was a direct relationship between both the severity of the offense and the defendant's prior criminal record and the severity of sentence imposed. Using these factors as independent variables, variations in sentences (i.e. custodial vs non-custodial and mean amounts of fines) were shown to be statistically significant.

In summary, Jaros and Mendelsohn argue that social attitudes and professional role considerations do motivate judicial behaviour. The overall lack of conclusive data may be attributed to the fact that the study involved only lower

court judges who deal consistently with relatively structured and routinized circumstances. It could be argued that these conditions perhaps minimize the potential influence of personal factors. As a result, judges made decisions, (or at least appeared to) on the basis of legally relevant criteria.

The data provide us with some interesting suggestive relationships - the more appropriately a defendant dresses in court, the less likely he will be sent to jail. However, this relationship does not apply to the imposition of sentences involving fines. While courtroom demeanor is not related to the imposition of jail sentences, however, higher fines appeared to be given to the defendants failing to display judicial respect.

Thus far, we have focused our attention on a number of studies which considered the influence of several extra-legal variables on sentence decisions. While these studies yielded interesting data, any conclusions which could be drawn are debatable, at best. The main weakness of these studies is their lack of attention to legal variables. In a critique of earlier studies, Gottfredson and Gottfredson (1980) suggest that problems with the research designs and analytical methods which fail to control statistically for "legal" variables in assessing the relevance of "extra-legal variables" have been numerous.

I. 5. LEGAL VARIABLES.

Recent research on sentencing of adult offenders has attempted to overcome some of the problems inherent in earlier studies. Tiffany, Avichai and Peters (1955) studied sentencing practices in 89 Federal District Courts in the United States during 1967 and 1968. The research concentrated on crimes of bank robbery, auto theft, interstate transportation of forged securities and forgery. Data were subjected to multiple regression analysis. The dependent variable was a scale of possible sentences that ranged from suspended sentence to over 120 months (10 years) imprisonment. The independent variables included type of crime committed; type of conviction (misdemeanor versus felony), trial; and defence counsel; and defendant's age, race and prior criminal record. The authors concluded that the seriousness of the crime committed had the greatest impact on sentencing. The variables of defendant's prior record and type of conviction were observed to be of less importance. Defendants involved in jury trials usually received more severe sentences than those tried by judge alone.

Sutton (1978) also used data from Federal District Courts in the United States. He used multivariate

techniques to analyze the nature and severity of sentences imposed. Even though this approach permitted a systematic analysis of the data controlling for a number of extra-legal factors, the best predictors of both the decision to incarcerate and the length of sentence were "legal" factors. Demographic characteristics of the offender appeared to have a relatively small role in these decisions.

Within the group of legal factors measured, Sutton also observed that some factors influenced the initial decision to incarcerate while others were more important as determinates of the actual length of imprisonment. Along this first dimension (decision to incarcerate) the offender's prior record was the most important factor. However, offense type and whether the conviction involved a jury trial appeared to be the strongest determinates as to whether or not a prison term was imposed.

Gottfredson and Stecker (1979) conducted a study in a large eastern metropolitan county (Newark, New Jersey) of the United States. The data were based on a total of 982 dispositions handed down by 18 judges. In addition, sentencing data were supplemented with information about offense factors, offender characteristics, including prior record and probation recommendations.

The primary aim of the study was to construct a profile of offenders who received custodial sentences versus non-custodial sentences. Results showed that 58 percent of the sample received incarceral sentences. These offenders tended to be those having committed more serious offenses - as perceived by the judge and legislatively more serious. Gottfredson and Stecker concluded that seriousness of their offense, and "legal class of the offense" are the best predictors of sentencing decisions. They suggest that the offender's prior criminal record also influences sentencing but is not as influential as offense seriousness. While assessing the relationship between prior criminal record and sentence, the authors also looked at whether or not "prior prison terms" would serve as a predictor of sentence. They found that this particular feature of prior criminal record had only marginal influence in the decision making process.

Another area of research on sentencing disparity has focused on examining "attitudes" of the judiciary in conjunction with various legal factors on sentencing. Green (1961) studied 1437 cases sentenced in Philadelphia during 1956-1957 by 18 judges. He concluded that legal factors such as the type of crime, prior record, number of indictments, and recommendations to the court accounted for a large proportion of sentencing variations.

Using an aggregation of legal factors, Green tried to predict the likelihood of specific dispositions occurring. These were: 1) penitentiary term; 2) prison for a short term; or, 3) a non-incarceral sentence. The results revealed that repeat offenders committing a serious crime are more likely to receive a penitentiary term than first time offenders committing a less serious crime. In addition, he found that as cases "move from the extreme of gravity or mildness towards intermediacy, judicial standards tend to become less stable and sentencing increasingly reflects the individuality of the judge" (Green 1961: 147).

In an attempt to explain the reasons for disparity evident in cases of intermediate gravity, Green suggests that:

- 1) judges may be using different scales of "penal values"; and,
- 2) judges may have different impressions of the seriousness of the cases.

I. 6 Sentencing Models

In addition to identifying the variables which appear to affect sentencing decisions, recent studies have

focused on how differences in "judicial philosophies" may also influence sentencing practices. Researchers such as Hood and Sparks (1970), and Hogarth (1971) examine this notion, and in addition, formulate sentencing models which attempt to clarify the sentencing process.

As early as 1764, Beccaria outlined various criteria for the justification of punishment. These have continued to provide a bases for current debates. He proposed that punishment had to be public; prompt and necessary; proportional in severity to the seriousness of the offense; and at the same time, it had to provide general deterrence.

According to Gottfredson and Gottfredson (1980), the criminal trial process in North America consists of two distinct phases; these are, a determination of criminal liability and sentencing. The sentencing decision has three main parts - goals, information and alternatives, all of which are complex. While there is an abundance of literature which discusses the numerous objectives for sentencing, four of these are the most widely accepted. Briefly, they are:

- (1) Deterrence - "the prevention of criminal acts in the population by means of the imposition of

punishment on persons convicted of crime"
(Gottfredson and Gottfredson 1980: 173).

- (2) Incapacitation - refers to restraining the person being punished from committing further criminal acts. The purpose is to reduce offender's opportunities for committing future criminal acts.
- (3) Treatment - this aim is future oriented and preventive in design - to lessen the propensity of those convicted of crime to commit further crimes. It includes all means intended to reduce the offender's proclivity toward future criminal acts.
- (4) Desert - This objective has no explicit deterrence or treatment aim, rather it is to solely express condemnation of criminal behaviour.

Gottfredson and Stecker (1979) proposed that an individual judge, besides selecting among sentencing alternatives, may also select among purposes such as the concept of deterrence, incapacitation, treatment or "just desert".

With this idea in mind, the authors studied the sentencing practices of 18 judges. Participants (the judges) in the research were asked to complete forms which

described their judgments in terms of various factors, including the identification of sentencing purposes that they defined as appropriate to each case. The data were collected at the time of sentencing and involved 976 cases.

The results showed that judges did not usually select only one aim as the single purpose of the sentence. Rather, it was more typical to mention a number of purposes. The main purpose most frequently identified was rehabilitation (36% of the sentences). Retribution was cited relatively infrequently (17%) as being the main reason for the sentence.

Hood (1962) studied variations in sentencing among 12 magistrates courts in an urban centre during the years 1951 to 1954. Hood argued that differences in sentencing are not attributable to the type of offender or offense confronting magistrates. Instead, he hypothesized that variations in sentencing practices are the result of different "policies" of the magistrates concerned.

As a follow-up, Hood and Sparks (1970) attributed sentencing disparities between judges to disagreements on the goals or philosophies of sentencing and to differences of opinion concerning the effectiveness of different

sentencing alternatives. They suggested that sentence variation does not necessarily show that judges do not follow a consistent set of policies or that they are not rational. Instead, Hood and Sparks propose a simple model which defines three sources of sentencing variation or disparity:

- (1) individual judges may be following different sentencing policies, which make different sentences appropriate for the same type of case;
- (2) different judges may be receiving different kinds of information about the offenders whom they are sentencing;
- (3) they may be classifying offenders and/or offenses in different ways, even though they receive the same type of information about them and have the same general aims in sentencing (Hood and Sparks 1970: 154).

If one of these three conditions is operative, a particular judge may consistently follow a policy of rational decision-making but, disparities in sentencing may still occur.

Research pertinent to this scheme - that there are objectives which judges are trying to accomplish which are related to the sentences which they impose - has been carried out by Shoham (1966) and Hogarth (1971).

Shoham (1966) conducted an evaluation of sentencing policy in the criminal courts in Israel. Research data were drawn from sentences imposed by nine judges in 3 district courts of Israel during the year 1956. By examining both the actual sentences and the reasons for the sentence given, Shoham concluded that variations in sentences could not be explained by differences in offense/offender characteristics. Rather, some variations were directly attributable to divergent sentencing aims and differing attitudes amongst the judges.

Hogarth (1971) conducted a study of sentencing behaviour of judges in an attempt to answer the following questions:

"Why are there inconsistencies in sentencing practices among Ontario magistrates? Are they simply due to variations in the cases coming before different courts? Are they due to differences in the social contexts in which the courts are situated? Are they due to the personal characteristics of the magistrates concerned?" (Hogarth 1971: 12)

The general research scheme involved confidential interviews with 71 full time Ontario Magistrates over a period of six months. The interviews focused on a number of

theoretical and practical issues in sentencing. In addition, Magistrates completed a self-administered questionnaire probing certain dimensions of their attitudes towards punishment, crime causation and other related issues. Analysis of the sample provided the researchers with a profile of Magistrates' background characteristics. It showed that the majority:

- (1) came from business or professional families;
- (2) were legally trained in the law (70%);
- (3) acted as defence counsel prior to appointment, (87%) and had at least 10 years experience at the bar prior to appointment;
- (4) had military experience;
- (5) had close formal links to the community, 80% were active members of service clubs; and
- (6) ranged in length of judicial experience from one year to 36 years with a mean of approximately 14 years.

Penal philosophy or the belief in reformation, general deterrence, individual deterrence, punishment, or incapacitation, was examined. The study showed that magistrates rated reformation as the most important penal philosophy. This was followed by general deterrence,

incapacitation and punishment, respectively. Magistrates differed widely in their views concerning the relative effectiveness of different kinds of penal measures. While 80 percent of the judges in the sample believed that institutions were effective in treating offenders, 66 percent believed that probation is effective as a general deterrent. In conjunction with this, the interviews also revealed that magistrates believe that punishment is good for offenders. "This enables them (magistrates) to believe that they can punish and treat offenders at the same time" (Hogarth 1971: 363). Overall, Hogarth notes: "Interviews revealed that most magistrates were guided in choosing among various sentencing alternatives by a number of self-imposed guidelines and rules of thumb" (Hogarth 1971: 77).

Magistrates' views regarding causes of crime were found to be related to their penal philosophies. Belief in reformation was associated with a more complex view as to the etiology of crime. "Magistrates appear to interpret selectively the causes of crime and the amount of pathology exhibited by offenders in ways which maximize concordance with their personal objectives in sentencing" (Hogarth 1971: 85).

Hogarth also obtained measures of judicial behaviour by analyzing the sentencing practices of Ontario Magistrates for 1966 and 1967. Statistical analysis revealed a relationship between Magistrates' attitudes toward sentencing goals and their sentencing decisions. Moreover, it was shown that the relationship between judicial attitudes and judicial behaviour cannot be described purely in terms of a simple punitive, non-punitive dimension but in fact can be associated with a host of attitudes such as "intolerance of deviant behaviour" or the concern for "general deterrence".

Findings from the study are very conclusive in that variations in sentences were found to be associated with differences in the Magistrates' attitudes. It is suggested that the "...judicial process is not as uniform and impartial as many people would hope it would be" (Hogarth 1971: 365).

In addition to this, some of the research findings identified a tentative relationship between Magistrates background characteristics and their views on sentencing aims. First, professional family background was associated with being treatment oriented while magistrates from working class backgrounds appeared more punitive. Second, legally trained Magistrates tended to be less punitive in their

outlook, and had a more creative and flexible approach than did lay Magistrates.

Hogarth also examined Magistrates' use of case related information in sentencing. They considered information regarding family background, criminal history and employment record as essential. However, the research concluded that the identification of essential information and the relevant weights attached to different categories were consistent with the penal philosophies of Magistrates.

Concerning the assessment of case related information, Hogarth's results showed that while there was "...a high level of agreement among Magistrates concerning the severity of the crime, there was considerable disagreement among them in their perception of the offender and in the possibilities for treatment" (Hogarth 1971: 376).

Furthermore, Magistrates tended to interpret information in a way that was consistent with their personal beliefs. "The magistrates holding strong views about the necessity of deterrence and punishment did not see offenders as having serious problems in their family life" (Hogarth 1971: 376). While those Magistrates holding rehabilitative views found a great deal of pathology in the offender's background.

Data were also presented concerning the organization and integration of information used by Magistrates. It appeared, if one treats Magistrates as an aggregate, that the most important determinant of their decisions was the degree of offenders' culpability in commission of the offense. The study showed some Magistrates consistently gave weight to one or more of the purposes of sentencing while totally excluding the others. This pattern appeared to be established independently of the sentence imposed or the type of case involved. It was evident that different Magistrates chose similar sentences through quite different mental processes. For example, one Magistrate might impose a lengthy term of incarceration for the purpose of rehabilitation while another, in a similar case, might impose the same sentence but for the aim of punishment or deterrence. There was also a tendency for Magistrates to filter out and overlook those elements of information which were not consistent with the sentence they had in mind - in an effort to minimize inconsistency.

Stuart Jaffary in "The Sentencing of Adults in Canada" (1963) collected data from court records with a view to showing variations in sentencing by judges in different provinces. From his analysis, Jaffary was able to show that

an offender convicted of theft under \$200.00 was nearly twice as likely to be sent to prison in Quebec as in some other parts of Canada and almost five times as likely as in the provinces of Manitoba, Saskatchewan, or British Columbia.

In commenting on Jaffary's study, Hogarth notes that it (like many other studies) was restricted to a statistical examination of sentencing based on official statistical records - usually police records. He stated that the usual procedure is to "collect as much information as possible concerning the type and severity of the offenses committed, the backgrounds and characteristics of the offenders concerned and the nature of the sentencing decisions made" (Hogarth 1971: 10). This form of research is termed the "input-output" or a "stimulus-response" model with the input being the facts of the case and the output being the response of the judge. Another term for this approach, according to Hogarth, is the "black box" model, as nothing is known about the judges apart from the decisions they make.

Since the application of this model controls for "input", any disparity in sentencing is usually attributed to the attitudes or personalities of the judge concerned. Researchers tend to infer judicial attitude directly from

judicial behaviour - i.e. judges appear to be toughminded, rigid, et cetera because their sentences appear to be so. Even though inferences about sentencing behavior based on a judge's personality may be inaccurate, proponents of this methodology tend to formulate firm conclusions about this relationship. In addition to this inherent problem, Hogarth cited 3 other concerns:

- (1) it is possible that information other than that known by police is affecting the decision of the court;
- (2) the researcher and the court may differ in the weights attached to the information actually considered; and,
- (3) the researcher may take into account some information which was never placed before the court.

In light of the potential shortcomings of both the "input-output" model and the phenomenological model (Hood and Sparks (1970) and Hogarth (1971)), we examined Hogarth's research which tested the two models in terms of their power to predict sentencing decisions. The input-output model assumed that significant facts are limited to 'legal

variables'. Conversely, the phenomenological model is based on the 'meanings' that judges attach to facts, laws, ideas and people who they deem significant.

Hogarth's study showed that Magistrates tend to interpret their environments differently depending on their personal values and subjective goals.

"The model which emerges from the analysis is one that sees sentencing as a dynamic process in which the facts of the cases, the constraints arising out of the law and the social system and other features of the external world are interpreted, assimilated and made sense of in ways compatible with the attitudes of the magistrates concerned" (Hogarth 1970: 343).

The study concluded that the phenomenological model was considerably more powerful in predicting sentencing decisions than the "input-output" model. Only nine percent of the sentencing variation was explained for by defined facts, while 50 percent of the variation was accounted for by background information about the judge. As a result "...sentencing was shown to be a very human process" (Hogarth 1970: 383).

I. 7 Recent Studies focusing on sentence disparity

Over the past three years, the Department of Justice, Canada has taken several initiatives aimed at gaining a better understanding of sentencing practices and dispositions. Specifically, the department has funded a number of research projects which directly address the issue of sentence disparity. Of particular interest are two studies which will be highlighted briefly in the remaining section.

I. 8 Appeal Court Study

The impetus for this piece of research was established in response to an inter-departmental sentencing project supported by the Department of Justice and the Ministry of the Solicitor General. The major task of the research was to review the principles of sentencing emanating from decisions handed down from Provincial Courts of Appeal in an attempt to provide longer term input into the Criminal Code Review. Basically, the study attempted to answer two important questions: 1) What general principles guide the sentencing decision of judges? and, 2) How are the principles applied?

In addressing these questions, data were extracted from all available decisions which had been reduced to writing for the period commencing January 1977 to October 1980. The data base consisted of 1263 cases, and included the following elements:

- 1) Appeal Court jurisdiction;
- 2) year of judgement;
- 3) offenses charged;
- 4) original sentence and original plea;
- 5) source of the appeal;
- 6) final sentence;
- 7) social characteristics of the offender; and
- 8) offense factors or characteristics.

Generally, the results revealed that Ontario courts were more than twice as likely to intervene (that is change the sentence) than were the Quebec, British Columbia or Alberta Courts. In addition, those courts which intervened (Ontario and Newfoundland) were most likely to describe the original sentence as "too hard" while the non-interventionist courts described the original sentence as "too lenient".

In 41.1 percent of the cases, no specific principle of sentencing was cited. The overall distribution of the data for this item was as follows:

- 1) 34.5% - general deterrence;
- 2) 19.7% - rehabilitation;
- 3) 4.8% - specific deterrence; and,
- 4) 41.4% - no principles cited.

The study also showed that judges in different provinces emphasized different general principles. In addition, those courts which found "hardness" more unacceptable than "leniency", in terms of the sentence, were also more likely to emphasize rehabilitation as a principle for varying the sentence. Judges who emphasized the principle of rehabilitation also cited the personal or social characteristics of the offender in justifying their intervention. "There appeared to be some assessment of the rehabilitation potential of the offender" (Himmelfarb 1980:28).

Part of Himmelfarb's analysis examined the relationships between offense characteristics and the appeal court's decision for a particular case. The general conclusion drawn is that "type of offense" did not appear to influence decisions to intervene or not. When intervention

took place, however, the sentence was most likely to be increased for crimes of violence and most likely to be reduced for property offenses. In conjunction with this part of the analysis, Himmelfarb also looked at more specific offense characteristics associated with certain crimes; these were sometimes identified as being either aggravating or mitigating circumstances. The data revealed the following patterns:

- 1) robbery - degree of violence and use of a weapon were cited;
- 2) drug offenses - amount and type of drug along with the degree of planning were cited;
- 3) assault - amount and type of injury along with the offenders' relationship to the victims were cited; and,
- 4) manslaughter - degree of planning and use of weapon were cited.

Unfortunately, Himmelfarb did not report how these kinds of factors might have influenced the courts' decisions to intervene or type of intervention. When analyzing the characteristics of the offender in relation to appeal court decisions, Himmelfarb found that the courts often reduced

the sentences for youthful offenders and increased the sentences for offenders aged 30 to 49 years. Those who were designated as young, living at home, employed part-time and with no criminal record had their sentences reduced in every case. A previous record or lack of it, was cited as an important factor (either mitigating or aggravating) in 93.8% of the cases. Furthermore, as the severity of the offense increased, so did the likelihood for the previous record (or lack of it) being mentioned.

In addition, the author found that the appeal court was most likely to intervene in crown appeals and the crown was more likely to win its appeal than was the defence. It appeared that the judges felt that sentences being appealed by the defence were "too high" and those appealed by the crown were "too low".

Overall, the study concluded that the appeal court would be well served by: a) a resolution of ambiguities in general sentencing principles; b) a clear articulation of these principles and the general factors to be considered in sentencing; and, c) a set of guidelines which are based in the "...empirical evidence of the consequences of particular kinds of sentences for particular offenses and specific offense and offender factors" (Himelfarb 1980:87).

I. 9 Analysis of Sentencing disparity in Two Canadian Communities

Brantingham, Beavon and Brantingham (1982) conducted an "Analysis of Sentencing Disparity in Two Canadian Communities." The study consisted of a secondary analysis of sentencing data pertaining to "legally aided" cases for 1979 and 1980. A sample of 2,000 cases, representing the court load from 2 communities, provided the data base. The study was designed to explore:

- 1) judicial disparity - disparity in sentencing that could be attributed to variations in judicial behaviour;
- 2) court disparity - disparity in sentencing that could be attributed to variation in overall court practices;
- 3) crown disparity - whether there was disparity in Crown decision-making; and,
- 4) co-accused disparity - whether co-accused were treated in similar fashion.

In analyzing disparity in this context, the authors focused on examining three types of sentencing decisions. These were:

- 1) stay/withdrawal decision;
- 2) sentence-type decision; and,

3) sentence length decisions for jail terms.

Using these decisions as the dependent variables, the authors identified four categories of independent variables which were used as predictors. These were:

- 1) facts of the case;
- 2) characteristics of the offender;
- 3) system operational factors; and,
- 4) judge characteristics.

Brantingham et. al. found that 34 percent of the 2000 cases ended in a stay of proceedings or withdrawals, and 17 percent failed to appear. The remaining 59 percent were tried in court and disposed of in the following manner: jail sentences - 30%, fines - 40%, community service orders - 30%, probation - 15% and discharges - 5%.

The authors drew the following conclusions about judicial disparity:

- 1) judicial decision-making was most strongly related to the facts of the case, prior record information and aggravating and mitigating circumstances;
- 2) there were differences in sentencing patterns of judges who heard a high volume of cases as compared to judges hearing fewer criminal cases;
- 3) guilty pleas were associated with longer probation orders and lower fines;

- 4) individuals represented by a public defender received fewer jail sentences than clients of private counsel;
- 5) sentence length decisions were positively correlated with measures of offense dangerousness and habitual criminal status; and,
- 6) withdrawal of charges were positively correlated with lack of a prior record.

Another component of the study which is particularly relevant to our interests, examined variations in Crown Counsel decision-making. Concerning this, the authors note:

"Crown decisions potentially influence all major sentencing decisions and, in fact, control who is prosecuted. Crown has much discretion, possibly more discretion than a judge. Crown can stay or withdraw charges; a judge can acquit. There is no formal appeal of Crown's decision to stay; Crown or defence counsel can appeal and acquit a sentence" (Brantingham, Beavon and Brantingham 1982:87).

In looking at the decisions of prosecutors, the authors found that certain variables were good predictors of stay/withdrawal decisions. These were:

- 1) lack of prior record;
- 2) extended time period since last conviction; and,
- 3) defence counsel's willingness to enter into discussions.

In addition, the study suggested that Crown Counsel decisions were based on aggravating and mitigating factors as well as communication with the defence.

Overall, the study revealed a high degree of regularity in decisions about sentence length, and case facts were found to be reasonable predictors of sentence type. Finally, the authors suggest that understanding the dynamics of how Crown Counsel make decisions is, in many ways, as fundamentally important as understanding judicial decision-making. Brantingham et. al. argue that case facts and provability of a case should matter most in court decision-making. This is not, however, what the crown seems to be focusing on. Instead, it appeared that the discussions with defence counsel, and prior record (or lack or it) of the accused seem paramount.

"In comparison to the unanswered questions surrounding Crown decision-making judicial decision-making seems straight forward."
(Brantingham, Beavon and Brantingham 1982:88)

Crown do make important decisions that should be answered within the general disparity issue.

1. 10 Summary

As we mentioned at the outset, empirical research on sentencing disparity has explored many avenues in an attempt to identify and measure salient variables which might influence judicial decision-making. As our literature review indicates, this effort has encompassed a variety of approaches ranging from ad hoc data dredging involving 'gut level' notions to systematically testing more logically derived hypothesis.

Even though most of the studies discussed have focused their attention on the role of the judiciary in sentencing, many of the issues raised (and factors used to explain variations in sentencing decisions) involve the same kinds of information which prosecutors are exposed to and must use in their own decision-making.

Quite simply, it is reasonable to assume that a prosecutor will consider information about case facts, offender characteristics and attitude of the judge (when known) in his decisions to proceed with prosecution, prepare his case and speak to sentence. With this in mind, it is

encouraging to see researchers like Brantingham et. al. (1982) expand their work to encompass the role of Crown Counsel in the sentencing process.

Another shortcoming of studies on sentencing disparity has been the failure of researchers to translate their findings into a pragmatic tool for assisting policy-makers in the justice system. Specifically, how can these data be used in assisting policy-makers to resolve problems resulting from sentence disparity.

Instead of dealing with the consequences of sentencing disparity, researchers have formulated proposals for reducing the occurrence of disparity. Some of these proposals are examined in the next chapter.

Leaf 45 omitted in page numbering

CHAPTER II

METHODS FOR REDUCING UNWARRANTED SENTENCE VARIATION

Keeping in mind some of the studies which we discussed in the last chapter, it is probably fair to suggest that much of the research on sentencing disparity has been purely ad hoc in nature and limited mainly to descriptive analysis. While much of this work has a certain intuitive appeal, it can also be criticized as being somewhat 'soft'; sometimes these studies represent little more than a weak test of notional hypothesis using loosely formulated analytical methods applied to an 'opportunity' sample. At best, most studies describe the problem but fail to explore viable solutions.

The net result of the kinds of weaknesses cited above is that much of the research on sentencing disparity has not been useful for assisting policy-makers in formulating initiatives to reduce unwarranted or unjustifiable disparity. Instead, a separate body of research and policy development aimed at this objective has

emerged. Over the past five years, a number of jurisdictions (particularly in the United States) have proposed various strategies for dealing with this issue; these are:

- (1) sentencing councils;
- (2) sentencing institutes;
- (3) flat sentencing;
- (4) presumptive sentencing;
- (5) appellate review; and,
- (6) sentencing guidelines.

The remainder of this chapter presents a brief overview of these measures. The focal point of our discussion is on sentencing guidelines since this approach has received the most attention from the research community.

