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CONFLICT THEORY AND CAPITAL PUNISHMENT:

AN EMPIRICAL ASSESSMENT OF THE USE OF THE DEATH PENALTY IN CANADA, 1946 TO 1952

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SUMMARY

The view that society is a composite of competing interest groups engaged in a struggle for power, and that society's institutions, but particularly the law, are ultimately controlled by the more powerful groups to protect and further their interests, has received considerable support. Empirical studies of the law, through the various stages of enactment and enforcement, have added weight to this conflict view of society by demonstrating that the law favours the interests of the powerful, and that its burden falls disproportionately on those groups which exercise least power in society.

In this study, the use of the death penalty in Canada is examined within the framework of conflict theory, the hypothesis being that those who are executed can be differentiated from those who are commuted on the basis of extra-legal attributes. Theoretical background for the study is established with an historical overview of the theoretical development of consensus and conflict explanations of the role of law in society, and a review of the empirical research on conflict theory. Extensive empirical research on the use of the death penalty in the United States, providing overwhelming evidence of racial

discrimination in its application, is also reviewed, and the evolution of death penalty legislation in Canada, up to its abolition in 1976, is described.

The study comprised an examination of 109 capital cases presented to Cabinet for a decision as to execution or commutation during the period 1946 through 1952. Information on legal and extra-legal characteristics of these cases, relating to the offence, offender and victim, together with recommendations made by the jury, the judge, the Department of Justice and the Minister of Justice, were obtained from Order in Council documents, maintained in the Public Archives.

Cross-tabulation analysis provided an aggregate description of the outcome of these capital cases in relation to these various characteristics. Bivariate correlation analysis showed that a number of legal and extra-legal characteristics were significantly related to the final disposition. This analysis also revealed that, while the final decision was significantly related to the recommendations of all parties, the relationship was lowest for the jury, systematically increased with each successive party, and was invariably related to the recommendation of the Minister of Justice.

Multiple regression analyses were conducted separately on offence, offender and victim characteristics to determine the relative contribution of characteristics within these categories to the explanation of variance in the final decision. A further regression was conducted on those characteristics which had explained at least 1% of variance within their own category. This final regression indicated that the greater part of variance in the final decision was explained by legal characteristics, with the presence of mental abnormality being the most highly contributing factor. Among the extra-legal characteristics, European ethnicity on the part of the offender was the only factor which made any meaningful contribution. All of the legal and extra-legal characteristics together explained approximately one-third of the variance in the final decision.

Some methodological and conceptual limitations are discussed, relating to the size of the study, and the unavailability of information for all cases.

It is argued that, notwithstanding the finding that legal characteristics appeared to play the most important role in the decision, there are a number of indications that the use of the death penalty during this period can be explained within a conflict theory model. The large amount of

unexplained variance, even after legal factors had been taken into account, suggested that extra-legal considerations not apparent from the documentation were important.

It is proposed that Cabinet relied heavily on the recommendations of the judge and the Department of Justice, and accepted without question the recommendation of the Minister. It can be reasonably assumed that these judicial, bureaucratic and political parties shared the political interests of the state, and be expected to make a recommendation which met with the state's view on the use of the death penalty. The recommendations themselves were based on a selective and subjective interpretation of information, not all of which was necessarily included in the written documentation.

We should expect, if society is consensus-based, that rules would be applied, and that decisions would be made in a manner which is verifiable by the observer. The extensive use of rule by exception and invisible decision-making enables the state to avoid outcomes which would not meet with political interests, and adds support to the conflict model of society.

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CHAPTER 1

LAW IN SOCIETY: CONFLICT OR CONSENSUS

One of the questions that has interested people from almost time immemorial has been the purpose of the law and how its substance is determined. With the roots of the law traced to the customs and mores governing the lives of individuals in primitive societies, the law has been viewed as those rules of conduct which define the manner in which people should so organize their activity as to ensure, firstly, peace and tranquillity, but secondly, and perhaps more importantly, their continued existence as a group.

One of the earliest modern political philosophers concerned with the nature of society in relation to its members, particularly in terms of the common rules that develop, was Jean Jacques Rousseau. In his famous 1762 work The Society Contract, Rousseau proposed that the conventions of society are a form of contract among all members, by which each member subjugates his individual interests to the common will. In his words:

> "Each of us places in common his person and all his power under the supreme direction of the general will; and, as one body, all receive each member as an indivisible part of the whole"(26: p.15).

Although his conceptualization of society was a form of social contract in which individuals were required to relinquish some of their interests for the common good, Rousseau believed that social organization was a natural development in which the relinquishment of interest was an unconscious act designed to ensure, and always resulting in, the greater interest of the individual. He did not see it as a sacrifice which members made as a trade-off, which would make the social contract a necessary evil. In Rousseau's view, all members of society were equal and consequently equally capable of safeguarding their own interests when conflicting interests demanded some form of resolution. Social contract produced the resolution without upsetting the social balance and without placing different groups in dominant-subordinate relationships.