II. 1 Sentencing Councils:

Over a decade ago, the judges of the United States District Court for the Eastern District of Michigan began a series of weekly meetings aimed at showing their concerns about sentence disparity (Frankel, 1973). The format of these sessions, later dubbed "sentencing councils" was as follows:

A judge who in hearing a particular case, along with two of his brother judges receives a copy of a pre-sentence report for the case. Each judge then reviews the report independently and draws a conclusion concerning the sentence that he would

impose based on the pre-sentence report. The judges then convene as a group, usually with a probation officer in attendance, compare their preliminary decisions and further discuss the case.

The sentence which is ultimately imposed by the presiding judge may be the same as his initial decision, or may incorporate the views of others in the group.

Research data based on monitoring the use of this scheme in selected courts yielded some very interesting findings:

- (1) in a large percentage of cases, the sentencing judge appeared to shift from his initial decision to a sentence which instead reflected the views of his brother judges;
- (2) the group process had a moderating effect on individual sentencing extremes - that is, 'harsh' judges appeared to become more 'lenient' while 'lenient' judges appeared to grow more 'harsh';
- (3) overall however, judges appeared to impose more lenient sentences in that they gave shorter prison terms and utilized probation services more frequently (Frankel, 1973).

Diamond and Zeisel (1975) evaluated the performance of sentencing councils in two federal district

courts (Northern District of Illinois and the Eastern District of New York). Judges in these courts followed a process which closely resembles the operation of sentencing councils. Even though, presentence reports were not part of the decision process, the trial judge conferred - before pronouncing sentence - with his brother judges in order to determine their views on an appropriate sentence.

The results from this study showed that this collaborative decision-making process only produced a modest reduction in the observed levels of sentencing disparity. The use of a pre/post measurement research design permitted the researchers to compare disparity across two time intervals; the first, being an interval prior to the introduction of this approach and, the second, examining sentences imposed through the use of this scheme. In relation to measurements of "mean" disparity for a sample of sentences, this approach appeared to reduce the level of observed disparity from 37 to 33 percent in the Chicago Illinois court and from 46 to 41 percent in the New York court. In a general comment about the use of a collaboration approach to judicial decision-making, Frankel (1973) states:

"Perhaps the main obstacle to the wider use of the sentencing councils is the reluctance of judges to invest the added time for considering their colleagues' cases and for meetings". (Frankel 1973: 71)

Another argument against the use of sentencing councils is that such forums are a threat or an affront to the 'independence' of the sentencing judge. Proponents of sentencing councils reject this position in light of the fact that the sentencing judge still retains unfettered powers in the determination of sentence.

Kress (1980) contends that, in times of serious economic restraint, a low priority would be given to expending resources which would permit three judges to perform the duties of one judge. He also suggests that certain problems would arise concerning the procedures for assigning cases to sentencing councils. Assuming that all cases need not or would not (because of time and workload constraints), be considered by a sentencing council, what criteria would be used for case selection and who would set these criteria?

Sentencing councils do not have the potential for affecting the root problems of sentencing disparity - "the absence of precise rules and corollary excess of discretion left to the deciders" (Frankel 1973: 72). However, preliminary assessments of their use suggests that they may be superior to the traditional approach of permitting an individual judge to make an independent decision about sentence.

II. 2. Sentencing Institutes

Frankel (1973) proposed a very basic approach to reducing the potential for disparity in sentencing. His suggestion is, quite simply, to "improve the judges". He expresses support for the use of sentencing councils as an mechanism for judges exchanging views and developing a collaborative approach to decision-making. Further to this, Frankel suggests that external resources should be allocated - through the establishment of sentencing institutes, toward better training of judges.

In 1958, the Congress of the United States introduced provisions for the periodic convening of training sessions commonly referred to as sentencing institutes. These institutes provided the forum for bringing together judges, United States Attorneys, specialists in sentencing models, criminologists, psychiatrists, and others who could contribute to problems of disparities in sentencing (Frankel, 1973). The purpose was "to promote the interest of uniformity in sentencing procedures by studying, discussing, and establishing the criteria for sentencing those convicted of crimes and offenses in the Courts of the United States" (Frankel 1973: 62).

Even though the introduction of sentencing institutes was met with much enthusiasm and optimism, they do not appear to have been implemented to their fullest potential. The main criticism was that their use has been limited to selected jurisdictions, primarily only at the state level.

In 1974, the Council of Judges of the National Council on Crime and Delinquency, specifically devoted a chapter to "Disparity and Equality of Sentences". In this chapter, noting that disparity cannot be eliminated, they recommended among other things the establishment of sentencing institutes which would have a national scope. However, to date, this recommendation has not been acted on.

Undoubtedly, institutes are of some utility but their potential worth should not be pre-judged. According to Frankel (1973), the benefits of institutes are not amenable to direct measurement. Judges may come together and discuss issues of importance however, because the training does not result in a "binding decision" the participants may "...leave about as miscellaneous and unpredictable as they were when they arrived" (Frankel 1973: 64).

II. 3 Flat Sentencing

In 1975, Gerald Ford spoke on the topic of crime in his "Message to Congress". He stated that he had asked the Attorney General "...to review the problem of wide disparity in sentencing for essentially equivalent offenses to ensure that the federal sentencing structure, is both fair and appropriate. Amongst other things, it may be time to give serious study to the concept of so called flat-time sentencing in the Federal Law" (Report of the Twentieth Century Task Force 1976: 16).

The model of flat sentencing is intended to be responsive to sentencing objectives of equity, proportionality between offense and punishment, accountability, clarity and certainty of punishment. This approach sets out systematic procedures for assigning fixed length sentences of incarceration. According to the National Institute of Law Enforcement and Criminal Justice (1976) the most prominent flat-time plan is as follows: once the judge has elected to incarcerate the offender, he is then bound by one of two penalty scales; one scale issued for the "typical" offender and the other for the "especially dangerous" or repeat offender. The scales specify a

distinct sentence for each class of offense which the judge is required to follow. Under this model, all forms of early release such as parole are abolished. The flat-time concept allows the judge to choose between probation and imprisonment, but eliminates judicial discretion in setting the length of any incarcerative sentence.

This model has a 'common sense appeal' because it is premised on the principles of: (1) fairness - 'you should be punished for what you did, rather than who you are'; (2) equity - 'people committing similar crimes should receive similar punishments'; and, (3) humanity - 'serving a prison sentence is easier knowing when your release date will be rather than wondering if and when you will be paroled' (Ministry of the Solicitor General's study on conditional release, 1981). It is also consistent with the premises of "commensurate deserts" and "general deterrence" - 'if two years means two years it may have, through its certainty, a greater impact on potential offenders'.

Critics of this model argue that this approach still permits the exercise of judicial discretion and, accordingly, may not reduce the potential for disparate sentencing. Since judges are still free to choose a non-carceral alternative, to set concurrent or consecutive sentences, or to add and subtract from the sentence for

aggravating or mitigating circumstances flat-time sentencing still leaves them with potentially disparate sentencing options. According to Gottfredson, Wilkins and Hoffman (1978), "If discretion is squeezed out at one point in the system it will appear somewhere else" (Gottfredson et. al. 1978: 39):

The Ministry of the Solicitor General's study on "Conditional Release, 1981", points out that 12 U.S. states have passed legislation eliminating the traditional parole authority in favour of flat-time sentencing. Available evidence suggests that it would be premature to judge the effects of these legislative reforms. However, the authors hypothesized that this approach may produce increases in prison populations in that it focuses too much attention on prison as a sentencing option. This new legislation could also have negative effects within the prison system. Since flat-time sentencing abolishes early release (which is often regarded as a major source of incentive to inmates), it may have a direct impact on inmates' motivation for participating in various programmes as well as the willingness of correctional authorities to maintain a range of programmes and activities.

Independent of possibly introducing some new aspects of judicial discretion, Donnell, Churgin, and Curtis

(1977) conclude that flat-time sentencing goes too far in eliminating all flexibility in that it threatens to create a system so automatic that it may operate in practice like a "poorly programmed robot".

II. 4 Presumptive Sentencing

Presumptive Sentencing, while suffering from divergent definitions, generally refers to the existence of pre-determined or "presumptive sentences" for specific offences. Nevertheless, if the judge identifies extraordinary circumstances (either aggravating or mitigating in nature) to exist, he may impose a sentence which departs from the presumptive sentence. In doing so, the judge is required to provide a written justification for such a deviation. The presumptive sentencing model clearly shifts the powers of sentencing authority from the judiciary to legislators.

The National Institute of Law Enforcement and Criminal Justice, U.S.A. cited three arguments against legislatively imposed sentences. They are:

- (1) rules for sentencing which are fixed in a legislative framework would be less responsive to changes in the attitudes of policy makers and the

public simply because the process of changing these rules would require a lengthy timeframe. Over a period of time, some of these rules would likely be seen as either too lenient or too harsh depending upon shifts in sentiments;

(2) despite the fact that judges would still retain final sentencing authority under presumptive sentencing, the implementation of this system would be seen to be an unfair imposition of a major policy on the judiciary without the benefit of their input into the formulation of that policy; and,

(3) legislators are not in a position to formulate sentencing policy in the context of a clear 'empirical' understanding of current sentencing practices and, accordingly, their decisions would reflect little more than intuitive 'best guesses' about what appropriate sentences should be.

In conjunction with point 3 above, the National Institute of Law Enforcement and Criminal Justice (1976) notes that: "...little regard is given to the collective wisdom and experience of sentencing judges" (National Institute of Law Enforcement and Criminal Justice 1976: 4).

II. 5 APPELLATE REVIEW

The work of Kress (1980) provides a definition of appellate review. He states, this means (appellate review) of "...curbing sentencing disparity may be referred to as the evolution of a common law of sentencing, a system that structures judicial discretion by a set of principles evolved through the case law of the appellate courts over a period of time" (Kress 1980: 43).

The concept of appellate review is not recognized in existing legislation in the United States. However, England and Australia have a long history of appellate review of sentences.

"The English Court of Appeal has made judgments relating to the weight to be attached to the plea and attitude of the defendant, sentences on accomplices, giving evidence or assistance to the Crown, the effect on the offender's career of a conviction, his ignorance of the law, contributory negligence on the part of the victim, collusion by the victim, and other factors. Once the judge has placed the information he receives into a category or type of case he is surrounded by legal conventions limiting his discretion" (Hood and Sparks 1970: 170).

Thomas (1979), who is generally recognized as a leading author on sentencing principles, claims that the Criminal Division of the Court of Appeal in Britain has the

responsibility of determining sentencing principles and policy, while the "shaping" of that policy is left up to the judiciary.

Legislation in England limits appeals of sentences to the offender. Unlike Canada, provisions do not exist in British legislation which allow the prosecution to appeal a sentence on the grounds that it fails to reflect the public interest.

Thomas also notes that British Courts of Appeal are concerned with tariffs "...or principles which constitute a framework by reference to which the sentencer can determine what factors in a particular case are relevant to his decision and what weight should be attached to them" (Thomas 1979: 29).

The proper use of tariffs provides a basis for maintaining consistency for sentencing of different kinds of offenders while allowing for individual factors to be considered.

Thomas cites three major reasons for the failure of Appellate review to be adopted in the United States as it has in England:

- (1) indeterminacy of so many sentences leaving the effective length of time decision with the parole board;

- (2) pervasiveness of plea bargaining in the United States; and,
- (3) historical reluctance of the appellate courts to assume the task (Thomas 1979: 62)

In its argument favoring the adoption of Appellate review in the United States, the American Bar Association sets out three compelling reasons: They are:

- (1) it would be a mechanism for correcting grossly inappropriate sentences;
- (2) it would upgrade the rationale of sentencing because judges would be required to prepare written reasons for sentences imposed in cases which are the subject of appeal;
- (3) it would enhance the public's respect for the judicial system.

Opponents of the Appellate process argue that trial judges have special competence by virtue of their experience in making sentencing decisions, whereas, appellate judges could contribute little to judicial decision-making. In addition, appeal procedures would cause lengthy delays in the imposition of a final sentence. On the other hand,

proponents argue that appellate review would tend to make judges reflect more carefully on their sentencing decisions.

II. 6 Sentencing Guidelines

Initial research on sentencing guidelines grew out of the interests to develop a system of guidelines for making parole decisions. The preliminary work in this area can be traced back to work carried out for the United States Parole Board Study. A brief analogy of how guidelines were applied in the American parole system is useful in establishing their relevance to decision-making on sentencing.

The term "guideline" refers to:

"A system of data which functions as a tool in assisting decision makers in arriving at individual and policy determinations. It accomplishes this purpose by using some form of equation(s) to summarize the link among the main concerns of decision makers" (Institute of Law Enforcement and Criminal Justice 1976: 5).

A three year study conducted by Gottfredson and Wilkins (1978) was designed to formulate and assess the application of guidelines in the Criminal Justice System. This research involved the United States Parole Commission in the development of parole decision-making guidelines.

As of 1972, "...80 to 85 percent of the parole decisions are based on the use of guidelines" (National Institute of Law Enforcement and Criminal Justice 1976: 30).

The primary objective for using guidelines is to assist the "hearing examiner" and the Parole Commission in making parole decisions. It is hoped that the application of guidelines will ensure that 'similar persons are dealt with in similar ways in similar situations'. In order to achieve this type of equality, the guidelines were designed to serve two functions:

- (1) structure discretion to provide a consistent general parole board policy; and,
- (2) to alert "hearing officers" to decisions falling outside the guidelines so that the unique factors in these cases may be specified or the decision reconsidered.

The initial stage of the research involved working closely with parole officials to identify case-based data elements which were commonly used in making parole decisions. In establishing an analytical framework based on these elements, specific weights or significance was attached to each item.

The next stage of the research demonstrated that the decisions of the Parole Commission could usually be predicted from the knowledge of three focal concerns:

- (1) seriousness of the criminal behaviour involved in the offense;
- (2) probability of recidivism; and,
- (3) institutional behaviour of the individual.

The third task was to transform the subjective estimates of offense seriousness and parole prognosis into objective measures.

In its final form, the parole study defined guidelines which were characterized by a two dimensional model. This scheme linked the intersection of the dimension of offense seriousness with the dimension of parole prognosis with a time (in months) to be served prior to release on parole. The dimension of offense seriousness is measured along a six-point scale called the Six Category Offense Severity Classification System. The parole prognosis dimension is measured by an 11-point Salient Factor Score which is divided into four classes of risk, and nine weighted offender characteristics. This three-part model is designed to provide a relatively objective estimate of the probability of recidivism (Gottfredson, Wilkins and Hoffman, 1978).

In applying the model, a parole examiner is required to score each case in terms of offense seriousness and parole prognosis. This scoring permits him to locate

their cell of intersection on a grid which indicates an expected range of months to be served. If the examiner decides to depart from the range, written reasons must be provided.

Researchers involved in the Parole study believed that there was additional value in the guideline concept because it could be adopted to many other decision-making situations, particularly to sentencing. Consequently, they pursued work on the "Sentencing Guidelines: Structuring Judicial Discretion" research project which began in 1974 and was concluded in June 1976. The research team operated from 2 basic positions:

- (1) to work with the judiciary in a collaborative venture and not around or against them;
- (2) to assume not only the existence of sentencing discretion and variation but also its desirability to meet one of the two primary sentencing goals; individualized justice and equal justice.

The researchers developed an operational guideline system which would be based only upon statistically valid factors and weights which would also be acceptable from an ethical viewpoint.

The basic working assumption of the research team was that "while judges in a particular jurisdiction are making sentencing decisions on a case-by-case or individual level, they are simultaneously, and as a by product, making decisions on a policy level" (Kress 1980: 10). Thus, the aim was to develop an "equation" which would predict sentencing decisions as the identification of a latent sentencing policy. With this goal in mind, the first analytical task of the staff was to identify the independent variables which influence sentencing decisions and to determine the weights or significance of each variable.

In an attempt to identify these variables, 250 different items of information were gathered from a random sample of 200 individual sentencing decisions obtained from courts in Denver, Colorado and Vermont. (The information consisted of data about the offender, and the related offenses.) Results from multiple regression analysis showed that approximately six variables accounted for close to 50 percent of the variations in sentencing. The best predictors of sentencing decisions were seriousness of the current offense and the extent of the offender's prior criminal record.

On the basis of these analysis, the researchers developed a number of simple models using the data elements

which were identified as having the most significant impact on sentencing.

Two of these models, which attempted to reflect the average sentence of all judges, were refined and implemented. They were:

- (1) the general or "class model"; and,
- (2) the "generic model".

The general model is a "system in which decision making matrices are developed parallel to and coordinate with the statutory classification system established by the states Criminal Code" (Kress 1980: 103). Under this model, all data elements remained constant for all classes of offense.

Under the generic model "an offense typology is developed that classifies offenses into broad categories based on the similarities in the criminal behaviour involved in the offenses" (Kress 1980: 105). Thus, the generic model focuses on the salient factors specifically related to the type of crime committed. Upon implementing this model, and performing the necessary computations, the judges first select the case related information pertaining to the type of offense involved. This information is then used to assign relative offense and offender scores. The intersections of these scores must then be located on an

offense specific matrix. Conversely, the decision-making matrix under the "general" model consists of a statutory class or typology.

The research team also gave consideration to a third guideline model which was referred to as the "Crime specific" approach. Kress claimed that "...this model had the potential for obtaining the highest predictive power of all models" (Kress 1980: 106).

Under this model, a decision-making matrix was developed for every specific statutory offense at the time of conviction. Therefore, both the offense factors and offender factors might vary from crime to crime. However, in light of time as well as financial constraints, the researchers abandoned their work on this model (prior to its implementation) and, instead, limited their attention to the General and Generic models.

Further derivations on the two basic models resulted in the development of five additional mini-models; each were based on different theoretical and/or empirical considerations. All of the mini-model guidelines involved some form of a two-dimensional decision-making grid or matrix; the vertical axis related to the offense score, while the horizontal axis related the offender score. An intersection of these two scores plots the appropriate sentence.

In order to validate the different models and to ascertain which one(s) best represented or predicted sentencing decisions, five research sites were chosen for implementing the models.

As a first step in a judge's sentencing decision, a judge reviews:

- (1) a completed presentence report together with the sentencing recommendations of the probation department; and,
- (2) the guideline model sentence which has been tabulated by a probation officer.

The judge uses this information, together with any other information known about the case, in making his sentencing decision. If the judge has made a sentencing decision that departs from the guideline model sentence indicated on the worksheet, he is requested to provide reasons for this departure.

Empirical tests of four out of the five mini-models implemented yielded the following results: model A was tested on a sample of 221 in Denver Colorado - 84 percent of the decisions fell within the guidelines; models B and C were validated on 100 cases from Denver and correctly mapped 80 percent and 79 percent of the cases, respectively; in Vermont, model D correctly mapped 73 percent of the sentencing decisions.

In addition to these basic statistics, the tests produced some other key findings relevant to all four models. They were:

- (1) all sentencing decisions utilize a small core of information containing approximately 6 to 12 data elements whose weights remain constant;
- (2) when judges weigh the seriousness of the offense in determining sentence, they usually weigh the harm or loss suffered by the crime victim in what they perceive as the "real" offense; and,
- (3) judges sentence on the basis of their perception of the 'real' offense irrespective of the specific offense being tried.

In conclusion, the research team believed that their model produced a number of results. These can be summarized as follows:

- (1) reduced unjustified variation;
- (2) added speed and certainty to the judges own decision-making process;
- (3) required judges to give further consideration to their sentencing decision, should they fall outside the guidelines;
- (4) alleviated problems of court delays and backlog in that they reduced "judge shopping"; and,

- (5) provided an instructional tool for newly appointed judges.

On November 15, 1976, the first set of sentencing guidelines were formally implemented by the Denver District Court Judges (Kress 1980: 188). As recently as 1982, all of five research sites had maintained the program even though federal government support had been discontinued. Other county-wide guideline systems are presently being developed in Florida, Georgia, Louisiana, Maryland and Montana. State wide systems are being developed in Alaska, Connecticut, Massachusetts, Michigan, Minnesota, North Dakota, Oregon, Rhode Islands, Utah, Wisconsin and Pennsylvania (Kress 1980: 93).

II. 7 Summary

As we mentioned at the beginning of this chapter, most of the planning and research initiatives aimed at reducing sentencing variation have emerged somewhat independently of the wide ranging research on judicial decision making. Each of the five approaches reviewed above are quite unique in that they reflect very different levels of control over judicial 'independence' as well as different sources of control ranging from 'peer influence' to legislation.

Nevertheless, all of these methods are designed to have an impact on a particular actor - the judge, in relation to a particular event - the decision about sentence. All of these schemes raise questions about how each method could work and how acceptable each type of intervention would be to the judge. Further planning and research should also address questions about how decision making at one stage in the criminal process might be influenced by decisions and expressed attitude of actors whose behaviors 'feed into' judicial decision-making. Even under the various models for reducing sentence variations - short of totally eliminating judicial discretion - judges' actions would be influenced by key actors in the justice process such as Crown Counsel.

Our research can be seen as an initial first step toward examining this type of potential interaction effect in prosecutors' and judges' decision making. The primary thrust of our work was to identify variations in prosecutors' decisions about sentencing and explore some of the measurable dynamics of their behavior. The next chapter outlines the methodology developed for this study.

Leaf 72 omitted in page numbering

CHAPTER III

METHODOLOGY

In formulating the methodology for the study, our main objective was to generate an empirical data base relating to prosecutorial decision-making. The sampling frame consisted of the total population of 234 prosecutors employed by the Attorney General of Ontario, Canada, who are serving in Provincial Judges Courts across Ontario. Respondents were requested to answer six questions in conjunction with each of the five cases in a standard case set (sample of the case and questionnaire is presented in APPENDIX A).

Data for the study were generated using a mail back questionnaire; this material included a covering letter explaining the study together with detailed instructions for completing the questionnaire. In substantive terms, the survey was a replication of the "Beyond the Black Box: A study in Judicial Decision-making" conducted by the Ministry of the Solicitor General. The information in our standard case set was identical and only minor modifications to wording were made to three of six questions in order to accommodate responses from prosecutors rather than judges.

Potential respondents for the study were identified through the Ministry of the Attorney General, Queen's Park, Ontario. During the data collection phase, initiatives were taken to improve the response rate for the study; this included a "reminder" letter and a follow-up telephone call during the 30-day period following the initial distribution of questionnaires. It was hoped that these two measures, in addition to providing a postage paid return envelope with the package, would provide additional encouragement for prosecutors to participate in the study.

As mentioned above, our study used a standard case set consisting of simulated cases. In addition to simply describing the case set and how it was applied, we feel that it is important to also provide a sound rationale for having chosen this approach. The remainder of this chapter discusses the development of our methodology together with a brief assessment of the strengths and weaknesses of other approaches.

III. 1 Beyond the Black Box: A Study of Judicial Decision-making

In 1980, research entitled "Beyond the Black Box: A study in Judicial Decision-making" was designed to gather

data pertaining to the issue of sentencing disparity. Participants in this study were 206 Provincial Court judges from across Canada who attended one of eight judicial association conferences held between January and May, 1980. Four conferences were held in Ontario while one was held in each of Quebec, Manitoba, Alberta and Newfoundland. The Alberta conferences involved judges from all four western provinces and the Yukon, while the Newfoundland conference involved judges from three of the four maritime provinces.

It should be emphasized that the sample of judges who participated in the study was neither an exhaustive nor random sample of Canadian Criminal Court judges. The representativeness of the sample was further limited by the fact that not all judges attending the conferences completed questionnaires. Judge Goulard (formerly of the Department of Justice) estimated that the overall participation rate was approximately 50 percent of all the judges in Canada.

As noted, the questionnaires were distributed at each of eight separate judicial conferences held across the country. In most instances, a full day was devoted to the completion of the exercise and subsequent discussion. Judges were asked to complete their questionnaires independently.

There were two major components to the questionnaire. First, judges were presented information about five hypothetical cases which involved a total of six accused. The offense categories represented included: (1) assault causing bodily harm; (2) impaired driving; (3) break and enter; (4) armed robbery - this case involved two co-accused and involved additional charges of possession of a weapon and indecent assault on a female; and, (5) theft over \$200.

The basic aim was to provide the judges with as much "relevant" information as possible. In addition to the factual case, information was also presented about circumstances surrounding the offense, and presentence reports were included which provided personal histories on each accused. Judges were requested to assign dispositions to each case on the basis of the information given as well as providing reasons for their decisions, and identify important case attributes.

The second portion of the questionnaire asked questions regarding the judges' background and personal history.

III. 2 Selection of Cases

The composition of cases for "Beyond the Black Box: A Study in Judicial Decision-making" was decided by an

ad hoc committee consisting of Provincial Court Judges from Ottawa, Ontario and officials from the Ministry of the Solicitor General. The five cases which were constructed, are totally fictitious; that is, they are not actual court cases. However, the facts of each particular case are based on research which indicated that these facts are consistent with a "typical" court case. For example, research suggested that for crimes of break and enter, the average age of the accused is 18, and the amount stolen is usually \$345.00 (Waller and Okihiro, 1978). These research data were used to formulate case three - Break and Enter. Our study utilized the same five cases which were given to the judges in the Solicitor General's project.

III. 3 Present Research: Subjects and Administration of the Questionnaire

Our study utilized the same case set used by the Ministry of the Solicitor General's study involving judges. While the Solicitor General's study was national in scope, our research was restricted to Ontario. This limitation was dictated by economic and logistical reasons. Nevertheless, Ontario was chosen because it gave us access to a sufficiently large sample of prosecutors in one

jurisdiction; all prosecutors in Ontario, 234 in total, were given the opportunity to participate in the study. Certain questions were modified in the original questionnaire given to the judges for 'suitability' purposes. For example, the judges were asked, "What sentence would you assign?" Whereas our survey asked prosecutors, "What sentence would you feel is appropriate in this case?" Other questions pertaining to background and personal history were dropped because of their irrelevance and questions regarding presentence reports were dropped from the questionnaire because it was felt that this information was not pertinent to prosecutors. (See APPENDIX A for the complete case package.)

In addition to the standard case set and questionnaires, each prosecutor received an introductory letter explaining the purpose of the research and instructions on how to complete the questions. By early February, 1982, 234 prosecutors had received a complete case package. They were instructed to return the material in the self-addressed, pre-paid envelope by February 15, 1982. A follow-up letter was sent to each prosecutor who had not returned the package by February 19, 1982. Telephone contacts were made to those persons who had not returned the questionnaires by February 26, 1982.

III. 4 Simulated Cases

As mentioned in Chapter I, studies dealing with the issue of disparity frequently involved the analysis of data from actual cases, i.e., the archival analysis of actual sentencing decisions. None of these studies have been able to account for all variations in sentences through the independent variables used. Consequently, each points to the existence of unexplained disparity or variability in sentencing.

In order to test the hypothesis that either; 1) the sentencing process could be understood through the mere addition of more variables to the sentencing equation (black-box model); or, 2) certain differences exist between judges in their perception of events, a comparison must be made across "equivalent" cases. A compilation of equivalent cases would no doubt be a fruitless, arduous task in that no two cases are identical. However, the use of simulated cases provides a viable alternative.

The major advantage of simulated cases is that it holds constant the information which is presented to a group of decision makers. This approach allows two different types of information to be investigated: 1) it permits one to measure the extent to which disparity exists; and, 2) it

allows researchers to focus on the reasons behind disparity, i.e., to ascertain the correlates of disparity.

Partridge and Eldridge (1974) conducted what is seen to be an exemplary study utilizing the simulated cases approach. They investigated the existence of disparity in sentencing by giving 20 presentence reports to 50 judges. These reports included information about a variety of offenses which had been chosen as representative of offenses that the judges would typically hear. Their results showed a substantial amount of disparity in all twenty cases. For 16 of the cases there was disagreement with respect to the basic in-out decision. The basic in-out decision refers to whether the person is sentenced to a period of incarceration - IN, or is given an alternative sentence such as probation - OUT. In the other four cases, judges agreed on the appropriateness of prison but disagreed on the length of the prison term.

The authors maintained that their results were comparable to the results from other studies which utilized the archival approach.

Accepting the existence of substantial disparity, one should still ask why the disparity occurred. A possible explanation is that the degree of observed disparity is not representative of actual sentencing behaviour but is purely an artifact of the type of methodology used.

Partridge and Eldridge's study did not involve a "real flesh and blood defendant". Some argue that this may have been a factor in causing disparate decisions since the absence of a real accused "deprived the judges of a multitude of cues and hence, made the 'nature' of the offender more ambiguous" (Palys 1980: 11). The authors present a different opinion noting that the "unusual" or "atypical" extreme offender might influence the judge however, the "usual" or "typical" offender would not.

Still another viewpoint worthy of consideration is that more disparity in sentencing could possibly exist when an actual offender is present in court. Extraneous factors such as, the offenders' appearance, or his/her attitude could affect sentencing. However, in making decisions using simulated cases, the judge has only the written material on which to base his decision.

Barnett (1980) found that the presence of a specific, real accused does not necessarily reduce disparity. He developed a modified approach in using simulated cases which involved the use of "live" actors playing the roles of defendants and lawyers. The results indicated that there was a level of disparity in sentencing comparable to that observed in other studies using simulated cases.

Perhaps the strongest criticism of the simulated case methodology is that it fails to recognize that judicial regard for human concerns such as consequences to the offender, his family, the victim, and society may result in spurious disparity. As Partridge and Eldridge (1974) stated:

"It may be that the responsibility that a judge bears when dealing with the lives of real people tends to result in sentences more nearly in agreement: the judge inclined to be tough may find it easier to indulge the inclination when there is neither a defendant nor a family to be hurt by this decision; the judge inclined to take probation risks may find it easier to do so if there is no risk at all that the criminal will find other victims." (Partridge and Eldridge 1974: 17).

If this line of reasoning is accurate, the tendencies described above would result in an overestimation of the degree of disparity in sentencing. In addition, one could also expect these tendencies to be weaker in case situations that were highly familiar to judges, and stronger in less typical fact situations. Partridge and Eldridge (1974) tested this proposition by dividing their simulated cases into groups of more (n=8 cases) or less (n=12 cases) familiar fact patterns. They found no difference in the amount of disparity across the two sets of cases. Thus, it is possible to conclude, as did the authors, "that the

tendency for the experimental sentences to be more disparate than courtroom sentences, if it indeed exists at all, is not a very strong one" (Partridge and Eldridge 1974:18).

Considering the various research findings and viewpoints outlined above, we concluded that, on balance, the strengths and weaknesses of the simulated case versus archival case methodology are comparable.

III. 5 Limitations of the Method Employed

There are numerous strategies for data collection in social research. However, for this particular study, the mail-questionnaire approach was deemed most advantageous.

As mentioned by Oppenheim (1966) the main advantage of the mail questionnaire approach is its quickness and economy. Another advantage is that a much larger sample can often be generated with only a modest increase in cost.

Moser (1958) maintains that the mail questionnaire approach also avoids the problems associated with the use of interviewers, i.e., interviewer bias. In addition, it avoids the problems of non-contacts and time scheduling; respondents not being available when the interviewer

calls or having left by the time the interviewer arrives". Finally, it is argued that some people may prefer to answer certain questions "...independently rather than face to face with an interviewer who may be a complete stranger" (Moser 1958: 67).

Moser (1958) identifies five major disadvantages to the mail questionnaire method. Briefly, these are as follows:

- 1) the questions must be simple, straight-forward and reasonably short;
- 2) the answers to a mail questionnaire have to be accepted as final. It is impossible to probe beyond the given answer, to clarify an ambiguous one, et cetera;
- 3) the mail questionnaire is inappropriate where spontaneous answers are required;
- 4) the answers cannot be treated as independent because the respondent sees all the questions before answering any one of them; and,
- 5) the major limitation of mail questionnaires is the difficulty of getting an adequate response. Moser (1958) states that,

"it is not the loss in sample numbers that is serious, but the likelihood that the non-respondents differ significantly from the respondents, so that estimates based on the latter are biased" (Moser 1958: 178).

In addition to these inherent problems in the mail-questionnaire method, researchers using this approach are often times faced with lengthy delays in receiving returned questionnaires. Furthermore, this problem results in an overall low rate of return which can, in turn, jeopardize the representativeness of survey data.

Recognizing this potential problem, three steps were taken in an attempt to optimize the response rate. First, the introductory letter was signed by Judge Guy Goulard, then with the Federal Department of Justice; Moser (1958) maintains that official sponsorship will normally get a better response rate. Second, a follow-up letter was sent to each prosecutor who had not returned the questionnaire by the due date. Third, one week after the follow-up letter had been sent, each prosecutor was contacted by telephone inquiring if the package had been received, and if so, the progress to date.

In addition to these measures, each package contained a stamped, self-addressed reply envelope, and assurances were given guaranteeing the anonymity and confidentiality of each response. Each questionnaire was labelled with a numeric identifier which permitted us to monitor questionnaire returns. The covering letter clearly stated that these numeric identifiers would be destroyed when the questionnaire was returned.

As suggested above, the mail questionnaire approach could result in the entire research being jeopardized by a poor rate of return. From our sampling frame of 234 prosecutors, a total of 129 questionnaires were returned; this translated into a response rate of 55 percent. It should be noted that this rate of return is quite respectable when compared to similar studies in the area. For example, a recent study on Prosecutorial Discretion (conducted by the Federal Department of Justice) involved a sampling frame of 1200 Crown Counsel across Canada. After several major initiatives were taken to further encourage respondents to complete their questionnaire, the overall response rate still remained below 20 percent.

There are no existing data which provides us with a professional and/or personal profile of the population of prosecutors in Ontario; that is, we do not know how the population is distributed in terms of various socio-demographic variables and professional background. However, even though our sample represents only slightly more than 50 percent of prosecutors in Ontario, we have no reason to believe that this sample is somehow biased and accordingly, unrepresentative. A geographical breakdown of our sample suggests that we have a fairly representative sample.

As part of our analysis in Chapter IV, we provide a detailed description of the sample in relation to some of the variables cited above. We believe that our basic methodology as well as our sampling strategy is sound and certainly defensible.

It is clear that mail questionnaires as a data-collection technique has its advantages and limitations. However, the mail-questionnaire method was the only viable approach and thus, all attempts were made to satisfactorily overcome the inherent limitations.

III: 6 Statistical Procedures

The analysis of data from the questionnaires was performed in several stages. First, since some items permitted open-ended responses, content coding schemes were developed. Coding categories that would cover all possible responses were generated from a sample of 15 completed questionnaires. The resulting set of codes were then applied to all the returned questionnaires.

A separate coding format was developed for the second portion of the questionnaire pertaining to data on respondents' personal characteristics, i.e. age and gender.

of the prosecutor, the number of years spent in practice since being called to the Bar, type of practice and post-secondary education other than law. Here again, the approach used was to establish coding categories based on a sample of returned questionnaires. These categories were then applied to the returned questionnaires. Frequency distributions (absolute, relative and adjusted frequency) were then computed. The analysis of questionnaire data was carried out by using various components of the Statistical Package for the Social Sciences (SPSS.)

In addition to computing and analyzing frequency distributions for:

- 1) sentencing objectives cited;
- 2) factors identified as relevant in the submission to sentence;
- 3) disposition of sentence;
- 4) adequacy of present correctional facilities; and,
- 5) socio-demographic characteristics;

we were interested in exploring factors which might affect the prosecutors' submissions to sentence. In conjunction with this, our analysis explored:

- a) the relationship between socio-demographic characteristics (the prosecutors age, the number of years since being called to the bar, the number

- of years as a prosecutor and the length of education) and the severity and type of disposition;
- b) the relationship between the legal objectives noted and the severity and type of disposition; and,
 - c) the relationship between important case attributes and the severity and type of disposition.

III. 7 Summary

Our concluding comments at the end of Chapter III suggested implicitly, if not explicitly, that research studies on sentencing disparity and various strategies for reducing sentence variation encompass very diverse orientations. It is somewhat difficult to detect a commonly accepted conceptual framework in either of these areas. Recognizing this, we were free to choose components from existing studies and supplement these ideas with our own particular research interests.

However, after identifying our substantive interests, it was apparent that there was no 'pre-ordained' methodology for executing the study. Various approaches bring with them inherent advantages but also disadvantages.

We believe that the examination of prosecutorial decision-making has an important role to play in sentencing research. Even within the limitations of the "mail-back questionnaire" approach, our study produced an interesting and useful data base. Chapter IV presents a discussion of the research findings based on the analysis of our questionnaire data.

Leaf 91 omitted in page numbering.

CHAPTER IV

RESULTS

Our discussion of the results is divided into three parts. The first section provides a brief descriptive profile of the respondents. We examined characteristics such as their age, post-secondary education, length of experience as a prosecutor, and prior legal background. The second section presents a statistical overview of the responses to questions about each of the five cases in the standard case set. This part of the analysis shows the frequency distribution of the answers to each question together with a brief discussion of highlights in the data. The third section explores, through the use of cross tabulations, various relationships in the data.

IV. 1 SECTION I

Socio-demographic Characteristics of the sample

The first part of our analysis examines the geographical distribution of the sample generated by the study. As mentioned earlier, questionnaires were sent to all prosecutors (N=234) in Ontario. In geographical terms,

prosecutors across 50 separate communities. Rather than treating each community in isolation, we established nine categories which were used as our units of analysis. Eight of these categories consisted of small groups of communities and the ninth category consisted of responding prosecutors from the Ministry of the Attorney General in Queens Park, Toronto. A breakdown of the sample across these nine categories is presented in APPENDIX B, TABLE B-1.

It is interesting to note that while the actual number of potential respondents in each of the nine categories varied markedly (2 - 110), the response rate is fairly consistent across all nine groups. In five of the nine groups, the rate of return ranged between 50 and 60 percent. In another three, the rate of return ranged between 61 and 69 percent. Prosecutors from northern Ontario showed the lowest rate of return at only 43 percent. Recognizing the inherent limitations in the "mail back" questionnaire approach to survey research, the response rate to this study reflects a high degree of participation.

As shown in TABLE 1, just over half (54.3%, N=70) of the respondents fall within an age range of 10 years; between the ages of 31 and 40. The composition of our

TABLE 1Distribution Of Respondents By Age

<u>Age Group</u>	<u>Relative Frequency (Percent)</u>
20 - 30 years	12.4
31 - 40 years	54.3
41 - 50 years	21.7
51 years and over	11.6
<hr/>	
Total:	100.0

sample of 234 Crown Counsel (55 percent of the total population) is extremely skewed in terms of gender; there were 120 males as compared to 9 females.

Given the relative 'youthfulness' reflected in the sample, it is not surprising that a comparable proportion of the respondents had only 10 years or less experience as a prosecutor; just over one third (34.9%, N=45) have experience of 5 years or less and another 25 percent (N=32) had between 6 and 10 years experience. TABLE 2 shows that these two groups, with the addition of prosecutors having between 11 and 15 years experience, account for about 77 percent of the total sample.

During the research design phase of the study, we had no information about the potential respondents for the survey in terms of their level or length of experience as prosecutors. Accordingly, we could not know how useful this single variable would be for analyzing the relationship between respondents' legal experience and their responses to case related questions. For this reason, we felt that it would be important to also obtain data pertaining to respondents' overall legal experience prior to becoming a prosecutor. In addition, respondents were asked to provide information about the nature of their post-secondary education prior to entering law school.

TABLE 2

Distribution Of Respondents By Length Of Experience
As A Prosecutor

<u>Number of Years</u>	<u>Relative Frequency (Percent)</u>
1 - 5 years	34.9
6 - 10 years	24.8
11 - 15 years	17.1
16 - 20 years	7.8
21 - 25 years	5.4
more than 25 years	10.1

Total: 100.1

The data showed that prosecutors varied somewhat regarding the nature of their prior legal experience. Only five (3.9%) respondents indicated that their legal experience was limited to prosecution work. The remainder (96.1%) had worked in other legal areas prior to becoming Crown Counsel. About one-third (32%) of the respondents had previous experience in more than one area of law; including family, criminal and 'general' law. The largest group (N=73, 57%) had previous experience only in criminal law. TABLE B-2 (APPENDIX B) presents the actual distribution of responses to this item.

As would be expected, 80 percent of the respondents (data are missing for the remainder) indicated that they had completed some post-secondary education before entering law school. The data showed that 58 of the respondents had completed a Bachelor of Arts degree and 23 had completed a Masters of Business degree. The types of degrees completed were limited to Bachelor of Arts, Master of Arts, Master of Business Administration and combinations of these (see TABLE 3). The most frequently cited degrees were in the social sciences (23.3%) and in political science (14%).

TABLE 3

Distribution Of Respondents By
Nature Of Post-secondary Education
Prior To Entering Law School

<u>Nature of Post-Secondary Education</u>	<u>Relative Frequency (Percent)</u>
2 years or less (no degree specified)	5.4
B.A. only	45.0
M.A. only	7.0
M.B.A. only	19.4
H.B.A. & M.A.	0.8
B.A. & M.A.	1.6
Respondents who did not answer question	20.9
Total:	100.1

IV. 2 SECTION IIAnalysis of Sentencing Disparity

Keeping in mind that the primary objective of the research was to examine the issue of sentencing disparity, the central component of our analysis deals with analyzing prosecutors' choices of dispositions for each of the five cases in the standard case set. In generating these data, respondents were asked: "What sentence would you feel is appropriate in this case?" As expected, data from this item produced a wide range of decisions which, in turn, present problems for constructing an appropriate analytical framework for assessing observed variations.

In Case 1, for example, respondents' choices varied from a \$500.00 fine to 3.5 years in a federal penitentiary. Even within the confines of our modest sample of 129, responses to this item produced a large number of data points. As in other sentencing studies involving judges, these data facilitate a detailed examination (i.e. providing a measure of 'absolute' differences) of disparity, but without a massive data collection effort, the findings can result in a discussion of a 'wilderness of single instances'.

Looking at differences between individual dispositions can be carried out by simply 'eye-balling' the data. However, translating these observations into defensible conclusions necessitates a more systematic analysis based on aggregated data consisting of groups of sentences. The distribution of responses across these sentence groups can, then, be used as a basis for making judgments about disparity.

In order to conduct this type of analysis, we had to first construct sentence groups by establishing decision rules for assigning dispositions to each group. Our rules took into account two dimensions of the sentence: (1) IN-OUT, whether the disposition imposed a period of incarceration (IN) or not (OUT); and, (2) QUANTUM severity of the sentence (e.g. length of jail term, length of probation, amount of fine, etc.). Using certain criteria (based on distributions in our data) for establishing cut-off points along the QUANTUM dimension and combining these with the dichotomy for the IN-OUT dimension enabled us to construct a cross tabulation matrix in which each cell represents a group of sentences.

The lower and upper values of the QUANTUM axis for the matrix constructed for each of the five cases varied as a function of the lowest and highest QUANTUM sentence

groupings based on respondents' data. After completing this cross-tabulation for each case, we examined the distribution of data in each matrix with the view to identifying one or more modal groups. Our conclusions about whether disparity was observed are based on the following reasoning:

- (1) NO DISPARITY - if a large proportion of the sample is present in one cell;
- (2) NO DISPARITY - if a large proportion of the sample is present in two or more cells but the differences between these sentence groups is not judged to constitute unwarranted variation;
- (3) DISPARITY - if substantial proportions of the sample are distributed across two or more cells and the variation between these cells is judged to constitute sentencing disparity.

The remainder of this section presents a statistical overview and brief discussion of our findings for each of the five cases.

IV. 3 Case 1 - Assault Causing Bodily Harm

This case involved one defendant (Ray R.) charged with the offense of "assault causing bodily harm". A total of 128 (99%) of the prosecutors assigned a sentence for this case; one respondent did not impose a sentence. The least severe sentence imposed was a fine of \$500.00. In contrast, the most severe sentence was a 3.5 year term of incarceration in a federal penitentiary. TABLE 4 presents a summary of the various types of dispositions for Case 1.

The data for this item showed a high degree of consensus (94.7%) that the sentence for this case should involve incarceration. However, respondents' decisions about the actual length or severity of this component were somewhat scattered. The length of incarceral sentences ranged from 6 months or less (41.0%) to 3.5 years (6.8%). The majority (85.0%, N=109) of respondents suggested incarceration terms of less than 2 years (i.e. to be served in a provincial institution). Considering this, the level of disparity which could be inferred from comparing the extremes (less than 6 months versus 3.5 years) is reduced substantially.

TABLE 4.

Distribution Of Dispositions By
Sentence Type: Case 1
(Assault Causing Bodily Harm)

Sentence Type	Relative Frequency (Percent)	
fine only	0.8	
probation (with conditions)	2.3	(OUT=4.7%)
fine + probation (with conditions)	1.6	

incarceration only	53.5	
incarceration + Temporary Absence Programme (TAP)	3.9	
incarceration + probation (with or without conditions)	33.3	(IN=94.7%)
incarceration + probation (with or without conditions) + TAP	3.2	
incarceration + probation (with conditions) + suspension of driver's licence	0.8	
missing data	0.8	

The data from TABLE 4 identify four general sentence types; these are: (1) simple OUT - fine, probation, or suspended sentence only; (2) mixed OUT - a combination of fine and probation; (3) simple IN - incarceration only; and, (4) mixed IN - a combination of incarceration and some OUT component(s). These four general sentence types are referred to in our initial discussion of the data for all five cases. The next part of our analysis provides a more detailed treatment of these data by mapping out the QUANTUM dimension of the sentences in matrix form (TABLE 5).

For this part of our discussion of the sentencing data for Case 1, we limit the analysis to the 110 prosecutors represented in TABLE 5. The cell for "simple" IN of 6 months or less jail is clearly the modal group; it contains 32.7 percent of the total prosecutors. The best way to examine the location of other groups relative to the modal category was to construct an ordinal representation of these data and label each ordered group as an increment or decrement of the modal category. This approach yielded the following schematic picture as shown in FIGURE 1.

In this ordinal form, the data (with the exception of the 1.8 percent in the OUT cell) are quite evenly distributed across the four other groups. It could be argued that the choice of labels for the various cells does

TABLE 5

Distribution Of QUANTUM Sentence
Components For Case 1
(Assault Causing Bodily Harm)

Incarceration (Months)	Probation (Months)						
	No Pro- bation	1 to 6	7 to 12	13 to 18	19 to 24	25 to 30	31 to 36
No jail				1.8			
6 mos. or less	32.7	0.9	0.9		10.0		0.9
7 to 12	15.4		4.5	0.9	9.0		0.9
13 to 18	3.6				2.7		
19 to 24	5.4						0.9
25 to 30							
31 to 36							
37 to 42	0.9						

VALID OBSERVATIONS = 110

Missing Data - Quantum not specified by respondent

No Sentence Imposed = 1

Fine = 1

Probation = 3

Incarceration = 8

Incarceration + Probation = 15

*Cell entries are expressed as percentages of the total number of valid observations.

not reflect a rigorous deliniation of actual QUANTUM differences. However, we believe that the data from this schematic representation together with the distributions in TABLE 5 speak for themselves.

Remembering our decision rules for assesing variations, it would be difficult to conclude that the two "Higher" and the "Lower" cells are disparate in relation to the modal group. Nevertheless, the sentences in the "Much Higher" and "Very Much Higher" cells are substantially more severe than the modal sentences. The magnitude of these variations, together with the fact that 29.9 percent are so far removed from the modal group, compels us to conclude that sentencing disparity was observed for Case 1.

IV. 4 Case 2 - Impaired Driving

This case involved one defendant (Joe J.) charged with the offense of "impaired driving". A total of 125 respondents (97%) assigned a sentence for this case; the remaining four prosecutors failed to provide data for this item. The sentences imposed ranged from a \$300 fine to a 13-year term of imprisonment. The distribution of disposition types is presented in TABLE 6.

Not unlike the data for Case 1, here again, respondents' showed a markedly high degree of consensus regarding the basic IN-OUT decision. However, within the range of the IN sentences, prosecutors were almost evenly divided between "simple" and "mixed" IN groupings. As might be expected, the suspension of Joe J.'s driving privileges (as well as probation) appeared as a component of the "mixed" IN sentences.

Even though a relatively small proportion (14%) of the dispositions involved a fine, the views of these 17 prosecutors concerning an appropriate QUANTUM of fine were divergent, at best; fines imposed ranged from \$300 up to \$5,000. If we only consider the upper and lower extremes of the IN sentences assigned, it would appear that the levels

TABLE 6

Distribution Of Dispositions By
Sentence Type: Case 2
(Impaired Driving)

Sentence Type	Relative Frequency (Percent)
fine only	0.8
fine + suspension of driver's license	3.9
probation (with conditions)	0.8
fine + probation (with or without conditions)	2.4
incarceration only	42.6
incarceration + fine	4.1
incarceration + fine + suspension of driver's license	3.1
incarceration + Temporary Absence Programme (TAP)	14.0
incarceration + TAP + suspension of driver's license	3.3
incarceration + probation (with or without conditions)	6.2
incarceration + TAP + probation (with conditions)	1.6
incarceration + probation (with conditions) + suspension of driver's license	13.2
missing data	3.1

(OUT=7.9%)

(IN=88.1%)

of disparity within incarceral sentences and fines is comparable; the QUANTUM of incarceration imposed ranged from 1 month to 11 years. However, it should be noted that almost all terms of incarceration imposed were less than 18 months. In addition, 23 prosecutors (18%) directed that jail sentences were to be served on an intermittent basis under the Temporary Absence Programme (TAP).

Thus far, we have only looked at the extent to which respondents differed in their views about appropriate QUANTUMS for fines and incarceral sentences. Since the majority of these sentences are but one component of a mixed IN and/or OUT disposition, it is also important to examine QUANTUM variations for the other main component. Specifically, do varying lengths of probation orders span a wide range? and, do some 'conditions' of probation represent an important additional sanction?

For Case 2, a total of 24 percent of the respondents included a probationary component in their sentences, and of these, almost one-half outlined special conditions to be attached to the order. Probation orders imposed ranged in length from 6 months to 3 years; the majority (76%) were 18 months or less. The conditions most frequently cited were: (1) Community Service Work (CSO) - indicated by 46 percent of the prosecutors who outlined specific probation conditions; (2) compulsory attendance at

an alcohol treatment programme (40%); and, (3) "life style" constraints such as regular reporting to a probation officer (14%). Finally, 24 percent of the respondents (spread across both IN and OUT dispositions) recommended the suspension of Joe J.'s driver's license.

If we were to restrict our attention to simply examining the overall distribution of responses between the two basic IN-OUT categories, any conclusions based on this limited analysis would be misleading, at best. The next part of our analysis presents a more detailed look at the distribution of QUANTUM sentence components for Case 2 (TABLE 7):

Using the same approach as in Case 1, this part of our analysis involves only the valid observations (N=100) from TABLE 7. The data for Case 2 presented no problems in identifying the modal cell from the cross tabulation of QUANTUM sentence components; as before, the "simple" IN of 6 months or less was the modal group, containing 55.0 percent of the observations. Constructing an ordinal representation of TABLE 7 resulted in the following schematic form (FIGURE 2).

Here again, it may be difficult to put forward a strong argument that the 21.0 percent of the observations in the two "Higher" cells represent sentencing disparity relative to the modal group.