This line of thinking received its most profound and influential contribution from Emile Durkheim(12). He contended that the law represented the morality of collective society and as such was ultimately right and just. The morality of the collective society had its roots in a social solidarity which could have been, on the one hand, a mechanical one in which all members were alike and consequently replaceable by each other or, on the other hand, an organic solidarity in which members were different,

but nonetheless important and equal components of the total, in that the functions of the one complemented the functions of the other, to enhance maintenance of society as a composite whole. Conflict, he contended, was inevitable in either form of society. It was actually necessary and desirable for the integrity of society because it helped to reinforce the collective norms and the social morality. Social solidarity, consequently, was the outcome of society's reaction to social conflict. It resulted, however, from a kind of compromise resolution of conflict rather than from a victory resolution which would have placed one or some groups in a dominant position. The social institutions, including the law, did not, in Durkheim's conceptualization, represent the interest of some groups over those of others.

Roscoe Pound, a prominent philosopher during the first half of this century and one of the founders of the American school of sociological jurisprudence, also believed in the inevitable presence of conflict in society. As a response to this conflict, he asked whether "the end of law (is) anything less than to do whatever may be achieved thereby to satisfy (individual) human desires?"(22: p.46). After examining the evolution of legal philosophy since the time of the 5th century B.C., Pound concluded that the purpose

of law is that "... of satisfying as much of the whole body of human wants as we may with the least sacrifice." He went on to say that he was content to see law as

> "the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence - in short, a continually more efficacious social engineering." (22: p.47)

Pound recognized the various distinct interests in society which could overlap and compete, but was confident in the law's ultimate ability "to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands . . ."(21: p.39). Pound's view of the law, then was that while it had not yet reached its full potential for ensuring human satisfaction, it was essentially right and just. It operated ultimately in the best interests of all members of society, rather than to the advantage of some groups at the expense of others, and represented general agreement about what the law should be. This perspective can be described as the consensus theory of law.

Very simply described, consensus theories are those which hold that there is fundamental agreement among society's members as to the goals of society and the rules necessary to facilitate individual pursuit of these goals. Thus, the social arrangements developing from these rules reflect a consensus-based society, and the rules defining acceptable behaviour are a natural and necessary development from these arrangements. The role of power among societal members or groups is not regarded as an important influence on how society develops or operates. A consensus theorist today usually acknowledges some inequalities in the law and in social arrangements as they presently exist, but regards these as imperfections which will right themselves as society further evolves, rather than as fundamental deficiencies.

The consensus model of law, and the consensus explanation of crime, have been increasingly challenged over the past century, in favour of a conflict explanation of law and deviance.

Conflict theories propose that conflict is inherent in society, and that it derives from structural divisions and, as such, cannot be resolved through further refinement of the present system. For historical, social and economic reasons, according to conflict theorists, society is not

ultimately integrated or unified. Members of society form relatively distinct groupings according to their circumstances. As circumstances between individuals or the groups to which they belong are not equally advantageous or desirable, the inevitable result is that those who are more advantaged seek to maintain this advantage and accompanying status, while the less advantaged seek to attain better circumstances and status. This situation generates a conflict in which each group strives for dominance over other groups.

In this struggle, the law, together with other formal social institutions, is used as the instrument by which the dominant group or groups can maintain their position. They are able to influence and control what society defines as acceptable behaviour, and what the rules of behaviour should be, in such a way as to ensure that the law serves to uphold their interests and, by consequence, to uphold the existing differential power structure in society, rather than to rectify inequalities.

The roots of the conflict perspective of social order are generally traced to the 18th century, to the writing of Cesare de Beccaria, although suggestions of the theory can be found much earlier in, for example, the work of Thomas

More. Beccaria was deeply aroused by what he regarded as political immorality, corrupt institutions and bad laws, all resulting in large scale injustices and wretchedness which, in his view, abrogated the concept of social equality that constituted the base of the social contract. In his famous 18th century Essays on Crimes and Punishment(1), he suggested reforms to the system of criminal justice which would overcome the capricious and purely personal justice of the time. His reforms were designed to restore the equitable state envisaged by social contract. His focus on the unequal distribution of power, the injustices of the prevailing institutions, and social inequality generally, gave his work the unquestionable flavour of an early conflict theorist.

It was during the 19th century that the conflict model was given the necessary theoretical base, firstly through the writings of Karl Marx, but more significantly for law and justice, with the work of Friedrich Engels. With the exception of a section on rights, crime and punishment in The German Ideology(17) which he wrote with Engels, Marx's writings only indirectly bear on the problem of deviance and criminal behaviour in society. However, his work suggests that he viewed crime as a functional by-product of capitalist society, in that it helped to maintain division

of labour and the occupational structure of capitalism.

Engels dealt with the problem at some length in The Condition of the Working Class in England in 1844(13), and his analysis was strongly influenced by Marx's contemporary analysis of political economy and the role that capital and labour played in determining the structure and nature of society. Engels placed the blame for the increasing social disorder and crime on the collapse of individual humanity and dignity, which he attributed to the brutal, impersonal and demoralizing nature of capitalist industrialization. His views on the nature of human behaviour and how it reacts to social conditions were clearly influenced, according to some, by Robert Owen's writings on the human character, earlier in the century(19: p.50) Engels further believed that capitalism, or free competition, forced individuals to fight for themselves against all others and, of even greater social consequence, created a 'social war' between the bourgeoisie, or the owners of production, on the one hand, and the proletariat, or the workers, on the other. This war of

> "all against all, of the bourgeoisie against the proletariat ... manifests itself symptomatically ... in the form of crime." (13: p.132)

The next notable contribution to conflict theory in relation to crime was made by Willem Bonger, in Criminality and Economic Conditions, written during the last part of the

19th century and first published in 1905(3). Bonger espoused the view of Marx and Engels that capitalism necessarily created divisions in society, that the capitalist class was dominant over the working class, and that the interests of these two groups were in opposition. His explanation of law was essentially that criminal acts were those which were considered to be immoral, immoral behaviour being that which was prejudicial to the interests of the group or society. The dominant class, given its powerful position, was able to ensure that those acts prejudicial to its interests were defined by society as criminal.

His explanation for criminal behaviour was, in part, very similar to that of Engels, in that he believed capitalism nurtured an egoistic rather than an altruistic character. In his view, such factors as poverty, inequality, alienation and the disorganization of family life among the working classes impeded moral development. The lack of moral development, in turn, together in many cases with absolute need, was the cause of criminal behaviour. The necessary and inevitable lack of morality in a capitalist society was also able to explain crime among the dominant class.

Bonger's work is regarded as an important contribution to conflict theory because of its basis in Marxist theory, its incorporation of Engel's view of the corrupting nature of capitalism, and its lengthy and detailed attention to the effects of capitalism on social conditions and human behaviour. However, it is regarded as falling short of true conflict theory in that it did not really attempt to explain how the actual content of the law, i.e. the specific acts defined as criminal, served to maintain power and social control within the dominant class.

During the first half of the 20th century, conflict theory was given little if no attention in the western world. In part, this can probably be attributed to the subsuming of economic explanations of crime into consensus theory. However, it is probably due, in even larger part, to the academic commitment to positivism and empirical social science which, in the case of criminological theory in particular, was not unrelated to the essential contradiction between conflict theory and the capitalist ideology prevailing in the west.

In 1958, the first criminological work to accord a significant place to social conflict as a cause of crime appeared. In Theoretical Criminology, George Vold, in

explaining how laws develop, proposed that

> "politics ... is primarily a matter of finding practical compromises between antagonistic groups in the community at large" (31: p.208),

where these groups do not have equal voice in determining the compromise that is reached. According to Vold

> "(w)hichever group interest can marshal the greatest number of votes will determine whether or not there is to be a new law to hamper and curb the interests of some opposition group",

and he suggested that

> "the whole process of law making, law breaking, and law enforcement becomes a direct reflection of deep-seated and fundamental conflicts between interests groups and their more general struggles for the control of the police power of the state." (31: pp.208-9)

Despite these strong words, Vold did not believe that all outlawed behaviour could be attributed to this political process. However, he did suggest that a great deal of crime, such as labour violence and racial protests, was a direct manifestation of social conflict, and he clearly recognized the existence and significance of the power struggle among competing interests.

In the following year, Ralf Dahrendorf presented a strong attack on the consensus model, and proposed an alternative conflict model(8). Dahrendorf was primarily

concerned with explaining stratification and the accompanying power struggles in society, which he believed were not and could not be explained by consensus theory. He proposed, in fact, that the assumptions underlying the consensus model were completely lacking in realism and based on a Utopian view of society(8: p.119). In his view, society is rooted in conflict which produces constant change, and social cohesion rests on coercion and control. He argued that in order for there to be effective coercion, there must be differential power and authority distribution in society(9: p.165). Dahrendorf proposed that the existence of norms and sanctions in society illustrated this existing unequal distribution of power and inequality of rank. The formulators and enforcers of the law necessarily have more power and authority than those against whom the law is enforced, and this greater power enables them to establish the norms of their own group as the rules for society as a whole. The act of sanctioning for breaking these norms leads to a loss of rank, and a consequently lower status and power.

> "In the last analysis, established norms are nothing but ruling norms, i.e. norms defended by the sanctioning agencies and those who control them." (10: p.174)

In his view then, norms were imposed rather than accepted, and the resulting reduced status for those not in the norm setting group provided the roots of stratification and inequality. This produces a society characterized by inevitable and permanent conflict, as those groups less favourably placed in society seek to gain power in order to be able to establish their own norms as social rules.

In arguing that society was rooted in conflict, Dahrendorf suggested at the same time that this conflict was not only functional as a means of cohesion, but it could also be beneficial to society by provoking creativity, innovation, and development in the individual as well as society(9: p.208). This aside, however, unequal distribution of power, and coercion through legal and other institutions, remain.

One of the most significant contemporary western advocates of conflict theory is Richard Quinney, who has developed a theoretical framework which attempts to provide "an understanding of crime that is relevant to our contemporary experiences"(23: p.3). According to Quinney, modern society is made up of various segments, each with its own ideological orientation, values and norms, producing survival and welfare interests different from those of other

segments. Each segment may be defined as an interest group, and society is thus characterized by a differential interest structure, which provides the basis for political life. There is an unequal distribution of power and conflict across this interest structure, and the state, through public policy, represents the interests of those who command the greatest power to influence policy formation.