TABLE 7

Distribution Of QUANTUM Sentence
Components For Case 1
(Impaired Driving)

Incarceration (Months)	Probation (Months)							Fine \$300 - \$5,000
	No Pro- bation	1 to 6	7 to 12	13 to 18	19 to 24	25 to 30	31 to 36	
Fine					3.0			4.0
No jail			1.0					
6 mos. or less	55.0				2.0		3.0	8.0
7 to 12	8.0			1.0	1.0			
13 to 18	8.0				1.0			
19 to 24								
25 to 30	1.0							
10 to 11 years	2.0							
12 to 13 years	3.0							

VALID OBSERVATIONS = 100

Missing Data - Quantum not specified by respondent

No Sentence Imposed = 4

Probation = 5

Probation + Fine = 1

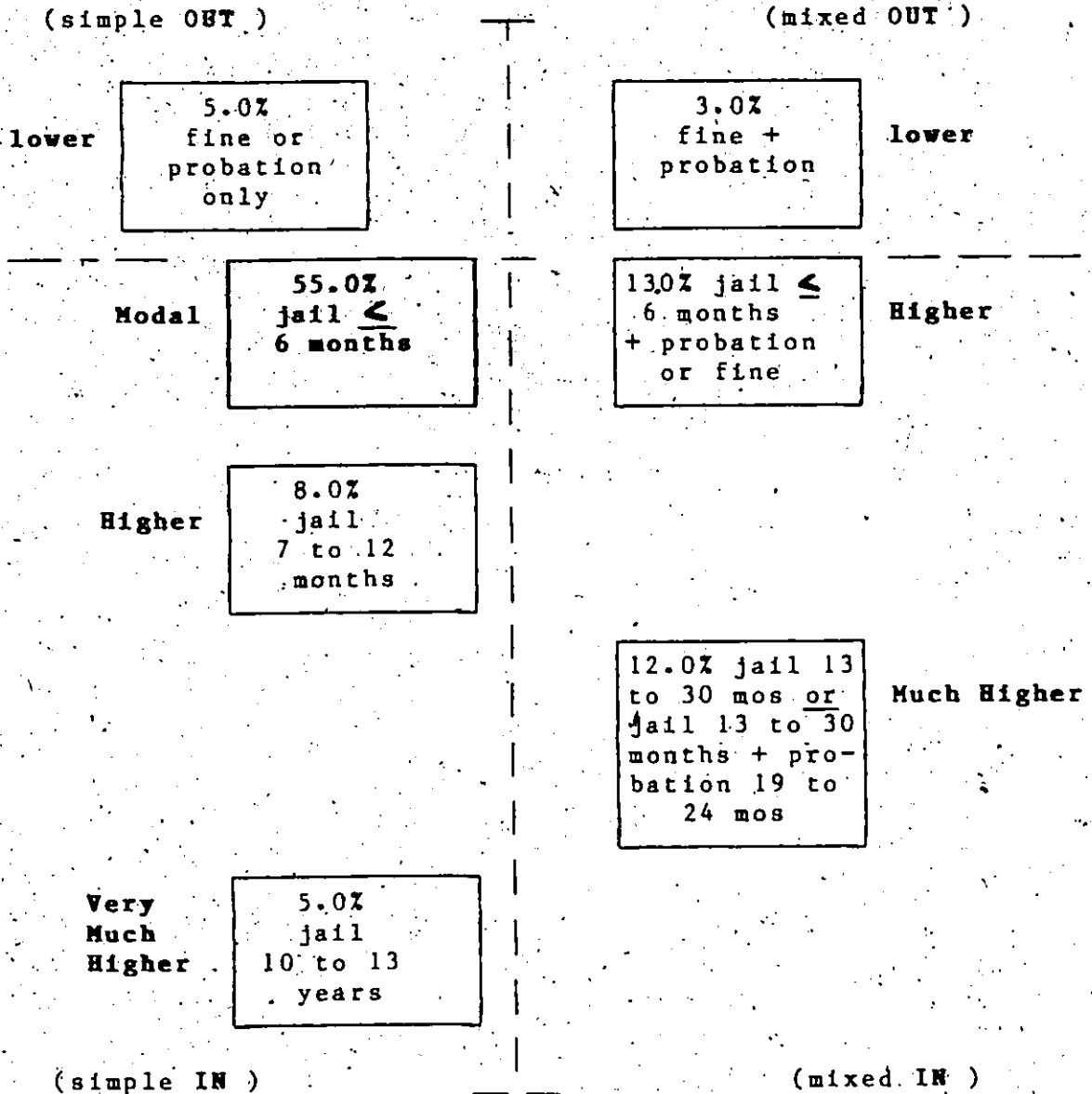
Jail = 12

Jail + Probation = 7

*Cell entries are expressed as percentages of the total number of valid observations.

FIGURE 2

Schematic Distribution Of Sentencing Data - As An Increment Or Decrement Of The Modal Category: Case 2



Similarly, the presence of a probation component in some of the "Lower" sentences (and recognizing that some jail terms in the modal cell are less than 6 months) would make any inferences about variations between these two groups and the modal cell tentative; at best.

Concluding that sentencing disparity exists for Case 2, has to be based on an assessment of the absolute difference between the modal category and combined data from the "Much Higher" and "Very Much Higher" cells. Sentences in the "Much Higher" group involve either (a) terms of incarceration which are at least marginally more (within the 7 to 12 months range) than for the modal group plus an added condition of probation ranging from 13 to 24 months; or, (b) markedly longer terms of incarceration (i.e. in the 13 to 30 month range), one of which also specifies probation in the 19 to 24 month interval. We suggest that both of these groups within the "Much Higher" category represent substantial variation relative to the modal cell. This observation, coupled with the fact that five prosecutors (the "Very Much Higher" group) imposed carceral terms of between 10 and 13 years, are strong support for concluding that sentencing disparity was observed in Case 2.

IV.5 Case 3 - Break and Enter

This case involved one defendant, (Peter R.) charged with "Break and Enter". A total of 128 respondents (99%) indicated a sentence; one prosecutor did not respond. The least severe sentence for this case was a suspended sentence (without any term of probation attached to it) while the most severe disposition called for Peter R. to be incarcerated for 24 months.

The respondents were fairly evenly divided concerning the basic IN-OUT decision; 48.1 percent chose OUT while 51.9 percent assigned IN dispositions. Within the OUT group, all but two of the sentences were "simple" and specified only a term of probation. For the IN group, however, the large majority of sentences were "mixed", combining probation with an incarceral sentence. A summary of the distribution of the sentence types for Case 3 is presented in TABLE 8.

Even though 51.9 percent of the sentences for this case involved incarceration, the majority of these (all but 9.3 percent) also included an OUT provision which in most cases, was the major thrust of the sentence. Many of the prosecutors imposed short jail sentences (less than 12

TABLE 8

Distribution Of Dispositions By
Sentence Type: Case 3
(Break and Enter)

Sentence Type	Relative Frequency (Percent)
suspended sentence	0.8
probation with or without conditions	46.5 (OUT=48.1%)
fine + probation with conditions	0.8
incarceration only	9.3
incarceration + Temporary Absence Program + probation (with conditions)	2.3 (IN=51.9%)
incarceration + probation (with or without conditions)	40.3
missing data	0.8

months) to be followed by 2 and 3 year probation terms which included fairly rigorous conditions. Almost half of those respondents who imposed a probation component (42%) also assigned conditions for; community service work, non-association with specific persons, regular reporting to a probation officer or combinations of these.

The next part of our analysis examines the QUANTUM distributions of the sentences for Case 3.

From a statistical viewpoint, our analysis of this case is perhaps weaker than for cases 1 and 2 in that only 72 prosecutors are represented in TABLE 9. The main reason for this is that 21 respondents failed to specify the actual QUANTUM of probation imposed and another 34 respondents failed to provide QUANTUM details for sentences which were combined terms of incarceration and probation. For Case 3, just over one-third of valid observations formed the modal group; that is, 36.1 percent of the sentences were "simple" OUT in nature and specified probation terms ranging from 19 to 24 months. Here again, our analysis involved organizing groups of dispositions from TABLE 9 as an ordinal distribution around this modal category. This ordinal representation of the data is shown in FIGURE 3.

TABLE 9

Distribution Of QUANTUM Sentence
Components For Case 3
(Break and Enter)

Incarceration (Months)	Probation (Months)						
	No Pro- bation	1 to 6	7 to 12	13 to 18	19 to 24	25 to 30	31 to 36
No jail	1.3 (suspended- sentence)		9.7	2.7	36.1		5.5
6 mos. or less	9.7		11.1	4.1	12.5		1.3
7 to 12	1.3				1.3		1.3
13 to 18							
19 to 24	1.3						

VALID OBSERVATIONS = 72

Missing Data - Quantum not specified by respondent.

No Sentence Imposed = 1

Probation = 21

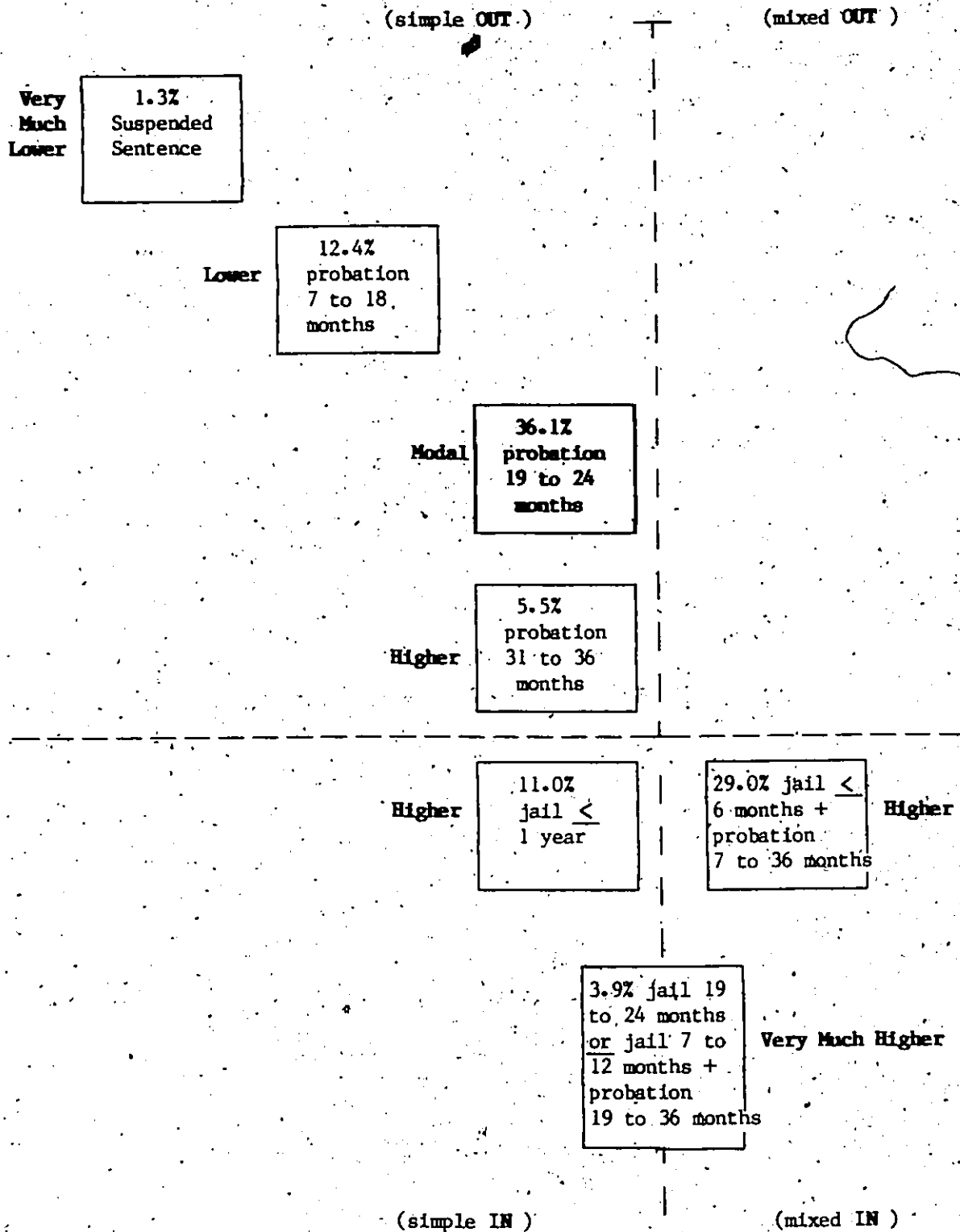
Probation + Fine = 1

Incarceration + Probation = 34

*Cell entries are expressed as percentages of the total number of valid observations.

FIGURE 3

Schematic Distribution Of Sentencing Data - As An Increment Or Decrement Of The Modal Category: Case 3



As shown above, our ordering of the data resulted in three groups which are all labelled as "Higher". Since our QUANTUM data points for jail and probation are expressed as 6-month intervals, assessing the actual magnitude of the variation between these three groups and the modal category would be subject to many divergent and/or conflicting interpretations. In this light, we chose to take a very cautious approach to inferring disparity across these groups and/or between them and the modal cell.

Since our data are in the form of 6-month ranges and recognizing that there is no simple method for equating jail and probation QUANTUMS, our ordinal chart does not present strong enough evidence to support the conclusion that disparity exists between the "Higher" groups and the modal category. However, the absolute differences which are self-evident between the 36.1 percent modal responses and the "Very Much Lower" (1.3%) and "Very Much Higher" (3.9%) groups represent sentencing disparity but only involve a small number of observations.

IV. 6 Case 4 - Armed Robbery

This case involved two defendants (appearing as co-accused) John J. and Michael M. Each was charged with "armed robbery, possession of a weapon for the purpose of committing an offense and indecent assault". Since respondents were asked to assign a sentence for each defendant, our discussion of the findings examines the sentences for each defendant separately. For both parts of this item, all but one out of the 129 prosecutors responded.

First Defendant: John J.

At a general level, the sentences imposed for John J. indicate total consensus in that all of the respondents were in agreement about the basic IN-OUT decision; 120 (93%) assigned "simple" IN (incarceration only) while the other 8 respondents chose to combine incarceration with a term of probation, with or without conditions, "mixed" IN. The distribution of these sentence types is summarized in TABLE 10.

TABLE 10

Distribution Of Dispositions By
 Sentence Type: Case 4
 (First Defendant - John J.)

Sentence Type	Relative Frequency (Percent)
incarceration only	93.0
incarceration + probation (without conditions)	4.7 (IN=100%)
incarceration + probation (with conditions)	1.6
missing data	0.8

Further support for the observation that there was a high level of agreement among the prosecutors in sentencing John J. is reflected in the QUANTUM distribution of probation terms; all sentences with this component involved probation orders of either 2 or 3 years in length. However, the high level of general agreement among the respondents deteriorates markedly when the QUANTUM distribution of the carceral component is examined. Incarceral sentences ranged from 1 month up to 9 years. Even the fairly homogeneous range for probation length (2 to 3 years) was linked to prison terms ranging from 4 to 9 years.

Since 93 percent of the sentences for John J. fall in the "simple IN" category, we felt that it would not be particularly useful to map these data in matrix form. Instead, we have limited our analysis to providing a detailed breakdown of the QUANTUM distribution of carceral sentences, this is presented in TABLE 11.

Even though the QUANTUM sentence data for Case 4 were not treated in a cross tabulation format, our approach to analyzing the distribution is the same as for Cases 1 through 3. As before, our discussion is limited to "valid observations". In TABLE 11, a total of 123 prosecutors are presented; only one respondent did not answer this item and

TABLE 11

QUANTUM Distribution Of
Incarceral Sentences For
Case 4: (First Defendant - John J.)

Length of Jail/Prison Term	Relative Frequency (Percent)
6 months or less	15.4
7 to 12 months	1.6
13 to 18 months	0.8
19 to 24 months	8.1
25 to 36 months	1.6
37 to 48 months	44.7
49 to 60 months	17.0
5 years to 7 years	5.7
7 years to 9 years	4.9
10 years to 13 years	0.0

Valid observations = 123

Missing data = 1

Data excluded = 5. (these respondents are not represented in the table because their sentences were expressed either too generally (e.g. "8 years plus") or as a range (e.g. 2 to 4 years). While decision rules could possibly have been created to quantify them in line with the ranges in this table, we wanted to avoid data manipulation of this nature.)

data from another five could not be assigned to meaningful sentence groupings.

While the modal sentence group (jail term of 37 to 48 months) for this case accounted for just under one-half (44.7%) of the observations, the remaining sentences range from 1 month to 9 years incarceration. If we treat the "49 to 60" group as "Higher" but not disparate, the remaining sentences which are more severe than the modal category only represent a combined total of 10.6 percent. The magnitude of these variations (i.e. at least from 1 to 3 years more incarceration) constitute disparity but represent extreme responses.

Examining the data for the sentence groups on the lower side of the modal category shows a thin scattering of respondents who imposed between 7 and 36 months jail; these respondents span four sentence groups but still represent only a combined total of 12.1 percent of the observations. Finally, using the 44.7 percent in the modal group as our base for comparison, we find that one-third as many respondents can also be found in a much lower category; that is, 15.4 percent assigned jail sentences of 6 months or less. Simple arithmetic tells us that there is a minimum of 2.5 years jail time difference between these groups.

Independently of any further qualifications regarding the proportion of respondents represented across these two categories, we are compelled to conclude that the magnitude of these variations constitute sentencing disparity.

Second Defendant: Michael M.

Here again, the respondents were unanimous in their recommendations about the general sentence type to be imposed. All 128 chose to incarcerate (IN) Michael M. as they did the co-accused, John J. Also the proportions of "simple" IN and "mixed" IN were almost identical. The same 120 respondents who had imposed a sentence consisting only of incarceration for the first defendant also did so for the second defendant. Another seven prosecutors included an additional term of probation. The remaining respondent cited provisions for allowing the carceral sentence to be served intermittently. TABLE 12 shows the distribution of sentence types for Michael M.

The overall QUANTUM ranges for Probation for John J. and Michael M. were also very similar. Lengths of the probation component for both accused were all from 2 to 3 years. Terms of carceral sentences given to Michael M. ranged from 3 months to 13 years, as opposed to 1 month to 9 years given to John J. TABLE 13 shows the QUANTUM

TABLE 12

Distribution Of Dispositions By
Sentence Type: Case 4 *
(Second Defendant - Michael M.)

Sentence Type	Relative Frequency (Percent)
incarceration only	93.8
incarceration + probation (with or without conditions)	4.7
incarceration + Temporary Absence Program (TAP)	0.8
missing data	0.8

(IN=100%)

TABLE 13

QUANTUM Distribution Of
 Incarceral Sentences For
Case 4: (Second Defendant - Michael M.)

Length of Jail/Prison Term	Relative Frequency (Percent)
6 months or less	0.9
7 to 12 months	0.9
13 to 18 months	0.9
19 to 24 months	13.5
25 to 36 months	6.3
37 to 48 months	18.9
49 to 60 months	28.8
5 years to 7 years	16.2
7 years to 9 years	6.3
10 years to 13 years	7.2

Valid observations = 111

Missing data = 1

Data excluded = 17 (these respondents are not represented in the table because their sentences were expressed either too generally (e.g. "8 years plus") or as a range (e.g. 2 to 4 years). While decision rules could possibly have been created to quantify them in line with the ranges in this table, we wanted to avoid data manipulation of this nature.)

distribution of the incarceral sentences for John J. Here again, because almost all of the dispositions involved "simple" IN sentences (93.8%), we felt it would not be useful to construct cross tabulations based on these data.

While the distribution of sentences for Michael M. and John J. are, in many ways similar, there are some interesting and important differences. As mentioned at the outset, respondents were unanimous about the decision to include an incarceral component in all dispositions for both accused. Even though the modal cells for the two accused were contiguous sentence groups (37 to 48 months for John J. and 49 to 60 months for Michael M.), the overall range and, perhaps more importantly, the distribution within the ranges were markedly different.

The data for John J. (TABLE 11) showed that only 10.6 percent of the observations fell above the modal category. However, 29.7 percent of the sentences for Michael M. were in excess of the modal group. In addition, some of these (7.2%) were in excess of the most severe sentence given to John J., that is 10 to 13 years versus 7 to 9 years incarceration.

In comparison to TABLE 11, the data from TABLE 12 are more clustered around the modal group and more skewed

toward the lower end. Even though the modal group (TABLE 12) only represents 28.8 percent of the observations, when this is combined with its two contiguous cells, 43.9 percent is accounted for.

Using the same approach as before, we examined the magnitude of variation between the modal cell (jail 49 to 60 months) and other categories. Here again, the "37 to 48" and the "5 to 7 years" categories would be designated as "higher", but not necessarily be judged to be disparate. What we would call the "very much lower" group, spanning less than 6 months up to 18 months, would constitute disparity but only represents extreme cases (involving 2.7 percent of the observations).

Preceding along the same lines of reasoning, we would combine the "19 to 24 months" and "25 to 36 months" cells into one group and designate it as "much lower". This represents 19.8% of the observations. Similarly, we would combine the "7 years to 9 years" and "10 years to 13 years" and designate this group as "very much higher". This represents 13.5 percent of the observations. The magnitude of variation between the modal cell and both the "much lower" and "much higher" groups constitutes sentencing disparity in that the minimum difference between the modal category and either of those cells is one year.

IV. 7. Case 5 - Theft over \$200.00

This case involved one defendant (Denis D.) charged with the offense of "theft over \$200.00". A disposition for this case was given by 127 out of the 129 prosecutors in the sample. The sentences ranged from a suspended sentence (with no reporting conditions) up to a 11 year term of incarceration plus 1 year probation; the probation component of this latter disposition also included provisions for "treatment" and requirements for community service work.

The large majority (89.8%) of respondents favored an IN sentence and most of them selected "mixed" IN dispositions which combined jail and probation. TABLE 14 shows the breakdown of dispositions for this case by sentence type.

In our discussion of Cases 1 through 4, it was pointed out that a small number of prosecutors (usually 2 or 3) suggested that jail sentences were to be served intermittently under the Temporary Absence Programme; a review of the raw data from the questionnaires indicated

TABLE 14

Distribution Of Dispositions By
Sentence Type: Case 5
(Theft Over \$200.00)

Sentence Type	Relative Frequency (Percent)
sentence suspended	0.8
suspension of driver's licence with conditions	0.8
fine Only	0.8
fine + probation with conditions	0.8 (OUT=10.2%)
probation with or without conditions	7.0
-----	-----
incarceration only	28.7
incarceration + Temporary Absence Program	11.6
incarceration + probation	8.5 (IN=89.8%)
incarceration + probation with conditions	17.8
incarceration + Temporary Absence Program + probation and/or conditions	20.9
incarceration + fine + probation	0.8
missing data	1.6

that these recommendations involved the same prosecutors across all 4 cases. This approach was more prevalent in the dispositions for Case 5 in that 42 (37%) of the 114 respondents who assigned an incarceral sentence suggested provisions for the TAP. Furthermore, the data showed that favoring the TAP is not directly linked or limited to a narrow range of jail QUANTUM; recommendations for the TAP encompassed jail terms from 1 to 24 months in length.

Respondents' use of probation as a vehicle for imposing additional sanctions on Denis D. was comparable to the data presented for Case 2, for the defendant Joe J. Here again, the majority of probation orders included specific conditions beyond regular reporting to a probation officer. Requirements for doing community service work were cited most frequently, followed by "life-style" constraints such as "no gambling" and/or "treatment" through a formal programme.

Even though the QUANTUM distribution of incarceral terms for this case ranged from 1 month to 11 years, 72 percent of these sentences were 18 months or less. TABLE 15 shows the cross tabulation of the QUANTUM sentence components for Case 5.

TABLE 15

Distribution of QUANTUM Sentence
Components For Case 5
(Theft Over \$200.00)

Incarceration (Months)	Probation (Months)							Fine
	No Pro- bation	1 to 6	7 to 12	13 to 18	19 to 24	25 to 30	31 to 36	\$100 - \$1,000
Fine					1.1			2.2
No jail	2.2 (suspended sentence)				2.2		4.4	
6 mos. or less	20.0			1.1	3.3		5.5	
7 to 12	12.2			1.1	3.3		8.8	
13 to 18	7.7				4.4		1.1	
19 to 24	8.8				1.1		1.1	
25 to 30	2.2							
31 to 36								
37 to 42	2.2							
10 to 11 years	1.1				1.1		1.1	

VALID OBSERVATIONS = 90

Missing Data - Quantum not specified by respondent

No Sentence Imposed = 2

Probation = 1

Jail = 9

Jail + Probation = 27

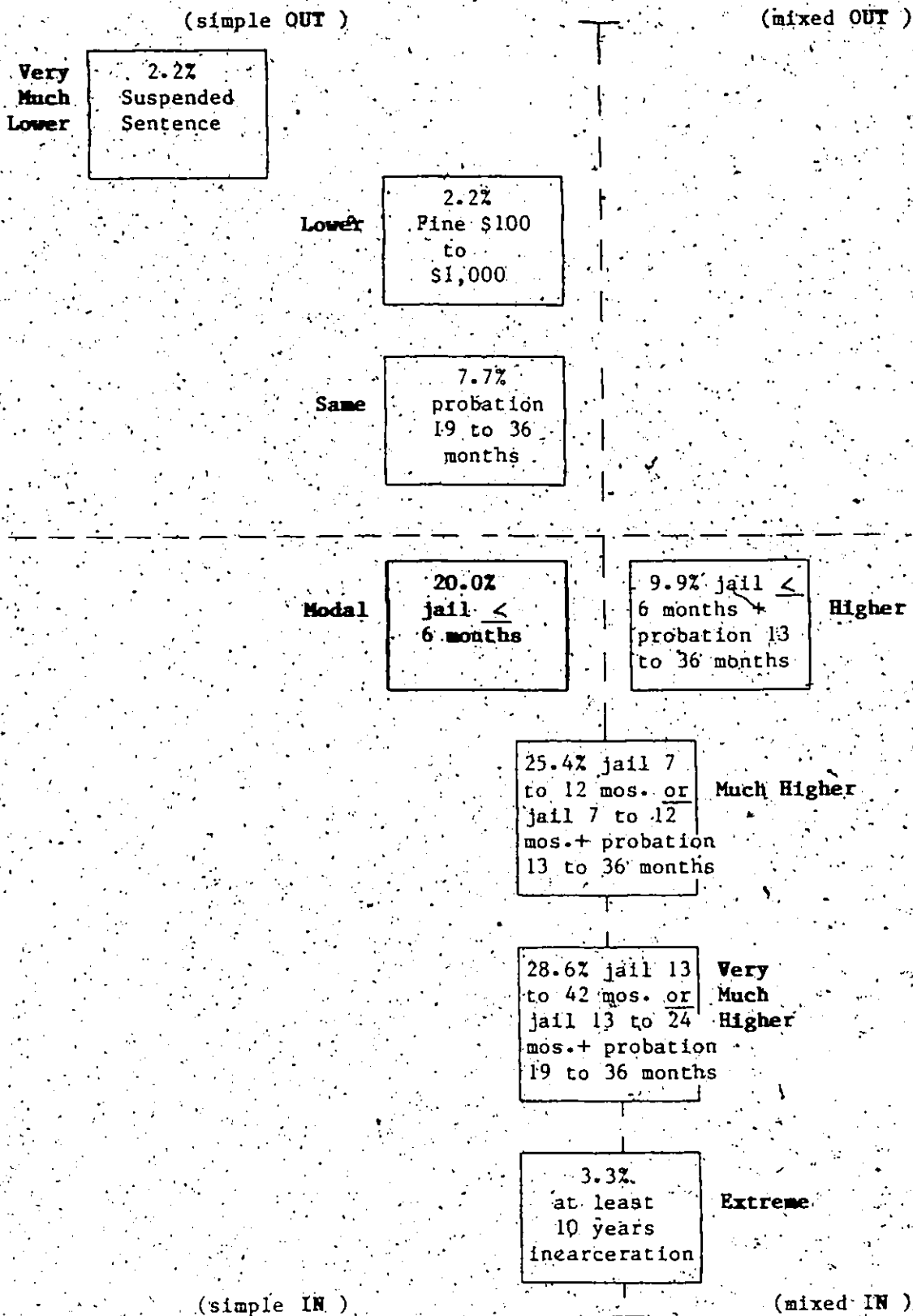
*Cell entries are expressed as percentages of the total number of valid observations.