> "In this conflict-power model, ... politically organized society is held together by conflicting elements and functions according to the coercion of some segments by others." (23: p.23)

According to Quinney, the law is that part of public policy which regulates the behaviour of society, not only through the formation of laws, but also through their administration, which is largely discretionary. As public policy is determined by the most powerful interest groups, the law regulates behaviour in such a way as to secure the interests of these groups at the expense of others.

This view of the current political system and of social control has support in the historical development of the state, whereby the functions of policy formation and administration of justice were acquired by the state.

In Greece, criminal law began to develop in the 6th century B.C., when every citizen was given the right to

prosecute in the event of certain offences. Previously, all such action was exclusively the right of the hereditary ruling aristocracy, and all others were politically subjugate, either absolutely or perhaps with some right of participation if they were attached to the aristocracy. As the politically impotent groups gained economic strength, they became increasingly discontent with their impotence, and the aristocracy, in order to avoid either revolution, on the one hand, or tyranny on the other, instituted reforms to allow broader political participation and the right of all citizens to redress wrongs through popular courts.

In Rome, the concept of criminal law developed slowly. During the 5th century B.C., the law of the Twelve Tables recognized the right of injured parties to seek private vengeance, but also gave the state the right to inflict punishment for crimes against society. As Rome developed into a more complex organization, with increasing social tensions resulting from the growth of the urban proletariat and the slave population, it was apparent that more vigorous measures to maintain order were necessary. During the 3rd and 2nd centuries B.C., a central jurisdiction and tribunals were established to control activities such as violence, treason, arson, poisoning, theft of state property and the carrying of weapons, all of which were seen as potentially

threatening to the state. Roman criminal law thus developed to quell inter-group conflict and ensure the maintenance of the state, rather than to protect individual rights.

In very early times in England, where the historically recent precursors of our current system of justice are to be found, the function of ordering social life and controlling social behaviour, to the extent that this was necessary, was exercised at the local, tribal or community level. Wrongs that occurred against individuals were considered to be against the family or kinship group, and any revenge or atonement was meted out by and within these groups, often in the form of a blood feud. By the 10th century, England was structured into a number of kingdoms. Responsibility for righting wrongs was taken from the family or tribe, and absorbed by the kingdom, and private revenge was replaced by compensation to the offended kinship group. This process of centralizing control was completed in the 11th century, when William the Conqueror unified England, redistributed the land, and placed all social relationships on a land tenure basis. By the end of Henry II's reign in 1189, a court of "common law" to ensure common justice was in place, a central body of laws and administration had emerged and, for the first time, some offences were regarded as a violation of the peace of king and country rather than an offence by

one individual or group against another. These dramatic changes in social order introduced potentially enormous benefit for individuals and groups in that lesser placed groups were no longer at the complete mercy of their landlords. At the same time, however, given the inherent conflict produced by differential power relationships, the centralizing of control under the king or state, and the introduction of criminal law, institutionalized the possibility that one group could use the state to protect and extend its interests while other groups could be denied this opportunity, even at the same time as they were denied the right to take private action to rectify wrongs(23: pp.47-49).

In England, following the centralizing of all legal activities under the King, criminal law became increasingly used as a means of regulating behaviour, and an examination of some of the laws which were formulated illustrates, according to Quinney, that they represent values and interests of those groups which had the power to influence public policy. This regulation of behaviour to protect certain interests extended beyond Britain's borders as England began to colonize the Americas, India and Africa.

In America, for example, prior to Independence, England had invoked its own treason and sedition laws to suppress

anti-British activities and criticism. Following independence, the preservation of the British style of political order was assured through enactment of treason and sedition laws which were almost identical to corresponding laws in England. Attempts to change the economic and political institutions inherited from England were in this way legally constrained.

The Sunday laws provide another example to Quinney of how the law is used to maintain the existing order and promote differential interests. The biblical command to keep holy the Sabbath was first given legal status by Constantine in 321 A.D., when he ordered all work to cease on that day. In England, laws regarding the Sabbath can be traced from 1237, when Henry III forbade attendance at market. Over the next 400 years, numerous activities were banned on Sunday, all relating to commercial activity, labour and amusements. In 1677, under Charles II, the concept of keeping holy the Sabbath was extended to include compulsory church attendance. Similar laws were enacted in the American colonies, as early as 1610 in Virginia. The purpose of these laws was to ensure the continuation of the churches' role in society. Quinney examines a number of court cases involving violation of the Sunday laws in America, and amendments to the laws in various U.S. States

up to 1961, when the Supreme Court ruled that the Sunday laws no longer retained any religious significance and were of strictly secular character. In reaching its decision, the Court acknowledged that recent amendments to the Sunday laws clearly served economic purposes, and resulted from pressure from labour groups and commerce associations. Quinney is able to conclude, then, that the Sunday laws illustrate how law responds to different and changing social interests.

Another area of legislation cited by Quinney to illustrate how the law responds to competing social interests is that of theft. The origins of theft as a legal concept have been documented by Jerome Hall in Theft, Law and Society(16).

Prior to 1473, in England, the legal concept of theft was much narrower than is the case today. It was an incident known as the Carrier's Case which led to a significant expansion of the larceny law of the time. The Carrier's Case involved theft of the contents of bales which the defendant had been hired to transport to Southhampton. Until that time, common law held that larceny must include trespass, i.e. taking of property from one in possession of it, and that trespass could not occur if the person was already in possession of the property. In the Carrier's

Case, a departure from the precedents and rules of common law was introduced with the decison that the breaking of the bales terminated the contract between the defendant and the complainant. The bales thus reverted to the possession of the owner, and the removal of their contents constituted trespass.

In order to understand why this common law departure occurred, Hall turned to the political, social and economic conditions of the time. One contributing factor, according to Hall, was that the King, Edward IV, was himself a merchant, and the new interpretation was therefore in his interests. As the courts at that time were subservient to the Crown, the Crown's interests were under their protection. A more significant but related contributing factor, however, was the changing economic conditions. It was at this time that England and Europe were evolving from a feudal to an industrial economy, based on industry and commerce, giving rise to a new mercantile class. The textile industry was the most important industry of the time, involving extensive trade between England and Europe. In the Carrier's Case, given the known facts, Hall reasonably hypothesized that the bales in question contained wool and/or cloth and that the complainant was a foreign merchant, and he suggested that "the interests of the most

important industry in England were involved in the case"(16: p.31). The Carrier's Case decision can thus be interpreted as a necessary legal change for the protection of new and important economic interests.

In Quinney's view, and others share this view, the modern political state has evolved even further, such that many of the functions traditionally held by the state since its emergence have today been taken over by certain powerful groups. He cites Wolfgang Friedmann, who questions whether the modern power of some highly organized groups has rendered the state's legal power merely symbolic. In Friedmann's words:

> "If this is a correct interpretation of the social change of our time, we are witnessing another dialectic process in history: the national sovereign State - having taken over effective legal political power from the social groups of the previous age - surrenders its power to the new massive social groups of the industrial age"(14: p.239-40).

Quinney clearly believes this analysis to be accurate. He suggests that in this new order, a private government operates behind public politics "in a way that not only guarantees rewards to well organized groups, but affects the lives of us all"(23: p. 41).

The development of anti-trust laws in the United States serves as an illustration. According to Quinney, the growth

of the antimonopoly movement was clearly in response to increasing threats to the prevailing capitalist free enterprise system. The opposition to monopolies came from a number of diverse groups, including labour - which found that it was at a disadvantage in bargaining with large corporations, small businesses - which feared for their survival, and the agricultural sector - which blamed the growth of large corporations for declining farm prices. The eventual result was the Sherman Act of 1890, which outlawed trade restraint and monopolies. This act was innovative not only in its substance, but also in the fact that it represented a departure from the traditional scope of criminal law, to now include support of a particular kind of economy. The purpose and effect of the law were not to alter the existing economic order, but to protect it, by reducing its negative effects on less powerful but nevertheless not inconsequential economic groups, and thereby reduce challenges to the existing order. The expansion and more vigorous enforcement of antitrust laws continued over the following years, leading to even greater state intervention in business practices with Franklin Roosevelt's New Deal Measures. In contrast to the commonly held view of Roosevelt as a socialist, Quinney suggests that Roosevelt was an economic conservative, and cites support

from Morison and Commager. In part, they propose:

> "Indeed it is certain that the New Deal did more to strengthen and to save the capitalist economy than it did to weaken or destroy it ... it saved the system by ridding it of its grosser abuses and forcing it to accommodate itself to larger public interests"(20: p.630).

The area of food and drug legislation in the United States provides another illustration for Quinney of the development of legislation in response to interest group pressure, in this case the conflicting interests being private and public. Between 1880 and 1906, when the Federal Food and Drug Act was enacted, over 150 pure food and drug bills were defeated in Congress as a result of opposition lobbying from various organized food and pharmaceutical interests. Over the next 56 years, until a bill to secure stricter testing, labelling and advertising provisions was successfully introduced in 1902, a number of bills to tighten standards were introduced, a few of them successful. All of these attempts, however, were met with large scale and organized opposition from the corporate food and drug interests, who were intent on stalling regulation by any means, even though they could not support their opposition with sound ethical arguments(23: pp.77-82).

The development and enforcement of vagrancy laws is yet another demonstration of how the law is used to protect certain interests. Vagrancy was first outlawed in England in 1349, when it was made a crime to be able-bodied and unemployed. The purpose of this law, according to Chambliss(5), was to ensure sufficient landlabour at a time when feudalism was breaking down and there was a shortage of labour. As the economy evolved more towards industry and commerce, and the enforced supply of land labour became unnecessary, the vagrancy statutes were rarely invoked. In the 16th century, however, they were revived, but with a different focus. By this time, a more significant social/economic problem was the "roadmen" who made the transportation of goods dangerous. These people became the focus of the vagrancy laws, in order to ensure safety in the economically important commerce industry. Thus, the same law first served to protect the interests of the powerful landowners in feudal England and subsequently served to protect newly powerful commerce interests in the newly industrialized England.