Re-organizing the information from TABLE 15 into an ordinal configuration involved sentences for 90 prosecutors. Here again, the main reason that more data are not included in the analysis was respondents' (N=27) failure to specify actual QUANTUMS for sentences involving jail plus probation components; another nine prosecutors assigned terms of incarceration, the lengths of which were not even specific enough to fit into our interval scaling. In comparison with the other four cases, the modal category for Case 5 contained the smallest proportion (only 20.0%) of the valid observations. The schematic ordering of sentence groups around the modal cell is shown below in FIGURE 4.

Before discussing these data, we would like to set out some comments to qualify our analysis. As suggested at the outset, the main objective of our analysis of cross-tabulated sentence QUANTUMS was to examine the proximity between various groups of sentences and a modal category. This approach is perhaps not totally sound for Case 5 simply because the modal cell is only modestly representative (containing only 20%) of the observations in the overall distribution. Using this group as our base point from which to examine variation becomes a further point of contention when we recognize that the number of observations in some of

FIGURE 4

Schematic Distribution Of Sentencing
Data - As An Increment Or Decrement
Of The Modal Category: Case 5



the satellite cells which were constructed is larger than the original modal group. Nevertheless, we believe that this approach is defensible.

We would have used the largest of the satellite cells as our point of comparison for assessing variation, however, it could be argued that variations across sentences within some of these cells constitute disparity. Taking a conservative stance, we decided that the modal cell from the initial cross tabulation of the QUANTUMS should be left intact because it is still the best representation of respondents' most popular choice. In addition, the range in this cell is narrow enough to minimize any argument about disparity within this group of sentences.

Assessing the actual magnitude of variation between certain cells and the modal category for Case 5 presented problems similar to those encountered in Case 3. Here again, the issue of equating or attaching relative weights to jail and probation had to be considered. Without any sort of rigorous method for judging the relative severity of "jail \leq 6 months" (Modal cell) versus "19 to 36 months probation" (7.7%), we decided to designate the latter as "Same". In addition, as for previous cases, we believe that the magnitude of variation between the modal cell and

the "Higher" category (9.9%) is not overly strong evidence for inferring disparity.

However, the magnitude of variations between the remaining categories and the modal cell suggests that sentencing disparity was observed for this case. It would be extremely difficult to argue that the difference between a Suspended Sentence or 10 years incarceration are not disparate from a jail term of 6 months or less. Given that these two groups are the extremes (and only represent a combined total of 5.5%), a conclusion about observed disparity would have to involve an assessment of the variation between the modal cell and the "Very Much Higher" group (28.6%). Taking a conservative approach again, we would compare the maximum sentence in the modal cell (jail of 6 months) to the minimum sentence in the "Very Much Higher" cell (jail of 13 months). From this, (one being double the other), we are compelled to conclude that disparity was observed.

IV. 8 Summary

The first part of our analysis in this section permitted us to examine the overall level of agreement among respondents with respect to the general sentence type assigned for each of the five cases. Our discussion defined four case types which were built around the basic IN-OUT dichotomy: "simple OUT; mixed OUT; simple IN; and, mixed IN". TABLE 16 shows the level of consensus among prosecutors concerning sentence type for each case. Even in this general form, these data suggest that prosecutors' views on what constitutes an appropriate disposition for a particular case varies markedly. It is clear that their level of agreement is the highest for both parts of Case 4 (upwards of 90 percent). In the other four cases, their level of agreement was consistently around the 50 percent mark. In Case 1 and 2, prosecutors were in agreement about the need to impose an incarceral disposition but were split between "simple IN" versus "mixed IN": Case 3 reflects the most divergent opinions concerning Sentence Type in that the large majority of prosecutors are almost evenly divided between "mixed IN" and "mixed OUT".

When prosecutors' responses are categorized in this general format, the data suggest that there is at least

TABLE 16

Distribution Of Respondents' Sentencing
Decisions By Sentence Type And Case
(Percent)

	CASE 1	CASE 2	CASE 3	CASE 4		Case 5
Sentence Type	Assault causing Bodily Harm	Impaired Driving	Break & Enter	Armed Robbery		Theft over \$200.00
Simple OUT	3.1	1.6	0.8	0.0	0.0	9.4
Mixed OUT	1.6	6.3	47.3	0.0	0.0	0.8
Simple IN	53.5	42.6	9.3	93.0	93.7	28.7
Mixed In	41.2	45.5	42.6	6.3	5.5	59.6
Missing Data	0.8	3.1	0.8	0.8	0.8	1.6

some level of consensus in their sentencing decisions. However, a closer scrutiny of the data, focusing on the actual severity or QUANTUM of the penalty imposed revealed large variations. This part of our analysis examined the distributions in cross tabulations of the main sentence components of dispositions across the five cases. To begin with, it is important to note the the actual "range" of sentences imposed for each case; the least severe and most severe dispositions for each case are shown in TABLE 17.

These data show quite clearly that the minimum and maximum sentences in four out of the five cases meant the difference between an IN and an OUT sentence; only in Case 4 (for both defendants), did both the least severe and most severe dispositions include incarceration. In Cases 1 and 2, this difference involved the payment of a modest fine versus a term in a federal penitentiary. In the remaining two cases (Case 3 and Case 5) some prosecutors would have the defendant leave the courtroom with no more than a suspended sentence while others would find their way to a federal institution.

In order to permit us to comment on sentencing disparity, we conducted further analysis of cross tabulated QUANTUMS. Our main objective was to identify the modal response category (i.e. 'most popular' sentences imposed)

TABLE 17

Respondents' Sentencing Decisions:
 Least Severe And Most Severe
 Dispositions Imposed By Case

CASE	Least Severe	Most Severe
CASE 1 - Assault Bodily Harm	\$500.00 fine	3.5 years incarceration
CASE 2 - Impaired Driving	\$300.00 fine	13 years incarceration
CASE 3 - Break and Enter	Suspended Sentence	24 months incarceration
CASE 4 - Armed Robbery John J. Michael M.	1 month incarceration 3 months incarceration	9 years incarceration 13 years incarceration
CASE 5 - Theft over \$200.00	Suspended Sentence	11 years incarceration, 1 year probation with conditions

for each case and examine the distribution of other sentences around this group. TABLE 18 identifies the groups of sentences which were judged to be disparate relative to the modal category; entries in this table are percentages based on the total number of valid observations analyzed for each case.

In Cases 1 and 2 the modal category (fail \leq 6 months) was clearly near the lower end of the overall range of sentences imposed for these cases. With this in mind, it was perhaps to be expected that some disparity would be observed. Nevertheless, because some of the disparate groups represent upwards of 10 percent of the total observations and the modal categories do not represent a large majority of respondents, our conclusions can be justified.

For Case 3, the modal category was a group of "simple OUI" sentences (probation 19 to 24-months). It was not difficult to judge a Suspended Sentence as being disparate in relation to this modal group. Similarly, incarceral sentences of a comparable length and shorter incarceral sentences, but having probation components comparable in length to the modal group were clearly disparate.

TABLE 18

Summary Of Observed Disparity: By Case

CASE	Least Severe	Modal Group	More Severe		
CASE 1 - Assault Bodily Harm	—	32.7% jail < 6 months	15.4% jail 17-12 months plus 7-56 months probation	14.5% jail 13-42 months plus 24-36 months probation	
CASE 2 - Impaired Driving	—	55% jail < 6 months	12.0% jail 13-30 mos. or jail 13-30 mos. plus proba- tion 19-24 mos.	5.0% jail 10-13 years	
CASE 3 - Break and Enter	1.3% suspended sentence	36.1% probation 19-24 months	3.9% jail 19-24 months or jail 7-12 months plus 19-36 months probation		
CASE 4 - Armed Robbery					
John J.	15.4% jail < 6 months	44.7% jail 37-48 months	10.6% jail 5 years to 9 years		
Michael M.	2.7% jail < 6 months up to 18 months	19.8% jail 19-36 months	28.8% jail 49-60 months	13.5% jail 7 years to 13 years	
CASE 5 - Theft Over \$200.00	2.2% suspended sentence	2.2% fine \$100 to \$1,000	20.0% jail < 6 months	25.4% jail 7-12 mos. or jail 7-12 mos. plus 13-36 mos. probation	28.6% jail 13-42 mos. or jail 13-24 mos. plus 19-36 mos. probation
			3.3% jail 10 years		

For both parts of Case 4, the modal group involved "simple IN" sentences which fell between the extremes of the distributions. Since the overall range was so large, we were able to identify groups of sentences which were some 2 years above or below the modal group. Such variations must be seen as disparate in very absolute terms.

Case 5 presented us with the most complex analytical task. Using the same strategy as for the other cases resulted in the identification of five separate sentence groups which were judged to be disparate in relation to the modal category. As suggested earlier, the potential weakness of our analysis for this case stems from the fact that only 20 percent of the valid observations are represented in the modal category. However, here again, because the overall distribution of sentences ranged from a Suspended Sentence up to 10 years incarceration, disparity was somewhat self evident.

Preceding from our earlier discussion and the data in TABLE 18, it is clear that our conclusions about sentencing disparity are subject to, and must be assessed in, relation to the inherent limitations of both our data and the constraints of our analytical framework. While our use of the modal cells as points of comparison is debatable, we believe it is defensible.

Thus far in this chapter, we have presented a brief socio-demographic profile of the prosecutors in this survey together with an extensive discussion of their 'sentencing decisions' for the five cases in the standard case set. In actual practice, these decisions would be manifested through their 'submission to sentence' during the final stages of the trial process. In this context, prosecutors would not limit their presentation to simply recommending a particular disposition but would preface their suggestion by identifying (and articulating) certain case facts and legal objectives which they feel should help guide judges' sentencing decisions. Recognizing that prosecutors viewpoints about sentencing are predicated on these variables, we felt these variables should also be part of our discussion. The next section presents an overview of the findings from this part of the study.

IV. 9 SECTION IIICase facts relevant to sentencing decisions

In conjunction with the sentence assigned for each of the five cases, the questionnaire asked respondents to comment on "What grounds would you base your submissions to sentence?" Like the other parts of the questionnaire, this item did not provide a fixed set of response categories but instead permitted open ended responses. Furthermore, respondents were not instructed to prioritize or rank order their responses. As might be expected, this approach generated a wide array of case facts which were considered. In analyzing these data, we began by categorizing all responses as either: (1) offender characteristics or, (2) offense characteristics.

TABLES 19 and 20 presents a summary of the two sets of case facts which were identified as relevant to sentencing decisions for all five cases. While this item generated a total of 19 separate case facts (which, when taken separately represent a diverse set of variables to be considered), it is clear that offense characteristics are more frequently identified as relevant factors; in both TABLES 19 and 20, we have placed an asterisk (*) beside the modal response category(ies) for each case.

TABLE 19

Distribution Of Offender Characteristics Identified As Relevant To
Submissions To Sentence - By Case

Offender Characteristics	Relative Frequency (Percent)				
	Case 1 Assault causing Bodily Harm	Case 2 Impaired Driving	Case 3 Break & Enter	Case 4 Armed Robbery	Case 5 Theft Over \$200.00
age	4.7	2.3	16.3	7.8	1.6
employment	4.7	0	1.6	0	3.1
extent of prior record	16.3	7.8	28.7*	23.3*	7.8
prognosis for rehabilitation	0.8	1.6	0	1.6	0
attitude of defendant	51.2*	12.4	10.9	3.1	8.5
character of defendant	11.6	20.2*	12.4	1.6	6.2
social background	7.0	7.8	10.9	6.2	14.7*
other	1.6	0.8	0	0	0.8

Note: entries in this table are based on responses from
123 prosecutors.

TABLE 20

Distribution Of Offender Characteristics Identified As Relevant To
Submissions To Sentence - By Case

Offense Characteristics	Relative Frequency (Percent)				
	Case 1	Case 2	Case 3	Case 4	Case 5
	Assault causing Bodily Harm	Impaired Driving	Break & Enter	Armed Robbery	Theft Over \$200.00
violent nature of offense	35.7	0.8	1.6	37.2	0
provocation involved	31.0	0	0	0.8	0
alcohol involvement	13.2	51.9*	0	5.4	0
violated a position of trust	0	0	0	0.8	65.1*
consequences of offense to victim	52.7*	51.9*	7.8	41.1*	0.8
premeditation	2.3	0	27.9	41.1*	20.2
attitude of victim	2.3	0.8	0.8	0.8	9.3
seriousness of the offense	24.0	14.7	14.0	31.8	4.7
use of weapon	16.3	0.8	6.2	40.3	0
prevalence of the offense	3.9	14.7	24.8	14.0	3.9
other (quantum stolen, place of offense, "boldness" of the offense)	3.9	4.7	28.7*	27.1	29.5

Note: entries in this table are based on responses from
123 prosecutors.

Overall, TABLES 19 and 20 show that the actual number of factors cited as relevant varied markedly across the five cases. In addition, the specific factor identified most frequently varied on a case by case basis. A closer examination revealed that 'consequences of offense to victim' was the only factor that is stated most frequently in three of the five cases (Case 1, 2 and 4). The prominence of the other case facts appeared to fluctuate presumably as a function of specific case characteristics. In Case 1, for example, the 'attitude of defendant' was thought of as being relevant to sentence by 51.2 percent of the prosecutors as were the 'consequences of offense to victim' - 52.7 percent. In Case 2, however, 'alcohol involvement' (51.9%) and the 'consequences of offense to victim' (51.9%) were deemed relevant.

The data for Case 5 (Theft over \$200.00) reflect the highest level of agreement in that 65.1 percent of the respondents identified 'violated a position of trust' as an important factor to consider in sentencing Denis D. Despite the large QUANTUM of money stolen, the 'consequences of offense to victim' was only noted as being relevant by one respondent. It could be argued that this factor would be more relevant to the defense counsels' submission to

sentence in light of the victim's conciliatory attitude in offering to re-hire the defendant. Prosecutors would probably be more interested in citing aggravating circumstances in their submission to sentence.

In conclusion, we would suggest that prosecutors demonstrated a marginal level of consensus in their selection of one relevant case fact in four out of the five cases. Specifically, except in Case 3, the modal response category accounts for around one-half of the prosecutors; this ranges from a low of 41.1 percent to a high of 65.1 percent. However, in Case 3 the modal category accounted for only 27.9 percent.

So far in this section, the data presented have only served to provide us with a descriptive overview of prosecutors' selection of information from the 5 cases used in their submission to sentence. We recognize from the outset that these data, in themselves, cannot be used to draw any conclusions about the relative importance of certain variables in prosecutors' submission to sentence. The next part of our discussion examines respondents' rank ordering of important case attributes.

As a follow-up to the previous item, prosecutors were asked to "...list, in the order of their importance, those facts regarding the offender and/or offense which had the greatest bearing on your sentencing decision." The data can be seen for each case, in Appendix B, TABLES B-3 to B-7.

While TABLES 19 and 20 showed the "relevant" case facts selected by the respondents, the above question asked them to, in effect, translate their choices into "important" case facts. A comparison of the data from TABLES 19 and 20 to the data in TABLES B-3 to B-7 suggests that their use of "relevant" factors as "important" factors deviates somewhat from what we might expect. For example, in Case 1 only a total of 24 percent of the prosecutors mentioned "seriousness of offense" as a relevant factor. However, a total of 90.7 percent cited it as either of the three most important case factors. Further examination of these data, together with an understanding of their inherent limitations, lead us to conclude that the findings are interesting but not very useful for making inferences about inter-respondent or intra-respondent consistency. We recognize that this problem resulted, at least in part, from weaknesses in our measuring instrument and the fact that a self-administered questionnaire was utilized.

IV. 10 The Legal Objectives cited as being relevant to sentencing decisions

In conjunction with the data discussed in the previous section, respondents were asked to "identify the legal objectives which were seen as being relevant to sentence." Here again, the questionnaire did not specify any particular requirement for listing the objectives in a rank order form.

As shown in TABLE 21, the objective of 'general deterrence' was noted quite frequently as being relevant to the sentencing of the defendant across all five cases. In fact, the notion of 'general deterrence' forms the modal response category in three of the five cases (Cases 1, 4 and 5); we have used an asterisk to identify the modal cells in TABLE 21. While the issue of deterrence also had some prominence in Cases 2 and 4 (cited by between 30 to 40 percent of the respondents) 'rehabilitation of the defendant' formed the modal category; this was noted by upwards of 60 percent of the prosecutors. These observations could be used as a basis for suggesting that prosecutors showed at least a respectable level of consensus about what legal objectives their sentencing decision should reflect.

TABLE 21

Distribution Of Legal Objectives Identified As Relevant To
Sentencing Decisions: By Case

Legal Objective Noted	Relative Frequency (Percent)				
	Case 1 Assault causing Bodily Harm	Case 2 Impaired Driving	Case 3 Break & Enter	Case 4 Armed Robbery	Case 5 Theft Over \$200.00
specific deterrence	70.0	37.2	45.7	47.9	32.8
general deterrence	70.5*	40.6	38.8	59.3*	69.7*
deterrence - unspecified	0.7	4.0	4.7	7.8	9.2
protection of the public	2.9	22.7	21.7	51.2	7.6
rehabilitation of the defendant	28.7	67.5*	64.3*	25.2	33.6
maintain employment	0	0	0	0	0.8
societal repudiation of such crimes	14.7	13.2	1.6	15.4	3.7
credibility of the courts	24.0	27.6	11.6	21.1	14.3
offender restitution	0.8	0.8	5.4	0	21.8
supervise the defendant	3.9	0.8	10.1	1.6	0.8
retribution	22.5	11.4	11.6	13.8	8.4
other	1.5	0.8	0.8	2.9	1.7

Note: entries in this table are based on responses from 123 prosecutors.

Despite this apparent consistency, there were a total of 12 separate legal objectives identified as relevant factors. Others which are perhaps worthy of mentioning are 'credibility of the courts', and 'retribution'; these were cited by 27.6 percent and 21.1 percent, respectively. The notion of 'societal protection' was most evident (cited by 51.2 percent) in Case 4 - Armed Robbery, but was also referred to by over 20 percent of the respondents in Cases 1, 2 and 3.

IV. 11 The adequacy of post court resources and
correctional facilities

While judges and prosecutors (and defense counsel) focus their attention on "case facts" and "legal principles" the main concern of the offender is simply the final sentence imposed. What consequences will this have on his personal freedoms and liberties? In our discussion of the roles which the various actors play in the justice system, we mentioned the problems of weighing and balancing the interests of the State, victim and offender. With this in mind - and expecting that some of the respondents' dispositions would involve incarceration - we felt that it

was important to ask the prosecutors to comment on the "adequacy" of existing correctional facilities.

Specifically, the questionnaire asked: "Do you think existing legal provisions, facilities, or resources are adequate to deal with this case? If your answer is "No", are there any options you would recommend be provided?" Even though this item might be seen as giving prosecutors a good opportunity to simply "ventilate" by making suggestions for reform, the large majority chose to answer "Yes". As shown in TABLE 22 between 68.2 and 79.8 percent gave an affirmative response to this question across the five cases.

The most interesting data from this item involves prosecutors responses which included specific suggestions for change. Rather than linking these data to the specific case for which they were cited, we will simply summarize the findings. All suggestions can be categorized into 1 of 4 basic groups:

- 1) alcohol treatment programs-within institutions;
- 2) closer probationary supervisions;
- 3) better treatment centres; and,
- 4) wider use of reparative sanctions such as community service orders.

TABLE 22

Adequacy Of Existing Resources To Deal With Offender In This
Particular Offense - Cases 1 - 5

Response	Relative Frequency (Percent)				
	Case 1 Assault causing Bodily Harm	Case 2 Impaired Driving	Case 3 Break & Enter	Case 4 Armed Robbery	Case 5 Theft Over \$200.00
no, adequate facilities are not available - no suggest- ions made regarding change	2.3	3.1	0.8	9.3	7.8
no, adequate facilities are not available - suggestions made for change	17.8	24.0	13.2	17.8	6.2
yes, adequate facilities are available	75.2	68.2	79.8	75.1	79.8
yes, adequate facilities are available - additional suggestions made	0.8	--	--	--	--
prosecutors who did not respond	3.9	4.7	6.2	7.8	6.2

Recalling the general IN-OUT divisions across the sentences for the 5 cases, it is interesting to note that 3 of these 4 areas for potential change are related to OUT dispositions. The next section of our analysis examines the relationship between respondents' socio-demographic characteristics and the sentence assigned for each case.

IV. 12 SECTION IV

Relationships explored in the data

The survey questionnaire captured the following socio-demographic information about the respondents:

- 1) age;
- 2) number of years legal practice;
- 3) number of years experience as a prosecutor;
and,
- 4) the type of educational training prior to receiving a law degree.

During the design phase of our study, we had very little information about both the social and professional background of prosecutors in Ontario. This meant that grouping respondents in terms of their background

characteristics was done on the basis of patterns in the data rather than any preconceived decision rules.

Similarly, we had no information about the nature and quantum of sentence that would be assigned for a particular case. Here again, in order to avoid having to conduct our analysis around a 'wilderness of single instances', it was necessary to examine distributions in the data and establish groupings of sentences. The rationale behind the various delineations in our groupings for both the socio-demographic variables and dispositions is somewhat self-explanatory when we examine the overall patterns in the data.

In order to streamline our analysis and simplify cross tabulating certain data, we dichotomized the socio-demographic variables in the following manner:

- 1) age - (i) less than 30 years
 -(ii) greater than 31 years;
- 2) number of years spent in legal practice
 - (i) 6 years or less
 - (ii) more than 6 years;
- 3) number of years experience as a prosecutor
 - (i) 6 years or less
 - (ii) more than 6 years;

4) type of education:

- (i) 2 years university or Bachelor of Arts Degree;
- (ii) a Bachelor of Arts Degree plus a degree at the Master's level or higher.

The socio-demographic data collected for the study are quite limited and provide only very general information about the prosecutors. In examining the relationship between these variables and respondents' sentencing decisions across the five cases, we felt that the level of analysis for these two sets of variables should be compatible. Accordingly, we decided to compare socio-demographic characteristics to one of three dichotomized sentence groups. From our earlier, more detailed discussion, we presented a separate analysis of sentence type (using four categories of IN-OUT) and sentence QUANTUM. In our construction of the sentence groupings used for the analysis in this section, we wanted to define general categories which represented the main sentence component along both of these dimensions. Our approach to this is summarized below.

The dichotomous categories used were modified for certain cases depending upon sentence type and QUANTUM distribution in the data for each case.

For cases 1, 2, and 5, sentences were dichotomized as follows:

- 1) Short-In: this category encompassed all sentence types which included an incarceration term of six months or less;
- 2) Long-In: this category encompassed all sentence types which included an incarceration term of more than six months.

The dichotomy is appropriate for these three cases since over 89 percent of the respondents imposed a term of incarceration. Even though some incarceral sentences were to be followed by a term of probation, our main interest was to identify any patterns in the data which might suggest that certain characteristics of the prosecutors influenced their decision to impose a 'Short-In' versus 'Long-In' term of incarceration.

In Case 3 - Break and Enter, only 51.5 percent of the respondents suggested some form of incarceration. Approximately 90 percent suggested that a period of probation be included in the sentence. Since almost

one-half of those 90 percent also assigned a term of incarceration, we felt that both components should be reflected in our groupings. The groups are:

- 1) Out - this category encompassed all sentences which did not include a period of incarceration;
- 2) In-Out - this category encompassed all sentence which included a term of incarceration or a term of incarceration plus a period of probation.

This dichotomy permitted us to try to determine whether or not the type of sentence selected might be influenced by socio-demographic characteristics.

In Case 4 - Armed Robbery, over 95 percent of the respondents indicated that the defendant should be sentenced to a period of incarceration. As mentioned previously, approximately 60 percent assigned carceral sentences ranging in length from 3 to 7 years. We used the mid-point of this range as a basis for establishing the dichotomy:

- 1) 5 years incarceration or less;
- 2) more than 5 years incarceration.

Here again, since the respondents assigned separate sentences for the two defendants in Case 4 (John J. and Michael M.), our analysis in this section treats these independently.

We analyzed the relationship between respondents' socio-demographic characteristics and their assigned sentences separately for each of the five cases. In each instance, we constructed cross tabulations of the four pairs of variables; these were: sentence group by age group, number of years spent in legal practice, number of years served as a prosecutor and, type of education. In conjunction with each of these cross tabulations, we used Chi Square as the test statistic.

Simply 'eye balling' the distributions in the data suggests that our findings confirm some intuitive hypothesis about the relative influences of social and professional background on sentencing decisions. However, this observation is not supported by the results of statistical tests. Specifically, as shown in APPENDIX C, TABLES C-1 to C-22, only the relationship between the 'years spent in legal practice' by 'sentence group' in Case 3 (Break and Enter) was shown to be statistically significant.

As mentioned earlier, the format of our analysis of respondents' sentencing decisions is two dimensional; that is, sentence 'type' and sentence QUANTUM. Even though we found that the QUANTUM or severity of the sentences were sometimes widely scattered within a given 'type'; the 'nature' of the sentence assigned (as defined by the 'type') was more consistent than might have been expected.

A similarly high degree of consistency was reflected in respondents' stated objectives of sentencing. Here again, between 50 and 70 percent of the sample usually cited the same objective for their sentencing decisions. Recognizing that there was a high degree of homogeneity in the data along the sentence type dimension and general agreement on the objectives of sentencing, it is perhaps not surprising that cross tabulations of variables did not yield results which were statistically significant.

IV. 13 Chapter Summary.

Our discussions in this Chapter provided an overview and analysis of the data from the survey questionnaire. The findings represented the views of 129 of

the 234 prosecutors in Ontario who returned their questionnaires. In terms of socio-demographic characteristics, the composition of the sample can be summarized as follows:

- (1) 54% of the respondents were between 30 and 40 years of age;
- (2) 70% of the respondents had 15 years or less experience as a prosecutor;
- (3) 96% of the respondents had some experience in another area of legal practice prior to becoming a crown prosecutor; and,
- (4) 65% completed no more than a Bachelor of Arts Degree prior to entering Law School.