Another set of laws cited by Quinney in support of his interest theory are the sexual psychopath laws in the United States. He suggests that these laws developed in response to growing social concern over an apparent increase in sex

crimes during the 1940s and 1950s. This general social concern was channelled into organized action groups, typically led by psychiatrists, who proposed that sexual crimes were the result of emotional or mental pathology, and that the offender therefore needed to be treated for this illness. The sexual psychopath laws, enacted in more than half of the States during the late 1930s through the 1950s, generally provided for indefinite detention in a mental hospital for the purpose of treatment. A lesser interest being served through these laws was the legitimizing and strengthening of the psychiatrist's role in society. The larger social interest being met, however, was that of reinforcing the fashionable medical model of criminality, by which all offenders were regarded as sick persons in need of treatment. Despite the widespread readiness to enact such laws, there was at the same time a reluctance to enforce them. Sutherland, in his analysis of the development of sexual psychopath laws, offers a number of reasons for this, including the relief of social panic as a result of their enactment and hence a reduced demand for action, the lack of psychiatric hospital facilities, and the reluctance of the courts to view offenders as patients(28). In the case of these laws, then, their formulation was in response to a clearly identifiable social interest, although this interest

was to some extent bypassed in their application because of conflicting social priorities.

Finally, Quinney turns to the broad area of social and sexual conduct. According to Quinney, a wide range of behaviour, including homosexuality, abortion, adultery, prostitution and drug consumption all reflect moral principles which are offensive to the majority of society, and the law has been invoked to control these behaviours, thereby maintaining and reinforcing the moral principles of particular social groups.

There are a number of other studies of the law making process, other than those described by Quinney, which add support to the position that the legal system operates in response to competing and changing interests in society, and that laws reflect the ideology and interests of the more powerful group(s).

The interplay of various interests was stressed by Edwin Schur prior to Quinney, in his examination of law making in society. Schur proposed that "... the formulation of law is a political process ... in which individuals attempt to gain, limit, escape or resist power"(27: p.39).

The complex influence of conflicting interests in shaping the law has been of particular interest to Chambliss, who emphasized the dynamic nature of the process of law making within a conflict context. In his view, the structural or class-based society, and the inevitable competing interests, make a situation of conflicts and contradictions, out of which there is a struggle for social and legal change. The interests of the ruling class usually emerge successfully from this struggle.

> "The more general point is that the creation of law reflects a dialectical process, a process through which people struggle and in so doing create the world in which they live. The history of law in capitalist countries indicates that in the long span of time, the capitalists fare considerably better in the struggle for having their interests and views represented in the law than do the working classes; but the shape and content of the law is nevertheless a reflection of the struggle and not simply a mirror image of the short-term interests and ideologies of 'the ruling class' or of 'the people'." (6: p.24)

In an analysis of the revision of New York's laws on prostitution during the late 1960s, Roby illustrates the influence of interest groups during the different stages of legislative drafting, passage and enforcement(26). Of particular significance was how certain groups can enforce their interests even in spite of legislation. For example, the proposal to include patronage of a prostitute as an offence was eventually included in the final version of the

bill after considerable controversy and lobbying; however, despite a large increase in the number of arrests of prostitutes after introduction of the law, the number of customers arrested was negligible. Roby's analysis strongly supports the contention that the process of law making is a political process in which various interest groups seek to exercise power through legal protection of their interests, either by enactive or selective enforcement.

Dickson analysed the role that the U.S. Bureau of Narcotics played in the process by which drug use was made illegal after 1914 and became the focus of widescale enforcement(11). The activities of the Bureau, including media campaigns which generated considerable outcry against narcotics and marijuana use where none had previously been heard, and lobbying to ensure passage of the 1937 Marijuana Tax Act which greatly increased its sphere of jurisdiction, suggest that the Bureau's commitment to preventing drug use was not moral but rather a means of obtaining additional organizational power and funds and ensuring its survival and expansion.

In this country, Cook similarly undertook an analysis of the development of Canadian narcotics legislation(7). Her review suggested to her that the narcotics laws clearly reflected the interests of certain groups. The overt

rationale for criminalizing narcotics use was the harm they caused. The most dangerous drugs, however, were actually patent medicines, predominantly used by the middle classes, and these were excluded from the legislation, while the most severe penalties were reserved for opium, at that time used almost exclusively by the socially inferior and powerless Chinese.

There have recently been a number of studies which have undertaken to empirically test, either directly or indirectly, the conflict hypothesis, by examining the operations of the legal system in regard to either the way in which legislation is enacted to control certain behaviour, or the consistency with which existing legislation is enforced in the courts.

In California, Berk, Brackman and Lesser(2) examined changes in the State's Penal Code over a number of years, in order to identify the forces that shape criminal law, and thereby empirically evaluate the various theoretical perspectives, including the consensus and the conflict models, that are proposed to explain the sources of criminal law.

They propose that four separate but interactive factors shape criminal law: the social structure, values and beliefs, bureaucratic interests, and the legislative

process. The question of concern to them, then, was the particular interests reflected by these factors in their influence upon the law, and the relative importance of each. They firstly examined the politics of criminal law making, using a qualitative approach, by analysing the history of significant bills before the California State Legislature during 11 consecutive sessions from 1955 to 1971. They found that over this 16 year period, the legislative process saw a number of changes. These included the entrance of a wider and more diverse range of groups into the lobbying process, a greater ideological polarization between liberals and conservatives, and a back and forth swing between liberals and conservatives in terms of the ideological intent of legislation enacted during this period.

They also quantitatively analysed almost 700 revisions to California's Penal Code during the same period, categorising each revision in terms of its intent or target - the four possible broad target areas being behaviour (e.g. outlawing firearm possession), the role of system functionaries (e.g. broadening police powers), clients of the system (e.g. extending the criteria for bail), and general non-specific (e.g. making existing legislation more efficient). They looked at how these revisions affected the

extent of criminalization of behaviour and the severity of penalties, as well as the various factors that influence legislative decision-making - both internally (party control, lobbying etc.) and externally (crime rates, public opinion, the media etc.).

They concluded from their qualitative study of the legislative process that the actors involved were motivated by short-term self interests rather than a clear ideological approach to the role of criminal justice, and that the legislative process, if viewed in isolation, supports the pluralistic view of society, in that no single group or force dominated. However, the authors suggest that while their qualitative and quantitative information do not clearly demonstrate that powerful interests in society are able to shape and influence the law, it is nevertheless the case that those actors or groups who have influence are generally in support of the existing system. They conclude:

> "The process of ... change has not favored any narrow lobby group or particular political perspective within the range represented by contending legislative factions. However, to the degree that State power has been enhanced, the larger interests it most immediately represents have new tools with which to shape society"(2: p.300-301).

In Canada, Reedie(24) examined the treason and sedition laws from their codification in 1892 through to the present. Within the context of prevailing social and economic conditions, she analysed changes to the definition of these offences and their penalties, as well as circumstances pertaining to offences charged under these laws. She was able to demonstrate, in each criminalization change, as well as 'instances of enforcement', almost without exception, that the interests of one or more dominant group were being served. She concluded from this evidence that the enactment and enforcement of these laws provided support for the conflict model of law, not only in terms of the formal process of criminalization but also in application.

A recent study in the United States demonstrates the complexity of societal forces and interests, and the need to examine events within their social and political context. Hagan and Bernstein examined the sanctions imposed on draft resisters during the period 1963 through 1976, from a conflict theory perspective(15). They identified two periods of coercive and cooptive social and political control during this time, distinguishable by the means used to enforce draft registration. In addition to examining court records and dispositions of 283 defendants, they made

a content analysis of newspaper articles and editorials on draft resistance and reform activities. The criteria they used to determine support for the conflict model were race and type of resistance. They found that draft resisters who were both white and activists were singled out for severe sanctioning during the period of cooptive control. They concluded that the societal response to draft resisters could be explained from a conflict perspective, taking the prevailing social and political contexts into consideration.

More limited support for the conflict theory comes from a recent study by Carter and Clelland(4). Rather than the traditional conflict perspective which predicts class bias regardless of type of offense, they proposed a neo-Marxian theory which would distinguish between the relative impact of two offence patterns - traditional crimes against the person and property versus crimes against the moral order, status offenses and victimless offenses - on the social relations of production. They hypothesised that for person or property offences, the severity of sentence would be no greater for juveniles from the unstable working class than for those from the stable working class, but that for status or victimless offences, the sentence would be more severe for juveniles from the unstable working class. Their findings, obtained by analysing 350 juvenile court records,

generally supported their hypothesis, i.e. that class difference is a more significant variable in the sentencing of status offences than for traditional person and property offences.

A recent study in Halifax by Warner and Renner(32) looked at the extent to which court operations reflect equality. They collected information on over 1000 criminal cases before county and magistrates courts, excluding only driving charges. Their data, firstly, illustrated the selective nature of enforcement. Only certain behaviours, committed by certain individuals, were typically considered to merit an offence charge, even though these may be less costly to society than others, e.g shoplifting versus store overpricing, petty theft versus expense account abuse. The defendants in this study were far from representative of their immediate society - 73% under 25, 61% with less than 10th grade education, 83% single, 88% male, 28% living in low-income districts (i.e. districts with 40 times more low-income residents than the remainder of the city), 49% unemployed, and 15% black (seven times greater than their city population proportion). They conclude that

> "criminal law falls heavily on persons who lack resources and who do not have important, or secure, social and economic positions". (32: p.4)

Perhaps their most striking findings related to legal representation, given the generally held belief that the introduction of legal aid has assured all members of society of equal advantage before the law. Firstly, they found that well over a half of all summary offence defendants were unrepresented. Because legal aid resources are so limited, they are mainly reserved for cases where imprisonment is more likely to result. Of the remaining 41%, 24% were represented by private counsel and 17% by legal aid.

It was found that the unrepresented are more likely to be poor and uneducated, twice as likely to receive a fine or imprisonment, and three times less likely to receive a suspended sentence or conditional discharge. Even when represented by legal aid, defendants were more likely to be convicted, and to receive a more severe sentence than if privately represented. For indictable offences, again, legal aid defendants were convicted more frequently. The presence of unequal treatment was particularly apparent with regard to race - among first-time summary offence defendants who pleaded guilty, almost one quarter of white defendants received some kind of discharge, whereas not one black defendant was similarly discharged. Selective justice could also be seen with regard to bail conditions and sentencing, in that these favoured those who were able to pay bail or a

fine, with detention resulting for the financially disabled.