When analyzing the type or nature of sentences imposed by the respondents, it was evident that the large majority (88%) favored incarceration, (whether it was short or long or also included a period of probation) in four of the five cases. Case 3 (Break and Enter) was the exception in that only slightly more than half of the respondents

included an incarceral component. Since the central theme of the research was to examine the issue of sentencing disparity, a large portion of our discussion in this Chapter was devoted to analyzing variations in sentence QUANTUMS across the five cases. Remembering the summary data presented in TABLES 16 to 18, our major conclusion from the study is that sentencing disparity was observed.

While varying proportions of respondents contributed to drawing this conclusion (i.e. the number of respondents who imposed sentences which were judged to be disparate relative to a modal group), the magnitude of the variations should be the primary basis for this conclusion. Irrespective of the fact that observed disparity sometimes only involved a small minority of respondents, it is difficult to argue that dispositions ranging from a Suspended Sentence up to 11 years incarceration (Case 5) does not constitute unwarranted variation.

Prosecutors were also asked to identify the "case facts" which they viewed as relevant to their sentencing decisions. In general, offense characteristics were identified more frequently than offender related characteristics. The factors cited as relevant varied

depending upon the offense involved. In Cases 1, 2 and 4, 'consequences of the act' to the victim was thought to be most important. In Case 5, on the other hand, over 65 percent of the respondents noted that a 'violation of a position of trust' was of paramount concern.

When asked to identify the "legal objectives" which were relevant to their sentencing decisions, the respondents were fairly unified in their opinion. For cases 1, 4 and 5, over 60 percent thought that 'general deterrence' should be the guiding objective in sentencing the defendant. In cases 2 and 3, 'rehabilitation' of the defendant was the most important issue with upwards of 64 percent citing this objective. Beyond these general data, however, prosecutors showed less agreement on ranking the importance of the "case facts" which were relevant to their sentencing decisions. For example, only slightly more than 50 percent agreed on the most important case fact (Case 2 - Impaired Driving and Case 5 - Theft over two hundred dollars)).

The final two components of our analysis explored; (a) respondents' views of the "adequacy" of existing correctional facilities and treatment resources; and, (b) relationships between socio-demographic characteristics of the respondents and their sentencing decisions. The data

for the first part are self-explanatory in that a clear majority of the prosecutors either stated that existing facilities/resources are adequate. Most of the respondents who indicated the opposite did not provide any in-depth suggestions for possible changes. For the second part of the analysis, the findings were interesting but not sound enough to use as a basis for drawing any defensible conclusions. In light of the skewed distributions in our socio-demographic variables (together with an understanding of how we grouped these data), we felt that it was important to rely on statistical tests in assessing the findings. Overall, the cross tabulations did not result in Chi Squares which even approached a level of statistical significance.

The material presented in this Chapter have provided a descriptive overview of the database generated by the survey questionnaire together with a systematic analysis of the findings. As mentioned earlier, our main emphasis was on discussing these data in relation to the issue of sentencing disparity. Our main findings, in this regard, was that disparity was observed in all five cases. This conclusion should be tempered by a clear understanding of the constraints and limitations of the research. The overall strength of the study should be cautiously assessed

in a methodological context, remembering our earlier comments about: 1) the use of hypothetical cases (the standard case set); 2) the self-administered questionnaire approach to generating the data; and, 3) the relatively small sample on which the study is based.

As mentioned in Chapter III, much of our work could be seen as a replication (but focusing on a sample of Crown Counsel rather than Provincial Court Judges) of a research project conducted by the Federal Ministry of the Solicitor General. Recognizing this, we felt that it is important to present a systematic comparison of our findings to those of the Solicitor General's study. Rather than limiting our discussion to a series of statistical comparisons, we felt that it would be interesting to also include more substantive information about the five cases which were used as a decision making base for the respondents in both studies. Accordingly, the next Chapter presents a brief profile of each of the five cases together with a synthesis of our research findings and comparative highlights across the two studies.

Leaf 170 omitted in page numbering

CHAPTER V

DISCUSSION OF FINDINGS AND RELATIONSHIP TO OTHER RESEARCH

Our study utilized the same standard case set and accompanying questions as used for the research titled "Beyond the Black Box: A Study in Judicial Decision-Making." Consequently, it is appropriate to compare the data from the prosecutors in our sample to the data provided by judges for the earlier research. Since the variables captured are compatible, the following discussion provides comparisons for the: dispositions given; legal objectives on which sentencing decisions were based; and important case facts relevant to decisions made. Our discussion presents an overview of the similarities and differences in the views of these two separate groups.

As a starting point for our comparisons between judges and prosecutors sentencing assignments, it is perhaps appropriate to first point out what might be seen as a fundamental weakness in the analysis of the data for the earlier study. A disproportionate part of this analysis

focuses on making an argument for the existence of sentencing disparity by focusing only on the upper and lower extremities of distributions in the data. While this approach serves the authors well in highlighting disparity, it should be acknowledged that the data pertaining to these extremities only involved a small number of individuals.

We made similar observations involving upper and lower extremities in our discussion of the overall range of sentences imposed for each of the five cases. However, in formulating our assessments about observed disparity, we tried to show that it was not limited to comparing a group of modal responses to 'single instances' of extreme deviations.

Recognizing that there are these differences in the analytical approaches for the two studies, our comparisons are necessarily limited to highlighting some general parameters across the two data sets.

V.1 Synthesis of Research Findings: Case 1

This case involved one defendant (Ray R.) charged with the offense of "Assault Causing Bodily Harm."

The scenario for this case situated Ray R. sitting alone in a disco bar with his feet up on a post near an aisle leading to the dance floor. After refusing to put his feet down, Ray picked up an empty glass and threw it at a young man who merely wanted to proceed to the dance floor. Ray R. is single, shows no remorse concerning the offense, and has a relatively deprived social background.

Dispositions imposed by prosecutors ranged from a fine of \$300.00 up to 3.5 years incarceration while the judges' sentences ranged from a fine of \$500.00 plus a six-month term of probation up to 5 years imprisonment. A closer examination of these data revealed that 96 percent of the judges and 95 percent of the prosecutors agreed that Ray R. should spend some time in jail. However, 61.2 percent of the judges, as compared to 41.6 percent of the prosecutors, included a probation component in their sentences. While this difference could suggest that judges displayed a propensity to assign more severe sentences, the analysis of the data from the judges does not permit us to explore this issue further.

Specifically, judges' decisions regarding the actual QUANTUM of the probation component are not reportable. For this reason, our comparison must be limited to looking at the relative severity of only the custodial component of the sentences. Using this single dimension,

the difference between the maximum sentence imposed by the two groups (i.e. 3.5 years versus 5 years) might be seen as constituting disparity in itself.

In conjunction with their sentencing decisions, both judges and prosecutors were asked to identify case characteristics which were relevant to their choice of disposition. Judges identified 14 different case attributes while prosecutors cited a total of 19 factors. The majority of judges cited the 'violence of the act' (72.5%) and the defendant's 'lack of remorse' (72%) as an important case attribute. While prosecutors appeared to agree with judges on this latter point (51.2%), the other primary concern seemed to be with the 'consequences to the victim' (52.7%); only 35.7 percent selected the 'violence of the act' as being relevant.

From this observation, it would appear that there is a noticeably higher level of consensus among the judges.

In addition, the respondents in both studies were asked to rank order the relevant case attributes identified in terms of their importance for sentencing decisions. With this in mind, we examined the extent to which the groups concurred:

While judges responses to this item were scattered across 12 separate case facts, 43.9 percent identified the 'violent nature of the crime' as the most important case

fact. The modal response category for prosecutors was, the 'severe consequences to the victim' which accounted for a total of 33.3 percent; the remainder were distributed across 14 categories.

Both groups of respondents were asked to identify the 'legal objectives' which guided their sentencing decisions for Case 1. Seventy percent of the prosecutors as compared to only 53.9 percent of the judges cited 'specific deterrence' as important. Similarly, almost the same proportions (70.5% and 47.7% respectively) in both samples chose 'general deterrence' as a relevant legal objective. Recognizing the common theme in these two response categories we can suggest that both prosecutors and judges expressed the view that deterrence, of some form, was needed to not only inhibit this individual from committing a similar offense but to also show other potential offenders that this type of behavior is not acceptable.

V.2 Synthesis of Research Findings: Case 2

This case involved one defendant (Joe J.) charged with the offense of "Impaired Driving". The case scenario is presented below:

Joe J. was a happily married man, father of five children and considered by all as a "great guy". One night however, Joe consumed too much alcohol and insisted on driving home. Joe fell asleep at the wheel, lost control of his vehicle and killed two small boys.

Here again, we began our comparison by looking at the overall range of dispositions imposed by the respondent's in each of the two studies. Prosecutors' dispositions for this case ranged from a simple fine of \$300.00 to a rather harsh incarceral term of 13 years; it should be noted that this term of imprisonment was recommended to be served intermittently. Even though the data for judges identified an identical minimum sentence for Joe J., the upper extremity was probably more in line with what we might expect; a 2 year term of imprisonment. Approximately 88.9 percent of the prosecutors, as compared to only 64 percent of the judges, included an incarceration term in their sentence. Using these general comparisons, it would appear that prosecutors assign more severe sentences for this case.

Considering that Joe J.'s offense resulted in the death of two children, it is not surprising that a significant proportion of both judges and prosecutors identified 'consequences of the act to the victim' as a relevant factor in this case; 56 percent of the judges and

51.9 percent of the prosecutors cited this point. However, only 35 percent of the judges, compared to 51.9 percent of the prosecutors, feel that alcohol consumption was a relevant case fact to consider when sentencing the defendant. It was encouraging to find that both groups of respondents not only identified this information as "relevant", but also cited it as the "most important" factor with comparable frequency; specifically, 52.7 percent of the prosecutors and 47.3 percent of the judges noted it as the "most important" factor.

As for Case 1, both groups of respondents selected 'general deterrence' as an important legal objective (judges - 58.6 percent, prosecutors - 40.6 percent). However, it is interesting to note that there was a marked disagreement over the idea of possibly rehabilitating the defendant. While 67.5 percent of the prosecutors chose 'rehabilitation' as the most important legal objective which influenced their decision, only 4.6 percent of the judges selected this objective.

This is worthy of noting in that the case material referred to a presentence report which specified that the defendant had no prior drinking problem. Consequently, is it logical to prescribe alcohol treatment for someone who has no history of problems with alcohol? The information presented in the case indicated that he went

to a wedding reception and the "champagne was flowing." At this particular occasion, Joe had too much to drink. This does not imply however, that he has an alcohol problem. Nevertheless, prosecutors appear to be of the opinion that rehabilitation of the defendant is of paramount concern.

In conjunction with this concern, the data also revealed that prosecutors questioned the adequacy of existing resources available to deal with the offender. For all other cases, over 75 percent (as opposed to only 68 percent in this case) thought that adequate correctional facilities are available. However, since this case may have pointed out the need for alternative "treatment" resources, 24 percent perhaps perceived this as an opportunity to propose suggestions for additional resources.

V.3 Synthesis of Research Findings: Case 3

This case involved one defendant (Peter R) charged with the offense of "Break and Enter." Information for this case presented the following situation:

After being certain no one is home, Peter R. tries the front door, finds it unlocked, and walks into a home he has "staked" out. He ransacks through desk draws and takes \$600.00 and jewelry worth

\$100.00. Upon hurrying out of the house he is confronted by two policemen who had been alerted by a neighbour. Peter is 22 years of age, unemployed, has no prior criminal record and has a relatively good family background. He is polite and indicates his crime was motivated by the need for money.

Prosecutors' suggested dispositions for Peter R. ranged from a Suspended Sentence up to 24 months incarceration. While the data from judges identified the same minimum disposition, the upper extremity of their sentences was only 12 months incarceration; including that this be served intermittently under the Temporary Absence Program. Only 24 percent of the judges, as compared to 51.5 percent of the prosecutors, included a period of incarceration in their disposition. If a period of incarceration is seen to be more severe than an OUT sentence, regardless of length, then, the data suggest that prosecutors appear to assign more severe sentences. Furthermore, here again, it is appropriate to note that the actual difference between the maximum penalties (1 year intermittent versus 2 years incarceration) imposed by the two groups of respondents constitutes sentencing disparity in itself.

Keeping in mind the relative simplicity of this case, it was somewhat surprising that prosecutors' selection of relevant case facts did not show a consensus of opinion.

While 77 percent of judges cited Peter R's status as a first time offender as a relevant case fact, only 28.7 percent of the prosecutors noted this point. Similarly, the rank ordering of the most important factors showed a comparable difference of opinion between the two groups; 40 percent of the judges chose extent of prior record as the 'most important' case factor as opposed to only 23.3 percent of the prosecutors. Unlike the other cases in the standard case sets, the situation of Peter R. presented the prosecutors with a situation free of complications and is typical of virtually hundreds of similar cases that come before the Criminal Courts each day. Consequently, it would be expected that agreement about relevant issues should approach consensus. However, while this is reflected in the data for judges, the routine nature of the case did not result in very unified responses from the prosecutors.

Both judges and prosecutors felt that the 'rehabilitation' of the defendant was an important legal objective to be reflected in their dispositions; 77.6 percent and 64.3 percent, respectively. The second most frequently stated objective was 'specific deterrence' (by prosecutors - 45.7 percent) and 'supervision of the accused' (by judges - 27.9 percent). While these data show some

level of agreement about appropriate legal objectives for sentencing Peter R., it is interesting to note that the remaining prosecutors and judges were distributed across a variety of response categories; judges were distributed across 6 other categories and prosecutors across another 10.

V.4 Synthesis of Research Findings: Case 4

This case involved two defendants (John J. and Michael M.) charged with three offenses; 'Armed Robbery, Possession of a weapon for the purpose of committing an offense and Indecent Assault'. The synopsis of this case is presented below:

After planning a robbery, the defendants force their way into a private dwelling each carrying a revolver. They tied the male occupant down to a chair and forced his wife to remove her clothing. They then tied her to a chair and threaten her with abuse should there "be any problems." One defendant cut the telephone line. Cash (\$300.00) and jewellery (\$3,000.00) is taken. They are picked up a few blocks away by the police who are tipped of by a neighbour. The youngest defendant, John J. (18) is a native Indian, unemployed, has a relatively unstable and deprived background, and has a juvenile but no prior adult record. Michael M.,

the co-defendant, is 29 years of age, caucasian, and employed. It appeared that he has a drinking problem and, in addition, also has a lengthy adult criminal record.

Although three separate charges were cited for the defendants, respondents in both studies usually imposed only a single sentence. Despite what could be seen as important differences in offender characteristics between John J. and Michael M., they received fairly comparable minimum and maximum sentences by both groups of respondents. First, prosecutors minimum sentences for John J. and Michael M. were 1 month and 3 months, respectively. On the upper end, the length of incarceral sentences imposed differed by 4 years (9 versus 13 years). Second, judges minimum sentences for John J. and Michael M. was a Suspended Sentence and a 8 month term of incarceration, respectively. Even though the data revealed a substantial discrepancy between the minimum sentences for the co-defendant, the maximum sentence imposed (a 13 year term of imprisonment) was the same for both. Within the overall range of sentences imposed by each group of respondents, most tended to impose comparable sentences for the two defendants. Unlike the data pertaining to the first three cases, prosecutors and judges were in agreement regarding the maximum sentence for Case 4. However, disparity between the two groups might be observed upon

closer examination of the differences between their minimum sentences (John J. - suspended sentence versus 8 months incarceration).

Approximately 62 percent of the judges and 41.1 percent of the prosecutors cited 'consequences of the act to the victim' as a relevant case fact. Two features of the case were selected most frequently as relevant case facts by both groups of respondents; these were:

- 1) 'use of weapon' (prosecutors - 40.3%, judges 54.3%); and,
- 2) 'premeditation' (prosecutors - 40%, judges 35.5%).

These data might suggest that there is substantial agreement between judges and prosecutors concerning case facts relevant to sentencing decisions. However, rank ordering case facts in terms of their importance revealed a very different situation. Specifically, while 30.9 percent of judges felt that the 'violent nature of the crime' was the most important case fact, only 15.5 percent of the prosecutors indicated this. Alternatively, prosecutors selected the aspect of 'premeditation' as the most important

consideration (25.6%) whereas judges ranked this as the second most important concern (18.3%).

The respondents from the two studies expressed very different viewpoints concerning the appropriate legal objectives for making sentencing decisions in this case. Almost half of both the judges and prosecutors cited a common legal objective but the objective was different for the 2 groups; 59.3 percent of the prosecutors noted that 'general deterrence' would be the guiding principle whereas 47.5 percent of the judges favored 'protection of the public'. Here again, the remaining half of the respondents in both studies were distributed across upwards of eight other categories.

V.5 Synthesis of Research Findings: Case 5

This case involved one defendant (Denis D.) charged with the offense of "Theft over \$200.00. A case synopsis is presented below:

Denis D. had been employed with a company for ten years. Approximately 2 years ago, Denis, in an attempt to pay off some debts he had incurred from horseracing; started falsifying the books of the company and had succeeded in defrauding his employer of almost \$92,000. One of his assistants discovered the scheme and Denis was suspended for

a period of 2 weeks. However, after conversations with his employer, Denis was permitted to continue working with the understanding that he would eventually pay back these monies. Denis is 32 years old, married and has a previous criminal record.

Prosecutors' dispositions for this case ranged from a simple Suspended Sentence up to a 11-year term of imprisonment to be followed by 1 year probation. Overall, judges' sentences for Denis D. were significantly less severe in that the maximum sentence imposed was 3 year incarceration. However, on the lower end of the scale, none of the judges felt that a suspended sentence was appropriate and, instead, imposed a minimum sentence of a \$1,000.00 fine followed by an unspecified term of probation.

The distribution of prosecutors' sentences were markedly skewed in favour of IN sentences; 90 percent included a jail term as part of their disposition. In addition to emphasizing the need for an incarceral component, over half (54%) of the prosecutors attached a probation component of varying lengths. While the majority of judges also imposed custodial sentences, they did so less frequently than prosecutors (only 79.4%).

In noting which case facts were relevant to consider for sentencing Denis D., both groups of respondents cited 'violation of a position of trust' most frequently;

prosecutors - 65.1 percent, judges - 63.4 percent.

Furthermore, they expressed a comparable level of agreement in also selecting this characteristic as the 'most important' case fact; here again, this was the modal response category for both groups.

Prosecutors identified 12 separate legal objectives which should guide sentencing decisions for this case and judges cited a total of 10. Even though 'rehabilitation' and 'specific deterrence' were frequently cited as important objectives (about one-third of the respondents from each group selecting these) both groups identified 'general deterrence' as the main legal issue; prosecutors - 69.7 percent, judges - 47.7 percent.

Regarding the adequacy of existing correctional facilities, 75 percent of the prosecutors were of the opinion that present facilities were suitable for dealing with this defendant. If this viewpoint influences, at least in part, their sentencing decision, this would help to explain their propensity to impose carceral sentences for Denis D. The analysis of the judges' data did not present the findings related to this question, therefore, we could not draw any comparison.

V.6: Summary

As mentioned earlier, there were some major differences between our approach to analyzing the prosecutors' data and the approach followed in the study on judges prepared for the Federal Ministry of the Solicitor General. For this reason, our comparative overview of the research findings from the studies could only be very general in nature. Rather than simply restating the points already outlined in our discussion we feel that it would perhaps be more useful to summarize our comparisons in a tabular format. TABLES 23 to 25 highlight the similarities and differences between prosecutors and judges with respect to the:

- 1) overall range of dispositions imposed for each case;
- 2) important case facts pertaining to each case; and,
- 3) legal objectives noted as guiding sentencing decisions.

TABLE 23

Distribution Of Minimum And Maximum Sentences Imposed:
By Case and Respondent Group

	Prosecutors		Judges	
	Lowest	Highest	Lowest	Highest
CASE 1 Assault Causing Bodily Harm	\$500 Fine	3.5 years incarceration	\$500 Fine plus 6 months probation	5 years incarceration
CASE 2 Impaired Driving	\$300 Fine	13 years incarceration	\$300 Fine	2 years incarceration
CASE 3 Break and Enter	Suspended Sentence	2 years incarceration	Suspended Sentence	1 year incarceration (under TAP)
CASE 4 Armed Robbery (John J.)	1 month jail	9 years incarceration	Suspended Sentence	13 years incarceration
(Michael M.)	3 months jail	13 years incarceration	8 months jail	13 years incarceration
CASE 5 Theft over \$200	Suspended Sentence	11 years incarceration plus 1 year probation	\$1000 Fine plus unspeci- fied term of probation	3 years incarceration

TABLE 24

Distribution Of Most Important "Case Facts":
By Respondent Group And Case

Case and Response Categories	Prosecutors	Judges
	(Percent)	(Percent)
CASE 1 - Assault Causing Bodily Harm severe consequences to victim violent nature of offence	33.3* 13.2	11.7 43.9*
CASE 2 - Impaired Driving alcohol involvement	57.2*	47.3*
CASE 3 - Break and Enter extent of prior criminal record	23.3*	40.0*
CASE 4 - Armed Robbery premeditation violent nature of crime	25.6* 15.5	18.3 30.9*
CASE 5 - Theft over \$200.00 violation of position of trust	58.9*	41.9*

Note: Highlighted (*) entries in the table are the proportion of respondents represented in the modal response category for the item. Those which are not highlighted show the proportion of respondents from the other group which also selected this category.

TABLE 25

Distribution Of Legal Objectives Relevant To Sentencing:
By Case And Respondent Group

Case and Response Categories	Prosecutors	Judges
	(Percent)	(Percent)
CASE 1 - Assault Causing Bodily Harm		
general deterrence	70.5*	47.7
specific deterrence	70.0	53.9*
CASE 2 - Impaired Driving		
rehabilitation	67.5*	4.6
general deterrence	40.6	58.6*
CASE 3 - Break and Enter		
rehabilitation	64.3*	77.6*
CASE 4 - Armed Robbery		
general deterrence	59.3*	45.9
protection of public	51.2	47.5*
CASE 5 - Theft over \$200.00		
general deterrence	69.7*	47.7*

Note: Highlighted (*) entries in the table are the proportion of respondents represented in the modal response category for the item. Those which are not highlighted show the proportion of respondents from the other group which also selected this category.

Noteworthy points for Table 23 are as follows:

- 1) In two of the five cases (2 and 3) both groups of respondents imposed identical minimum sentences. However, in both of these cases the groups differ markedly in their selection of maximum sentences; prosecutors favored more severe sanctions.

- 2) Treating the dispositions for Case 4 as two separate cases results in six cases across which we can compare the two groups of respondents with respect to their minimum and maximum sentences imposed. In three of the six cases prosecutors assigned lower minimum sentences than did judges and assigned identical minimum sentences in two more cases. Similarly prosecutors assigned more severe maximum sentences in three out of the six cases. Further comments along these lines would possibly be misleading in that it is tempting to draw inferences about observed disparity across the two samples. This is not the intention of our comparisons.

A more systematic analysis of the data in TABLE 24 would have to proceed cautiously since varying proportions of respondents across the two samples are represented in the modal response categories for each. Nevertheless, it is interesting to note that the modal group in both samples was linked to the same response category in three of the five cases.

Examining TABLE 25 should again be cautioned by the point that the proportion of respondents represented in the modal categories is not always comparable across the two samples. The main highlight of these data may be the fact that the notion of 'general deterrence' is the modal category for either group in four out of the five cases. In the remaining case, which involved the case of Break and Enter, 'rehabilitation' was the primary legal objective for both prosecutors and judges.

This section has provided a brief overview of our study in relation to a comparable piece of research involving a sample of judges. The overall findings of our study as well as some suggestions for further research are presented in the next section.

Leaf 193 omitted in page numbering

CHAPTER VI

CONCLUSIONS AND SUGGESTIONS FOR FURTHER RESEARCH

At best, our study should be viewed as a modest endeavor to examine the complexities of human decision-making. In this context, it addresses but a few aspects of a multi-faceted process which involves an array of actors with competing and sometimes conflicting interests. The research was exploratory in nature and the findings were not intended to provide any sort of verification of existing theory or an empirical test of certain hypothesis. Even though the issue of sentencing has been the subject of numerous studies, they have focused almost exclusively on judicial decision-making. Unfortunately, the role of Crown Counsel in the sentencing process and their potential influence on the judiciary has been neglected by the research community.

Recognizing that our study had to be developed on a somewhat ad hoc basis, its merit rests primarily on the soundness of its execution and treatment of the results. The use of a standard case set consisting of five

hypothetical cases and involving a relatively small sample of respondents imposes some very fundamental constraints on the generalizability of our findings. Nevertheless, the strength of the data lies in the fact that they are based on responses to a controlled information set. In addition, we believe that the respondents for this research represents a reasonable cross-section of Crown Counsel in Ontario.

Since Chapter IV already presented a very detailed treatment of the data, our discussion in this section only provides an overview of the general dimensions of our study which we feel could be used as an impetus for developing further research in this area. The highlights of our findings are outlined below.

- 1) Respondents demonstrated a respectable degree of consensus concerning the 'nature of sentence' imposed for all five cases.
- 2) Even though they demonstrated this apparent consensus concerning 'nature of sentence', particularly with respect to the basic IN-OUT decision, this is shown to deteriorate markedly when the data are analyzed in relation to the actual QUANTUM of sentence imposed.

- 3) On the basis of our systematic analysis of QUANTUM variations across dispositions, we have concluded that sentencing disparity was observed in all five cases.

- 4) Data pertaining to the selection of relevant case facts used in the submission to sentence produced a wide range of responses. Even though this range is collapsed somewhat, when the prosecutors are asked to rank order the relative importance of case facts for their sentencing decision, there does not appear to be a high level of agreement.

- 5) To further explore prosecutorial decision making, respondents were asked to identify the specific legal objectives which guided their sentencing decision. The most striking finding from these data is that both general and/or specific deterrence were cited as important legal principles even though the cases represented very different kinds of offenses.

- 6) The questionnaire included a single item which asked respondents to comment on the "adequacy of present correctional facilities and treatment resources". A clear majority expressed the opinion that there was no apparent need for reform in this area. Those that indicated there was a need for change only provided some very general suggestions.

As stated previously, our research was primarily a replication of the Federal Ministry of the Solicitor General's study: "Beyond the Black Box: A study in Judicial Decision-Making." Consequently, this provided us with the opportunity to compare the findings from the studies. The results of our comparisons are summarized below.

- 1) For the most part, differences between the sentences imposed by the two groups could not be mapped into any systematic pattern. Case by case comparisons showed that prosecutors and judges showed a higher degree of correspondence between the 'minimum' sentences imposed. With respect to 'maximum' sentences, the judges tended to favour the defendant.

- 2) Examining the data pertaining to the identification of important case facts for each case suggested some general agreement between the groups. However, here again, differences did not form any sort of coherent pattern.
- 3) When asked to identify "legal objectives" relevant to sentencing decisions, prosecutors and judges demonstrated a fairly high level of agreement. General deterrence was seen to be the common guiding principle.

The above observations, in themselves, suggest that there are a number of interesting topics worthy of further exploration. Recognizing the implicit, if not explicit role which Crown Counsel play in conjunction with sentencing decisions, further work in the area should be seen to be of equal importance to research involving the judiciary.

As a starting point for further work in this area, an enhanced and expanded version of our research would be worthy of consideration. Such a study should:

- 1) involve a much larger sample of respondents - with representation across several provinces in Canada;
- 2) be based on a larger standard case set within which information about offense and offender characteristics is systematically varied;
- 3) permit the collection of more detailed and in-depth socio-demographic data pertaining to both the prosecutors' personal and professional background; and
- 4) present questionnaire items in a more succinct manner and include some requirements (such as fixed response categories) for respondents to answer questions with a higher degree of precision.

Even with improvements such as those noted above, this type of modified replication of our work, would still only permit researchers to comment indirectly on the issue of disparity. The extent to which prosecutors actually influence judicial decisions would remain a topic for 'guess work' or informed speculation at best. Attempting to

address this issue through rigorous empirical research raises important methodological problems for measurement and possibly some ethical concerns. Nevertheless, an appropriate beginning to examining this could be to conduct a survey of prosecutors which would document their views about how they try to influence sentencing decisions; this type of research could also involve defence counsel or both groups. The utility of any research which is simply an enhancement of our study would still be extremely limited if it did no more than assume or propose that prosecutors do in fact influence judges.

There are three other fairly immediate research needs which we feel are very worthy of investigating. Even if our study is seen to make some contribution to research on disparity, we have examined only one source of disparity. The limitations of the case set used (i.e. only five cases and each one being somewhat unique) dictated that we could only assess variations in sentences between respondents. An important question to also be addressed is: How consistent are prosecutors in their sentencing decisions/submissions to sentence? Put simply, do they make similar decisions about similar cases?

Research along this dimension could also try to address questions about prosecutors' choice of (and

consistency in choosing) 'legal objectives' for sentencing decisions/submissions to sentence. If sentence severity is, at least in part, a function of certain legal objectives, what specific case facts are used to identify which objective is most appropriate? Finally, what magnitude of sentence variation constitutes unwarranted disparity? While we made assessments about observed disparity on the basis of specific decision rules, these were stated in a fairly general manner and, accordingly, are open to diverse interpretations. Would prosecutors and judges be in agreement with our application of these rules? More generally, for a set of very similar cases, what range of sentences (difference between least and most severe sentence) would be acceptable as justifiable or warranted variation. In addition to some of the specific research questions cited above, we believe that the findings from our study suggest that further research on disparity is important and should not focus solely on the judiciary.

Further research building on some of these ideas should perhaps also touch on current initiatives being explored by the Federal Government. First, if our research findings were to be translated into actual court dispositions, the sentences imposed by the majority of respondents would have direct implications on the prison

population in the province of Ontario. Even though, respondents' assessments of existing facilities/resources suggested that no changes are needed, policy makers are voicing a somewhat different opinion. At the provincial level, the introduction of a large scale community service work programme was viewed by some as a major initiative to reduce the jail population, and, accordingly, alleviate overcrowding in some institutions. Similarly ongoing concerns about overcrowding in Federal Penitentiaries has resulted in Federal policymakers also considering measures to reduce inmate populations. Prosecutors' positive assessments of existing facilities together with their apparently zealous approach to imposing incarceration sentences seem to fly in the face of policy-makers' concerns.

As noted in our discussion of respondents' choices of legal objectives in sentencing, the notion of deterrence (general or specific) appeared to be the most prominent guiding principle. Even though the principle of 'reparation' is being advocated by some policy-makers, very few of our respondents included any sort of 'reparative component' in their sentences. This is consistent with other empirical sentencing data which shows that reparative sanctions such as offender restitution and community service work are imposed quite infrequently in most jurisdictions

(Goetz, 1977). In giving further consideration to this principle, recent initiatives relating to victims of crime have explored the feasibility of victims participating in the sentencing process by the use of "Victim Impact Statements". This approach would permit victims to have direct input (through a formal submission similar to a presentence report) into sentencing decisions. It is anticipated that the presentation of information about the victims' circumstances and problems might identify the need to consider the greater use of reparative sanctions as a sentencing objective. If this type of information was included as a variable in the standard case set used in a study such as ours, it would be interesting to examine prosecutors' selection of legal objectives under this new condition.

At the same time that our study was underway, another group of researchers were also considering the role of Crown Counsel in the context of sentence disparity. Keeping in mind some of our suggestions for further research, these authors also raised the issue of Crown Counsel decision-making roles in the judicial process. Specifically, they note:

"The difference in Crown decision making patterns, and the lack of 'visibility' of Crown decisions, raise important questions that should be answered with the general disparity debate. In comparison to the unanswered questions surrounding Crown decision making, judicial decision making seems straightforward."

(Brantingham, et al, 1982:88)

Quite clearly, this point together with some of our research findings should hopefully be seen as providing a catalyst for further work in this area.

APPENDIX A

**Description of Standard
Case Set and Related Documents**

C

0



Department of Justice Ministère de la Justice
Canada Canada
Ottawa, Canada
K1A 0H8

February 5, 1982

Dear Sir/Madam:

This letter requests your co-operation in completing a brief questionnaire concerning your views on sentencing.

In 1980, the Interministerial Sentencing Project which is a project created through the joint efforts of the Federal Department of Justice and the Ministry of the Solicitor General, with the co-operation of their provincial counterparts, and of the Canadian Association of Provincial Court Judges, undertook a study of sentencing practices in provincial courts. This was done by preparing five fictitious cases, one involving two accused and asking approximately two hundred provincial court judges across the country to answer a questionnaire on these cases. The questions were relating to the sentence that the judges would have given in such cases along with the reasons, objectives, etc. for these sentences.

We would now like to compare these decisions with those of practicing lawyers and we are being assisted by Carolina Giliberti a Masters student, Department of Criminology, University of Ottawa, who is presently undertaking her thesis entitled, "Sentence Disparity." Her main objective is to replicate the above-mentioned study for prosecutors and possibly compare their results on sentencing to that of the judges.

.../2

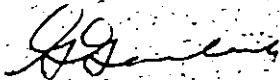
Canada

Enclosed you will find the relevant case descriptions and questionnaires. Your individual responses will be held in strictest confidence and no attempt will be made to identify specific individuals. Information based on this study will be provided only in the form of aggregate statistics. Digits identifying individual responses will be destroyed when the questionnaire is returned.

Your co-operation in completing these questionnaires within one week would be very much appreciated so that we may proceed with the study.

Thanking you in advance for your assistance.

Yours truly,



Judge Guy Goulard
Director
Sentencing Project
Policy Planning Section
Policy Planning and Development Branch

Enclosures

Instructions

This questionnaire contains five criminal cases. Please read the first case and complete the five questions before proceeding on to the next case. The last page requests brief background information concerning the participants in this study.

Completion of the questionnaire should take less than thirty minutes.

When completed, please return the questionnaire in the attached envelope.

It is hoped that replies will be mailed by February 22. If you have any questions please do not hesitate to call me at 613-996-7571 or 613-995-1794.

Charge: ASSAULT CAUSING BODILY HARM

On September 27, 1978, the Accused was sitting alone in a disco bar with his feet up on a post near an aisle leading to the dance floor. A young man trying to get to the dance floor asked the Accused to put his feet down in order that he might pass by. The Accused refused and an argument ensued. During the argument the Accused picked up an empty drinking glass and threw it into the young man's face. The glass shattered and the young man now has only partial vision in his left eye. The Prosecution proceeded by way of indictment and, after a trial, the accused was found guilty of assault causing bodily harm.

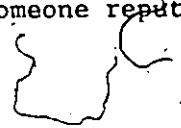
P.S.R. INFORMATION:

NAME: Ray R.
AGE: 21 years
EMPLOYMENT: Mail Sorter - Canada Post Office
RACE/NATIONALITY: Caucasian/Canadian
MARITAL STATUS: Single
EDUCATION: Grade 12
CRIMINAL RECORD: Nil

Subject has no remorse concerning the offence and believes that the stranger only got what he deserved after behaving like an "ass-hole", ordering me around.' A psychiatrist examined the subject and there is no indication of mental illness.

Ray R. comes from a deprived background. His family was poor and his father frequently absent from the home. Violence was prevalent in the family and Ray was often beaten by his mother as a form of punishment. He was frequently ill as a child and performed poorly in school.

The victim and the accused were known to each other although there existed no previous relationship. Ray R. was known in the community as someone reputed to have a violent temper when drunk.



QUESTIONNAIRE

CASE NUMBER 1

RESPONDENT NUMBER _____

With regard to the case you have just reviewed:

1) On what grounds would you base your submissions to sentence?

2) What sentence would you feel is appropriate in this case?

3) Do you see the sentence assigned as fulfilling some particular objective or objectives with regard to the offender, society and our system of justice?

If yes, what are these objectives?

4) Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your submissions.

5) Do you think that existing legal provisions, facilities, or resources are adequate to deal with this case? If your answer is "No", are there any options you would recommend be provided.

Charge: IMPAIRED DRIVING BY INDICTMENT

Joe J. is 55 years old, married, father of five children and President of Important Real Estate Corp., a company he has created and made to prosper. He has always been much involved in the business circles and in his community and is highly regarded for his integrity, hard work and is considered by all as "a great guy."

On April 2, 1979, he went to a reception on the occasion of the marriage of his best friend's son. Champagne was flowing and Joe, who had been working even more than usual during the preceding week, was affected more than usual by the alcohol.

Returning home with his wife, having insisted on driving, he appeared to have fallen asleep and lost control of his vehicle which went on the sidewalk, killing two young boys of seven and eight years of age.

Breathalyzer tests indicated 240 milligrams. The evidence disclosed that the accident had been caused by his impairment.

Joe pleaded not guilty and was convicted of impaired driving by indictment after a two-day trial.

P.S.R. INFORMATION:

NAME: Joe J.
AGE: 55 years
ADDRESS: Success Street, Your City
EMPLOYMENT: Corporation President
MARITAL STATUS: Married, five children
CRIMINAL RECORD: Nil

Joe J. is happily married, his five children are all now on their own and quite successful. He has no history of drinking problems or any record of past alcohol related motor vehicle offences.

The incident has affected him deeply and he has shown remorse over the death of the two boys.

QUESTIONNAIRE

CASE NUMBER 2

RESPONDENT NUMBER _____

With regard to the case you have just reviewed:

1) On what grounds would you base your submissions to sentence?

2) What sentence would you feel is appropriate in this case?

- 3) Do you see the sentence assigned as fulfilling some particular objective or objectives with regard to the offender, society and our system of justice?

If yes, what are these objectives?

- 4) Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your submissions.

- 5) Do you think that existing legal provisions, facilities, or resources are adequate to deal with this case? If your answer is "No", are there any options you would recommend be provided.

Charge: BREAK AND ENTER

Shortly after noon on a Friday, Peter R. drives through a neighbourhood close to his current residence in a large Canadian city, with the intention of entering a home and committing a theft. He knows, through a friend, that most of the neighbourhood women are attending a local meeting this particular afternoon. He spots a corner house that looks empty, parks his car and gets out.

He goes to the front door, knocks and waits several minutes for someone to answer. Certain that no one is home, he tries the front door knob and finds the door unlocked. He moves about through the house; he first ransacks the desk drawers, then goes to the master bedroom where he finds sixty dollars tucked away underneath some lingerie. He also finds and takes jewelry worth approximately \$100.

He hurries out of the house and is confronted by two policemen who had been alerted by a neighbour. He is not carrying a weapon at the time of his arrest and offers no resistance.

The accused pleads guilty on first appearance in court to a charge of breaking and entering.

P.S.R. INFORMATION:

NAME: Peter R.

AGE: 22

ADDRESS: He currently resides in a small apartment in a run-down building in a poorer part of the city.

EMPLOYMENT: Currently unemployed. He has previously had a variety of short-term jobs involving unskilled labour from which he was laid off when his services were no longer required by the employer. His previous employers describe him as being a satisfactory employee. He has few marketable skills and no definite prospects for the future.

MARITAL STATUS: Single

EDUCATION: Grade 9. School records show that Peter R. was a C student and was frequently absent.

CRIMINAL RECORD: None. He is known to police as one who associates with several individuals who have been convicted or suspected of committing breaking and entering in the past.

FAMILY BACKGROUND: Peter R. is oldest of a family of five. None of his two brothers and two sisters have a criminal record. His father is a responsible family man who has supported his family through semi-skilled construction work. There is no evidence of family problems. The parents are concerned about the present situation and are anxious to help in whatever way they can. However, Peter R.'s father admits to having little influence on his son's behaviour.

HEALTH: Peter R. is in good health, is not known to use any drugs and is moderate in his use of alcohol. Alcohol was not a factor in the crime for which he is currently charged.

BEHAVIOUR AND PERSONALITY: The accused is polite and appears concerned by his current predicament. He indicates that his crime was motivated by the need for money.

SUMMARY AND RECOMMENDATION:

Peter R. demonstrates a satisfactory attitude and shows no evidence of personal problems. His family is supportive and although he has few work-skills his past employers consider him a satisfactory employee. A probation order of one year is recommended. Supervision of his activities for this period of time and assistance in finding a new job would hopefully resolve his need for funds and give him a new lease on life.

QUESTIONNAIRE

CASE NUMBER 3

RESPONDENT NUMBER _____

With regard to the case you have just reviewed:

1) On what grounds would you base your submissions to sentence?

2) What sentence would you feel is appropriate in this case?

- 3) Do you see the sentence assigned as fulfilling some particular objective or objectives with regard to the offender, society and our system of justice?

If yes, what are these objectives?

- 4) Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your submissions.

- 5) Do you think that existing legal provisions, facilities, or resources are adequate to deal with this case? If your answer is "No", are there any options you would recommend be provided.

Charge: ARMED ROBBERY

The accused for some time had planned an armed robbery. One night at approximately 11:00 o'clock, they drive around until they decide on a residence where they will attempt their robbery.

They ring at the front door and when a man opens the door, they force their way in each carrying a revolver. They tie the man down to a chair. They force the wife to take all her clothes off and tie her to a chair leaving her nude. One of the accused, John J., fondles her breast and tells both of them that if there is any problem, she will regret it.

The accused, Michael M. cuts the telephone line. Both accused search the house and find approximately \$300.00 in cash and approximately \$3,000.00 in jewellery.

Leaving both tied to their chairs, the accused leave in their car to be picked up a few blocks away by the police who had been called by a neighbour who had witnessed the crime through the window.

The accused are both charged with armed robbery, use of a firearm for the purpose of committing an offence and indecent assault. Both accused plead guilty on their first appearance in court.

The Crown Attorney recommends a lengthy incarceration sentence for the purpose of general deterrence on the basis that there has been a number of similar incidences in the city during the previous months.

P.S.R. INFORMATION:

NAME: John J.
 AGE: 18 years
 ADDRESS: Skid Road Hotel, Metro City
 EMPLOYMENT: Unemployed
 RACE/NATIONALITY: Native Indian Canadian
 BIRTH PLACE: Local Indian Reserve
 MARITAL STATUS: Single
 EDUCATION: Grade 7

Subject is the fourth of eight children. The community where subject was reared is comprised almost entirely of Native Indians with seasonal employment of fishing and canning. Subject's parents are well known to the Department of Human Resources as people with alcoholic problems. Violence and neglect of the children is prevalent in this family. Subject's family have been involved in the Courts in the past and at present subject's two brothers are awaiting trial on a charge of manslaughter.

At the age of fourteen subject was made a ward of the Superintendent of Child Welfare under the Juvenile Delinquents Act and placed in a Youth Centre for one year. After he was discharged he lived in a foster home for four months and then was returned to his family.

After his return to the reserve, subject's behaviour showed marked improvement and he was discharged from wardship nine months later. He remained living in his home village until March of this year when he came to the city.

School records indicate subject repeated grades one, three and five and then was expelled from grade seven at the age of fourteen. Apparently subject was in conflict with the principal and teachers and could not accept their discipline.

Subject's employment history has been usually casual or short term in canning work or in logging camps. In Metro City subject worked one week as a delivery man, but was laid off due to a work shortage. The employer stated he was satisfied with the subject's work and attitudes and would be willing to rehire him when business warrants it. He has no specific job related skills and no definite prospects for future employment. He plans to return home as soon as this is possible.

Although subject has a positive Indian identity he at times projects a defiant and rebellious attitude and perhaps inappropriately suspects prejudices. At other time however subject indicates a willingness and capability to respond to counselling.

COURT HISTORY:

JUVENILE:

SEPTEMBER 1975

B. & E.
and Theft
(2) 1 year
Probation

JULY 1976

1) Theft Under \$200
2) Assaulting Peace Officer

- Convicted under the Juvenile Delinquents Act to care of Superintendent Child Welfare

ADULT:

Nil

NAME: Michael M.
AGE: 29 years
ADDRESS: Local Apartment, Metro City
EMPLOYMENT: Floor Layer
RACE/NATIONALITY: Caucasian/Canadian
BIRTH PLACE: Rural Town
MARITAL STATUS: Married
EDUCATION: Grade 10

Subject is one of four children and had a relatively normal family upbringing with the exception that his father was an alcoholic. Subject developed his own alcohol problem at age 16, at which time he left the family home in Rural Town and moved to Metro City. He married five years ago and his marriage has been seriously affected by his alcohol problem although his wife is very supportive and concerned and totally devoted to this welfare. Subject's work record has been sporadic as a result of his problem with alcohol. When he has been employed he is described as a good and conscientious worker. In June of 1977, subject made the voluntary decision to seek help for his alcohol problem and joined Alcoholics Anonymous. On the day of the offence the subject had "fallen off the wagon" and was in a greatly intoxicated state at the time he committed the offence. Since he joined AA, with the notable exception of the day of the offence, the subject has, for the first time in fourteen years, been able to abstain totally from the use of alcohol. The President of AA testifies that on the basis of his 27 years AA experience he feels subject has an exceptionally good chance to completely control his alcohol problem in the future. Subject's present employers describe him as an excellent tradesman with a cooperative and willing attitude and state that they will continue his employment in the future. Subject's wife continues to demonstrate considerable positive support for her husband and has stated that the past seven months have made the previous five years of marriage worth while.

COURT HISTORY:

JANUARY, 1967	Break & Enter with Intent	12 months definite & 6 months indefinite
MARCH, 1968	Escape from Lawful Custody	90 days
JULY, 1969	Common Assault	30 days
MAY, 1971	Break & Enter with Intent	Suspended Sentence & Probation for two years
OCTOBER, 1973	Dangerous Driving; Refusal to give breath sample	Six months plus two years Probation

QUESTIONNAIRE

CASE NUMBER 4

RESPONDENT NUMBER _____

With regard to the case you have just reviewed:

1) On what grounds would you base your submissions to sentence?

2) What sentence would you feel is appropriate in this case?
On the charge of:

a) armed robbery

b) Unlawful use of a firearm (Section 83 of the Criminal Code)

c) indecent assault

- 3) Do you see the sentence assigned as fulfilling some particular objective or objectives with regard to the offender, society and our system of justice?

If yes, what are these objectives?

- 4) Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your submissions.

- 5) Do you think that existing legal provisions, facilities, or resources are adequate to deal with this case? If your answer is "No", are there any options you would recommend be provided.

Charge: THEFT OVER \$200

The accused, Denis D., has been employed by a shoe factory for approximately ten years. For the past five years he has been in charge of accounting. For most of his adult life, he has been addicted to horse racing and he attends the local track a number of times per week.

His salary does not enable him to meet his family demands and the debts that he has built up as a result of his addiction to horse racing. Approximately two years ago, he started falsifying the books of the company and has thereby succeeded in defrauding his employer of almost \$92,000.

Recently, while he was away on holidays, his young, sharp, assistant discovered his system. Upon his return, the accused was confronted with certain documents and immediately recognized his crime. He was suspended from employment for a period of two weeks and after a lengthy discussion with his employer, he was reinstated on his job and a plan has been developed for repaying his debt over a number of years.

He was charged with theft over \$200 and entered a plea of guilt.

The Crown Attorney is requesting a lengthy period of incarceration on the argument that this is a test resulting from a position of trust and that the accused has to be an example for all others in similar positions.

The Defense Counsel is suggesting a suspended sentence, bringing to the Court's attention the fact that the accused has negotiated a restitution arrangement with his employer and based on the other positive factors disclosed in the pre-sentence report.

P.S.R. INFORMATION:

NAME: Denis D.
 AGE: 32 years
 EMPLOYMENT: Comfortable Shoe Manufacturing Company
 RACE: Caucasian/Canadian
 MARITAL STATUS: Married, 3 children
 EDUCATION: Grade 12
 CRIMINAL RECORD: Nil

The accused is the middle of three children. His father was a metro city policeman and is now retired and his mother is a housewife.

A psychiatric report revealed that the accused suffers from no psychological disturbances apart from his gambling addition and should benefit from counselling and treatment.

He has had no mental problems until recently when the tension resulting from his debts and offence has made him increasingly irritable and moody. His wife and friends generally consider him a good husband and father who fulfills his responsibilities as head of the family and his wife is concerned and supportive.

Apart from the current offence, Denis D.'s employer has found him to be a reliable and extremely competent employee. His main interest is that restitution be made and not that Denis D. be punished.

QUESTIONNAIRE

CASE NUMBER 5

RESPONDENT NUMBER _____

With regard to the case you have just reviewed:

1) On what grounds would you base your submissions to sentence?

2) What sentence would you feel is appropriate in this case?

- 3) Do you see the sentence assigned as fulfilling some particular objective or objectives with regard to the offender, society and our system of justice?

If yes, what are these objectives?

U

- 4) Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your submissions.

- 5) Do you think that existing legal provisions, facilities, or resources are adequate to deal with this case? If your answer is "No", are there any options you would recommend be provided.

Background of Participant

(1) Identify your age within the following age ranges.

20-25 _____

40-45 _____

25-30 _____

45-50 _____

30-35 _____

50-55 _____

35-40 _____

55-60 _____

60 and over _____

(2) Sex: Male _____

Female _____

(3) How many years have you served as a Prosecutor?

(4) How many years have you spent in legal practice (from first being called to the bar until the present)?

(5) In what type(s) of practice have you been involved?
(e.g. Defence, family law, etc.)

(6) Have you received post-secondary education or training in any area other than law?

Yes _____

No _____

If yes, how much training and in what subject (e.g. 1 year economics, B.A. Sociology, etc.)

APPENDIX B

SELECTED DATA TABLES

TABLE B-1Distribution Of Respondents By Geographical Location

Area	Number of Questionnaires sent to each Area	Proportion of Questionnaires sent to each Area (percent)	Response Rate by Area (percent)
Southwest of London- including Windsor area	20	8.5	60
London area to Toronto- including Niagra Falls area	110	47.0	51
North of London- including Lake Huron shoreline	2	0.8	50
North of Toronto-including- Barrie and Orilla area	7	2.9	57
North of Kitchener-including Owen Sound area	4	1.8	50
Northeast of Toronto- including Peterborough, Kingston and Belleville area	24	10.3	69
Northern Ontario-including North Bay and Pembroke area	23	9.8	43
Oshawa and surrounding area to the Quebec border	13	5.5	61
Ministry of the Attorney General, (Queens Park, Toronto)	31	13.2	64
Total:	234	100	

TABLE B-2

Distribution Of Respondents By
Nature Of Legal Experience Prior To
Becoming A Crown Prosecutor

Nature Of Prior Legal Experience	Relative Frequency (Percent)
defence work - nature not specified	0.8
previous criminal experience only	57.0
previous family experience only	2.3
general experience only	4.6
family and criminal experience	2.3
criminal and general experience	12.4
family and general experience	0.8
family, criminal and general experience	16.3
no prior experience	3.9
Total:	100

TABLE B-3

Distribution Of Case Fact Rankings: Case 1 (Assault Causing Bodily Harm)

Factor Cited	Relative Frequency (Percent)		
	Most Important	2nd Most Important	3rd Most Important
consequences of offense to victim	33.3	25.6	9.3
seriousness of the offense	17.1	40.3	33.3
violent nature of offense	13.2	0	0
provocation involved	10.1	0	0
attitude of defendant	26.4	23.3	27.9
extent of record	0	0	9.3
use of weapon	0	10.9	0
no factor mentioned	0	0	20.2

Distribution Of Case Fact Rankings: Case 2 (Impaired Driving)

Factor Cited	Relative Frequency (Percent)		
	Most Important	2nd Most Important	3rd Most Important
consequences of offense to victim	52.7	21.7	1.6
alcohol involvement	22.5	33.3	6.2
Other factors*	15.5	10.1	28.7
character of defendant	3.9	14.7	7.0
social background	3.1	7.8	11.6
no factor mentioned	2.3	12.4	45.0

* "Other factors" include those facts which were mentioned by less than 5 percent of the responding prosecutors across all rankings.

TABLE B-5

Distribution Of Case Fact Rankings: Case 3 (Break and Enter)

Factor Cited	Relative Frequency (Percent)		
	Most Important	2nd Most Important	3rd Most Important
extent of prior record	23.3	15.5	13.2
offense occurred in a dwelling house	14.0	5.4	3.9
premeditation	13.2	9.3	4.7
character of defendant	2.3	7.0	9.3
background of defendant	0	9.3	10.1
other factors	42.5	41.9	31.7
no factor mentioned	4.7	11.6	27.1

* "Other factors" include those facts which were mentioned by less than 5 percent of the responding prosecutors across all rankings.

TABLE B-6

Distribution Of Case Fact Rankings: Case 4 (Armed Robbery)

Factor Cited	Relative Frequency (Percent)		
	Most Important	2nd Most Important	3rd Most Important
premeditation	25.6	11.6	12.4
use of weapon	16.3	28.7	10.1
violent nature of offense	15.5	11.6	8.5
offense occurred in dwelling house	11.6	5.4	7.0
severe consequences of offense to victim	10.1	17.8	19.4
other factors	16.2	15.6	18.6
no factor mentioned	4.7	9.3	2.4

* "Other factors" include those facts which were mentioned by less than 5 percent of the responding prosecutors across all rankings.

TABLE B-7

Distribution Of Case Fact Rankings: Case 5 (Theft over \$200.00)

Factor Cited	Relative Frequency (Percent)		
	Most Important	2nd Most Important	3rd Most Important
violated a position of trust	58.9	37.8	1.6
premeditation	7.8	11.6	12.4
other factors	28.6	30.4	36.4
no factor noted	4.7	20.2	49.6

* "Other factors" include those facts which were mentioned by less than 5 percent of the responding prosecutors across all rankings.

APPENDIX C

Distribution of Respondents' Socio-demographic
Characterics by the Nature of Sentence Given

*all percentages are rounded off to the nearest whole integer.

Table C-1

Distribution of Respondents by Age
and Sentence Type (Short In, Long In):
Case 1 - Assault Causing Bodily Harm

AGE GROUP	Sentence Type		
	Short In	Long In	Total
Less than 30 years of age	n= 9 row % = 60 column % = 18	n= 6 40 12	n= 15 100 15
Greater than 31 years of age	n= 41 49 82	n= 43 51 88	n= 84 100 85
Total	n= 50 50 100	n= 49 50 100	*N= 99 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .268

*NOTE

- N does not equal the total responding sample of 129 because:
- 1) 1 respondent did not indicate a sentence;
 - 2) 7 respondents gave a non-incarceral sentence;
 - 3) 18 respondents did not indicate an incarceration length;
 - 4) 4 respondents indicated a range of incarceration such as 4-8 months.

Table C-2

Distribution of Respondents by
Number of Years spent in Legal
Practice and Sentence Type
(Short In, Long In)
Case 1. - Assault Causing Bodily Harm

		Sentence Type		
		Short In	Long In	Total
NUMBER OF YEARS SPENT IN LEGAL PRACTICE	6 years or less	n= 18 row % = 47 column % = 37	n= 20 53 42	n= 38 100 39
	more than 6 years	n= 31 52 63	n= 28 48 58	n= 59 100 61
	Total	n= 49 51 100	n= 48 49 100	*N= 97 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .838

*NOTE

- N does not equal the total responding sample of 129
because:

- 1) 1 respondent did not indicate a sentence;
- 2) 7 respondents gave a non-incarceral sentence;
- 3) 18 respondents did not indicate an incarceration length;
- 4) 4 respondents indicated a range of incarceration such as 4-8 months;
- 5) 2 respondents did not indicate the number of years spent in legal practice.

Table C-3

Distribution of Respondents by
Number of Years Experienced as a
Prosecutor and Sentence Type
(Short In, Long In)

Case 1 - Assault Causing Bodily Harm

		Sentence Type		
		Short In	Long In	Total
NUMBER OF YEARS EXPERI- ENCED AS A PROSECUTOR	6 years or less	n= 15 row %= 47 column %= 31	n= 17 53 35	n= 32 100 33
	more than 6 years	n= 34 56 69	n= 31 54 65	n= 65 100 67
	Total	n= 49 51 100	n= 48 50 100	*N= 97 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .0824

*NOTE.

- N does not equal the total responding sample of 129
because:

- 1) 1 respondent did not indicate a sentence;
- 2) 7 respondents gave a non-incarceral sentence;
- 3) 18 respondents did not indicate an incarceration length;
- 4) 4 respondents indicated a range of incarceration such as 4-8 months;
- 5) 2 respondents did not indicate the number of years experienced as a prosecutor.

Table C-4

Distribution of Respondents by
 Type of Education and Sentence Type
 (Short In, Long In)
Case 1 - Assault Causing Bodily Harm

		Sentence Type		
		Short In	Long In	Total
TYPE OF EDUCATION	Bachelor of Arts degree or less	n= 24 row % = 44 column % = 63	n= 30 55 73	n= 54 100 68
	More than a Bachelor of Arts degree	n= 14 56 36	n= 11 44 27	n= 25 100 32
	Total	n= 38 48 100	n= 41 52 100	*N= 79 100 100

- Differences are significant when Chi square = 3.19, 1d.f., $\alpha = .05$
- Calculated Chi = .5097

*NOTE - N does not equal the total responding sample of 129 because:

- 1) 1 respondent did not indicate a sentence;
- 2) 7 respondents gave a non-incarceral sentence;
- 3) 18 respondents did not indicate an incarceration length;
- 4) 4 respondents indicated a range of incarceration such as 4-8 months;
- 5) 20 respondents did not indicate their type of education.

Table C-5

Distribution of Respondents by Age
and Sentence Type (Short In, Long In):
Case 2 - Impaired Driving

AGE GROUP	Sentence Type		
	Short In	Long In	Total
Less than 30 years of age	n= 12 row %= 86 column %= 18	n= 2 14 10	n= 14 100 16
Greater than 31 years of age	n= 56 75 82	n= 18 25 90	n= 74 100 84
Total	n= 68 77 100	n= 20 23 100	*N= 88 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., α = .05

- Calculated Chi = .2248

*NOTE

- N does not equal the total responding sample of 129
because:

- 1) 4 respondents did not indicate a sentence;
- 2) 16 respondents indicated a non-incarceral
sentence;
- 3) 21 respondents did not indicate an incarceration
length or indicated a range such as 4-8 months.

Table C-6

Distribution of Respondents by
Number of Years spent in Legal
Practice and Sentence Type
(Short In, Long In)
Case 2 - Impaired Driving

		Sentence Type		
		Short In	Long In	Total
NUMBER OF YEARS SPENT IN LEGAL PRACTICE	6 years or less	n= 25 row %= 70 column %= 37	n= 11 30 50	n= 36 100 41
	more than 6 years	n= 39 79 61	n= 11 21 50	n= 50 100 49
	Total	n= 67 75 100	n= 22 25 100	*N= 86 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .4557

*NOTE

- N does not equal the total responding sample of 129 because:
- 1) 4 respondents did not indicate a sentence;
 - 2) 16 respondents gave a non-incarceral sentence;
 - 3) 21 respondents did not indicate an incarceration length or indicated a range such as 4-8 months;
 - 5) 2 respondents did not indicate the number of years spent in legal practice.

Table C-7

Distribution of Respondents by
Number of Years Experienced as a
Prosecutor and Sentence Type
(Short In, Long In)
Case 2 - Impaired Driving

		Sentence Type		
		Short In	Long In	Total
NUMBER OF YEARS EXPERI- ENCED AS A PROSECUTOR	6 years or less	n = 22 row % = 68 column % = 34	n = 10 28 45	n = 32 100 38
	more than 6 years	n = 42 78 66	n = 12 22 55	n = 54 100 62
Total		n = 64 74 100	n = 22 26 100	*N = 86 100 100

- Differences are significant when Chi square
= 3.19, 1 d.f., α = .05

- Calculated Chi = .4513

***NOTE**

- N does not equal the total responding sample of 129
because:

- 1) 4 respondents did not indicate a sentence;
- 2) 16 respondents gave a non-incarceral sentence;
- 3) 21 respondents did not indicate an incarceration
length or indicated a range such as 4-8 months;
- 4) 2 respondents did not indicate the number of
years experienced as a prosecutor.

Table C-8

Distribution of Respondents by
Type of Education and Sentence Type
(Short In, Long In)
Case 2 - Impaired Driving

TYPE OF EDUCATION	Sentence Type		
	Short In	Long In	Total
Bachelor of Arts degree or less	n= 36 row % = 75 column % = 65	n= 12 25 70	n= 48 100 66
More than a Bachelor of Arts degree	n= 19 79 35	n= 5 21 30	n= 24 100 34
Total	n= 55 76 100	n= 17 24 100	*N= 72 100 100

- Differences are significant when Chi square = 3.19, 1 d.f., $\alpha = .05$

- Calculated Chi = .0096

*NOTE

- N does not equal the total responding sample of 129 because:
- 1) 16 respondents indicated a non-incarceral sentence;
 - 2) 21 respondents did not indicate an incarceration length or indicated a range such as 4-8 months;
 - 3) 20 respondents did not indicate their type of education and/or did not indicate a sentence.

Table C-9

Distribution of Respondents by Age
and Sentence Type (Out, In plus Out):
Case 3 - Break and Enter

AGE GROUP	Sentence Type		
	Out	In plus Out	Total
Less than 30 years of age	n= 6 row %= 37 column %= 10	n= 10 63 18	n= 16 100 14
Greater than 31 years of age	n= 54 54 90	n= 46 46 82	n= 100 100 86
Total	n= 60 52 100	n= 56 48 100	*N= 116 100 100

- Differences are significant when Chi square
= 3.19, 1 d.f., $\alpha = .05$

- Calculated Chi = .917

*NOTE - N does not equal the total responding sample of 129
because:

- 1) 1 respondent did not indicate a sentence.
- 2) 12 respondents gave incarceal sentences only.

Table C-10

Distribution of Respondents by
Number of Years spent in Legal
Practice and Sentence Type
(In, In plus Out)
Case 3 - Break and Enter

		Sentence Type		
		Out	In plus Out	Total
NUMBER OF YEARS SPENT IN LEGAL PRACTICE	6 years or less	n= 12 row %= 32 column %= 20	n= 26 68 47	n= 38 100 33
	more than 6 years	n= 49 63 80	n= 29 27 53	n= 78 100 67
	Total	n= 61 53 100	n= 55 47 100	*N= 116 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = 8.78

*NOTE - N does not equal the total responding sample of 129
because:

- 1) 1 respondent did not indicate a sentence;
- 2) 12 respondents gave incarceral sentences only.

Table C-11

Distribution of Respondents by
Number of Years Experienced as a
Prosecutor and Sentence Type
(In, In plus Out)
Case 3 - Break and Enter

		Sentence Type		
		Out	In plus Out	Total
NUMBER OF YEARS EXPERI- ENCED AS A PROSECUTOR	6 years or less	n= 17 row %= 41 column %= 28	n= 24 59 44	n= 41 100 36
	more than 6 years	n= 44 59 72	n= 30 41 56	n= 74 100 64
Total		n= 61 53 100	n= 54 47 100	*N= 115 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .009

*NOTE

- N does not equal the total responding sample of 129 because:
- 1) 1 respondent did not indicate a sentence;
 - 2) 12 respondents gave incarceral sentences only;
 - 3) 2 respondents did not indicate number of years as a prosecutor.

Table C-12

Distribution of Respondents by
Type of Education and Sentence Type
(In, In plus Out)
Case 3 - Break and Enter

TYPE OF EDUCATION	Sentence Type		
	Out	In plus Out	Total
Bachelor of Arts degree or less	n= 29 row %= 45 column %= 60	n= 36 55 66	n= 65 100 64
More than a Bachelor of Arts degree	n= 19 51 40	n= 18 49 34	n= 37 100 36
Total	n= 48 67 100	n= 54 33 100	*N= 102 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .2016

*NOTE

- N does not equal the total responding sample of 129
because:

- 1) 1 prosecutor did not indicate a sentence;
- 2) 26 prosecutors did not indicate their type of
education and/or indicate a sentence.

Table C-13

Distribution of Respondents by
Number of Years spent in Legal
Practice and Sentence Type
Case 4 - Armed Robbery (Michael M)

		Sentence Type		
		Less than 5 years	Greater than 6 years	Total
NUMBER OF YEARS SPENT IN LEGAL PRACTICE	6 years or less	n= 17 row % = 44 column % = 28	n= 22 56 37	n= 39 100 32
	more than 6 years	n= 44 54 72	n= 37 46 63	n= 81 100 68
Total		n= 61 51 100	n= 59 49 100	*N= 120 100 100

- Differences are significant when Chi square = 3.19, 1d.f., $\alpha = .05$
- Calculated Chi = .821

*NOTE

- N does not equal the total responding sample of 129 because:
 - 1) 1 respondent did not indicate a sentence;
 - 2) 2 respondents did not indicate the number of years spent in legal practice;
 - 3) 6 cases were missing.

Table C-14

Distribution of Respondents by
 Number of Years Experienced as a
 Prosecutor and Sentence Type
 Case 4 - Armed Robbery (Michael M)

		Sentence Type		
		Less than 5 years	Greater than 6 years	Total
NUMBER OF YEARS EXPERI- ENCED AS A PROSECUTOR	6 years or less	n= 23 row %= 50 column %= 34	n= 22 50 46	n= 45 100 36
	more than 6 years	n= 45 55 66	n= 37 45 54	n= 82 100 64
Total		n= 68 53 100	n= 50 47 100	*N= 127 100 100

- Differences are significant when Chi square = 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .75

*NOTE

- N does not equal the total responding sample of 129 because:
 - 1) 1 respondent did not indicate a sentence;
 - 2) 1 respondent did not indicate number of years as a prosecutor.

Table C-15

Distribution of Respondents by
Type of Education and Sentence Type
Case 4 - Armed Robbery (Michael M)

Sentence Type

TYPE OF EDUCATION	Sentence Type		Total
	Less than 5 years	Greater than 6 years	
Bachelor of Arts degree or less	n = 36 row % = 55 column % = 66	n = 27 45 60	n = 65 100 64
More than a Bachelor of Arts degree	n = 18 49 34	n = 19 51 40	n = 37 100 36
Total	n = 54 50 100	n = 48 50 100	*N = 102 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .2024

*NOTE - N does not equal the total responding sample of 129
because:

- 1) 1 respondent did not indicate a sentence;
- 2) 20 prosecutors did not indicate their type of
education;
- 3) 6 cases were missing.

Table C-16

Distribution of Respondents by
Number of Years spent in Legal
Practice and Sentence Type
Case 4 - Armed Robbery (John J)

		Sentence Type		
		Less than 5 years	Greater than 6 years	Total
NUMBER OF YEARS SPENT IN LEGAL PRACTICE	6 years or less	n= 26 row %= 59 column %= 37	n= 18 41 37	n= 44 100 37
	more than 6 years	n= 45 59 63	n= 31 41 63	n= 76 100 63
Total		n= 71 59 100	n= 49 41 100	*N= 120 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .03

*NOTE

- N does not equal the total responding sample of 129
because:

- 1) 1 respondent did not indicate a sentence;
- 2) 2 respondents did not indicate the number of
years spent in legal practice;
- 3) 6 cases were missing.

Table Q-17

Distribution of Respondents by
Number of Years Experienced as
Prosecutor and Sentence Type
Case 4 - Armed Robbery (John J)

		Sentence Type		
		Less than 5 years	More than 6 years	Total
NUMBER OF YEARS EXPERI- ENCED AS A PROSECUTOR	6 years or less	n= 27 row % = 60 column % = 38	n= 18 40 37	n= 45 100 37
	more than 6 years	n= 44 59 62	n= 31 41 63	n= 75 100 63
Total:		n= 71 59 100	n= 49 41 100	*N= 120 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .002

*NOTE

- N does not equal the total responding sample of 129
because:
- 1) 1 respondent did not indicate a sentence;
 - 2) 2 respondents did not indicate number of years as
a prosecutor;
 - 3) 6 cases are missing.

Table C-18

Distribution of Respondents by
Type of Education and Sentence Type
Case 4 - Armed Robbery (John J)

TYPE OF EDUCATION	Sentence Type		
	Less than 5 years	More than 6 years	Total
Bachelor of Arts degree or less	n= 39 row %= 60 column %= 64	n= 26 40 63	n= 65 100 64
More than a Bachelor of Arts degree	n= 22 59 36	n= 15 41 37	n= 37 100 36
Total	n= 61 60 100	n= 41 40 100	*N= 102 100 100

- Differences are significant when Chi square = 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .024

*NOTE

- N does not equal the total responding sample of 129 because:

- 1) 1 respondent did not indicate a sentence;
- 2) 20 prosecutors did not indicate their type of education;
- 3) 6 cases were missing.

Table C-19

Distribution of Respondents by Age
and Sentence Type (Short In, Long In):
Case 5 - Theft over \$200

AGE GROUP	Sentence Type		
	Short In	Long In	Total
Less than 30 years of age	n = 4 row % = 36 column % = 14	n = 7 64 14	n = 11 100 14
Greater than 31 years of age	n = 24 36 86	n = 43 64 86	n = 86 100 14
Total	n = 28 36 100	n = 50 64 100	*N = 78 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .0926

*NOTE

- N does not equal the total responding sample of 129
because:
- 1) 2 prosecutors did not indicate a sentence;
 - 2) 13 prosecutors gave a non-incarceral sentence;
 - 3) 36 prosecutors did not indicate a length of
incarceration or gave a range such as 4-8 months.

Table C-20

Distribution of Respondents by Number of Years spent in Legal Practice and Sentence Type (Short In, Long In) Case 5 - Theft over \$200

		Sentence Type		
		Short In	Long In	Total
NUMBER OF YEARS SPENT IN LEGAL PRACTICE	6 years or less	n= 8 row % = 24 column % = 30	n= 25 76 48	n= 33 100 42
	more than 6 years	n= 19 41 70	n= 27 59 52	n= 46 100 58
	Total	n= 27 34 100	n= 52 66 100	*N= 79 100 100

- Differences are significant when Chi square = 3.19, 1 d.f., $\alpha = .05$

- Calculated Chi = 1.7859

*NOTE

- N does not equal the total responding sample of 129 because:
 - 1) 2 respondents did not indicate a sentence;
 - 2) 2 respondents did not indicate the number of years spent in legal practice;
 - 3) 36 respondents did not indicate a length of incarceration or gave a range such as 4-8 months;
 - 4) 13 respondents gave a non-incarceral sentence.

Table C-21

Distribution of Respondents by
 Number of Years Experienced as a
 Prosecutor and Sentence Type
 (Short In, Long In)
 Case 5 - Theft over \$200

		Sentence Type		
		Short In	Long In	Total
NUMBER OF YEARS EXPERI- ENCED AS A PROSECUTOR	6 years or less	n= 6 row % = 21 column % = 22	n= 23 79 44	n= 29 100 37
	more than 6 years	n= 21 42 88	n= 29 58 66	n= 50 100 63
	Total	n= 27 34 100	n= 52 66 100	*N= 79 100 100

- Differences are significant when Chi square = 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = 2.81

***NOTE**

- N does not equal the total responding sample of 129 because:
 - 1) 2 respondents did not indicate a sentence;
 - 2) 2 respondents did not indicate number of years as a prosecutor;
 - 3) 36 respondents did not indicate a length of incarceration or gave a range such as 4-8 months;
 - 4) 13 respondents gave a non-incarceral sentence.

Table C-22

Distribution of Respondents by
Type of Education and Sentence Type
(Short In, Long In)
Case 5 - Theft over \$200

	Sentence Type		
	Short In	Long In	Total
Bachelor of Arts degree or less	n= 15 row %= 35 column %= 68	n= 28 65 70	n= 43 100 69
More than a Bachelor of Arts degree	n= 7 37 32	n= 12 63 30	n= 19 100 31
Total	n= 22 36 100	n= 40 64 100	*N= 62 100 100

- Differences are significant when Chi square
= 3.19, 1d.f., $\alpha = .05$

- Calculated Chi = .0194

*NOTE

- N does not equal the total responding sample of 129
because:

- 1) 2 respondents did not indicate a sentence;
- 2) 13 respondents gave a non-incarceral sentence;
- 3) 36 respondents did not indicate a length of
incarceration or gave a range such as 4-8 months.
- 4) 16 respondents did not indicate their type of
education;

BIBLIOGRAPHY

- ADVISORY COUNCIL OF JUDGES (1974) The National Council on Crime and Delinquency. Guides for Sentencing. 2nd. Ed. New Jersey: Hackensack.
- AMERICAN BAR ASSOCIATION (1968) Project on Minimum Standards for Criminal Justice. Sentencing Alternatives and Procedures. Washington, D.C.
- AUSTIN, W. and WILLIAMS, T.A. (1977) A Survey of Judges' responses to simulated legal cases: Research note on sentence disparity, The Journal of Criminal Law and Criminology, 68, 306-310.
- BARNETT, T. (1980) Study on Simulated Trials. Personal correspondence to Dr. Stan Davorsky, Senior Research Officer, Solicitor General, Canada.
- BENSING, R.C. and SCHROEDER, D. (1950) Homicide in an Urban Community. Springfield, Illinois: Charles C. Thomas.
- BLUMBERG, A.S. and SMITH, A.B. (1967) The Problem of Objectivity in Judicial Decision Making, Social Forces, 46, 96-105.
- BRANTINGHAM, P.L., BEAVON, D. and BRANTINGHAM, P.J. (1982) Analysis of Sentencing Disparity in Two Canadian Communities: Simon Fraser University, British Columbia, Discussion Draft.
- CANADA (1981) Solicitor General's Study of Conditional Release, Ottawa: Department of Supply and Services.
- CANADA (1981) The Canadian Constitution: A resolution adopted by the Parliament of Canada. Ministry of Supply and Services, Canada.
- DENNING, Sir Alfred (1955) The Road to Justice. London: Stevens and Sons Limited.
- DIAMOND, S.S. and ZEISAL, H. (1975) Sentencing Councils: A Study of Sentence Disparity and its Reduction, University Chicago Law Review, 43, 109-114.
- FRANKEL, M.A. (1973) Criminal Sentences: Law Without Order New York: Hill and Wang.
- GAUDET, F. (1970) The Sentencing Behaviour of the Judge in J. Hogarth, Sentencing as a Human Process. Toronto: University of Toronto Press, 7-8.

GAUDET, F. And Harris, G. (1933) Individual Differences in the Sentencing Tendencies of Judges, Journal of Criminal Law and Criminology, 23: 811-823

GOETZ, M.L. (1977) Criminal Law Reform Fund Policy Statement. Department of Justice, Canada. (Unpublished)

GOTTFREDSON, M.R. and GOTTFREDSON, D.M. (1980) Decision-making in Criminal Justice: Toward the Rational Exercise of Discretion. Cambridge, Mass.: Ballinger Publishers.

GOTTFREDSON, D.M. and STECKER, B. (1979) Sentencing Policy Models. Newark, New Jersey: School of Criminal Justice, Rutgers University. (Manuscript).

GOTTFREDSON, D.M., WILKINS, L.T. and HOFFMAN, P.B. (1978) Guidelines for Parole and Sentencing. Lexington, Mass.: Lexington Books.

GREEN, E. (1961) Judicial Attitudes in Sentencing: A Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia. London: Macmillan.

GREEN, E. (1964) Inter and Intra-racial crime relative to Sentencing, Journal of Criminal Law, Criminology and Police Science, 55, 348-358.

HIMELFARB, A. (1980) Appeal Court Study: Principles and Factors. Department of Justice, Discussion Draft.

HOGARTH, J. (1971) Sentencing as a Human Process. Toronto: University of Toronto Press.

HOOD, R. (1962) Sentencing in Magistrates Courts: A Study in Variation in Policy. London: Stevens.

HOOD, R. and SPARKS, R. (1970) Key Issues in Criminology. New York: McGraw-Hill Book Company.

JAFFARY, S.K. (1963) The Sentencing of Adults in Canada. Toronto: University of Toronto Press.

JAROS, D. and MENDELSON, R.I. (1967) The Judicial role and sentencing behaviour, Midwest Journal of Political Science, 472, 850-869.

JOHNSON, G. (1941) The Negro and Crime. The Annals American Academy of Political and Social Sciences, 55, 348-358.

KRESS, J.M. (1980) Prescription for Justice. The Theory and Practice of Sentencing Guidelines. Cambridge Mass.: Ballinger Publishers.

- MOSER, C.A. (1958) Survey Methods in Social Investigation. London: Heinemann Ltd.
- NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE (1976) Sentencing Guidelines: Structuring Judicial Discretion. Washington, D.C.
- NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE (1978) Multijurisdictional Sentencing Guidelines Program Test Design. Washington, D.C.
- O'DONNELL, P., CHURGIN, M.J. and CURTIS, D.E. (1977) Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. New York: Praeger Publishers.
- OPPENHEIM, A.N. (1966) Questionnaire Design and Attitude Measurement. London: Heinemann Ltd.
- PALYS, T.S. (1980) Beyond the Black Box: A Study in Judicial Decision-Making. Prepared for the Research Division of the Solicitor General of Canada.
- PARTRIDGE, A. and ELDRIDGE, W. (1974) The Second Circuit Sentencing Study. Washington: U.S. Federal Judicial Centre.
- POPE, D. (1976) The Influence of Social and Legal Factors on Sentence Disposition: A Preliminary Analysis of Offender - Based Transaction Statistics, Journal of Criminal Justice, 4, 203-221.
- SELLIN, T. (1935) Race Prejudice in the Administration of Justice. American Journal of Sociology, 41, 212-217.
- SELLTIZ, C., DEUTSCH, M., JOHADA, M., and COOK, S.W., (1965) Research Methods in Social Relations. London, England: Methuen and Company Ltd.
- SHOHAM, S. (1966) The Procedure and Sentencing Powers of the Criminal Courts in Israel, cited in J. Hogarth, Sentencing as a Human Process. Toronto: University of Toronto Press, 166-189.
- SIMON, J.L. (1978) Basic Research: Methods in Social Science. New York: Random House.
- SMITH, A.B. and BLUMBERG, A.S. (1967) The Problem of Objectivity in Judicial Decision Making, Social Forces, 46, 96-105.

SUTTON, L. (1978) Variations in Federal criminal sentences:
A Statistical Assessment at the National Level
cited in D.M. Gottfredson and M.R. Gottfredson,
Decisionmaking in Criminal Justice: Toward the
Rational Exercise of Discretion. Cambridge,
Mass.: Ballinger Publishers, 182-183.

TIFFANY, L., AVICHAJ, Y. and PETERS, G. (1975) A
Statistical Analysis of Sentencing in Federal
Courts: Defendants convicted after Trial,
Journal of Legal Studies, 4, 369-380.

THOMAS, D.A. (1979) Principles of Sentencing, 2nd ed. Great
Britain: The Chaucer Press.

USA. (1976) Fair and Certain Punishment: Task Force
Report. New York: McGraw-Hill Book Company.

WALLER, I. and OKIHIRO, N. (1979) Burglary: The Victim
and the Public. Toronto: University of Toronto
Press.

WHEELER, S. (1968) Controlling Delinquents. New York:
Wiley and Sons.