Finally, the problem of selective ignorance was evident in that the courts did not systematically collect any of the information gathered by the researchers during this study. According to the authors, this at the very least "promotes unfairness." More importantly, however, it permits the criminal justice system to continue in its ways, operating as a means of controlling the consequences of fundamental and systematic socio-economic qualities, by almost exclusively restricting its attention to the less advantaged and less powerful, rather than genuinely promoting and ensuring social justice, as is mythically presumed.

There is, then, considerable evidence to indicate that the law is formulated and applied in a manner which favours certain interests or social groups over others.

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CHAPTER 2

EVIDENCE OF DISCRIMINATORY USE OF THE DEATH PENALTY

Those who have sought to test the conflict theory have, most frequently, looked to the law itself, tracing the development of particular laws, to demonstrate that laws are enacted either in response to the pressures of socially powerful groups seeking to protect their interests from newly emerging challenges (for example, the theft laws in England, or the anti-trust laws in the United States) or, by their effect on the social structure, to ensure that the wealth-producing needs of the socially powerful are met (for example, the vagrancy laws in England, or the Sunday Laws in England and the United States). The lasting implications of either of these effects is to maintain existing divisions in society, and reinforce the power of certain groups over certain other groups. Such historical analysis of law enactment is one approach in testing conflict theory, and tends to lend support to the conflict explanation of society.

The operation of the law in society comprises a number of steps, one apparently leading from the other but at the same time frequently operating as if they were independent of each other so much so that the totality - the criminal

justice system - has even been labelled as a non-system. The existence of these various segments in the rather ambiguous condition of dependence and independence permits the system to be viewed and analysed from a number of vantage points. The clearly identifiable components of the system fall into two broad categories. There is first what has been termed enactment criminalisation - the definition of behaviours considered undesirable and to be outlawed by the political machinery of the state. Then there is what may be called enforcement criminalization, which embraces the activities not only of the series of government officials specifically entrusted with enforcement of the law, but also those of the entire population who are encouraged to identify those people who fail to respect the requirements of the law. Enforcement criminalization comprises a series of processes, the one following the other. First, there is what may be called the identification process, involving the public and the police separating out from the mass of society those deviants who wilfully pay no attention to the legally established rules. Then there is what may be called the adjudication process, by which a group of people comprising the judiciary and related actors, particularly entrusted with the task, determine objectively whether the initial identification was

correct. Finally, there is the corrective process, comprising the activity of various groups who attempt to prevent and/or change the behaviour of the individual who breaks the law in order to protect the rest of society.

The operation of the law offers a second approach to testing the conflict hypothesis. This approach comprises essentially an examination of the enforcement process, in order to determine whether the law is invoked disproportionately against the less socially powerful groups in society, in terms of both frequency and severity. Studies which have followed this approach show clearly that the criminal population is not a random sample of the total population, but representative of specific groups in society, indicating either a propensity on the part of these groups to commit crime, or the operation of a specific selection process in law enforcement.

Both interpretations tend to lend support to the conflict theory. Were the situation a special propensity on the part of certain groups to commit crime, it could be considered the result of the operation of the conflict theory mechanism at the level of the enactment process, wherein behaviour peculiar to a particular group is outlawed. According to conflict theory, it is a political body - the legislators - who, through their ultimate power

to formulate law, are imposing their will and promoting the power of certain interests at the expense of others. Were the situation the operation of a specific selective process, the conflict is actualized through law enforcement. In law enforcement, the group that has the power to maintain law and order and contain social conflict by exercising their power or will over certain other groups, are the agents of enforcement - the police and the judiciary. At the level of law enforcement, in what may be called enforcement criminalisation, the mechanism of the conflict theory is made operative by these groups of people through their disproportionate selection of certain groups in society as the target of enforcement.

In the criminal justice system, at the two distinct levels of impact - those of enactment and of enforcement - power, it will be readily recognized, is in the hands of two theoretically independent groups of people. It might therefore be argued that, even though each of these levels has the effect of maintaining social divisions, the fact that the process is under the control of bodies which bear no relationship to each other, invalidates the conflict theory. In fact, it is commonly argued that the justice system is designed to protect against systematic inequity. Its system of safeguards - such as separation of the

political and judicial bodies, and independent decision making, etc. - is intended to and able to overcome any disproportionate or discriminating effect which might occur within any one component of the system. Thus, one body - the elected legislators - has the power to enact law, and is entrusted with the task of enforcing this law only in a broad and general sense. Enforcement, in practice, is entrusted to others - the police and judiciary - so as to maintain a separation of powers, and guard against abuse of power.[1]

From the point of view of those processed through the criminal justice system, this multi-component process usually results in the separation of two groups of people, the law abiders and the law breakers, in order that one may be protected from the other. The modern tendency, of course, is to ensure that this protection stems from the alteration of the characteristics of the law breakers to assume the characteristics of the law abiders, so that they can be reintegrated into society. Nonetheless, still existing in society are remnants of an earlier tendency to ensure the protection of society through permanent or

1. The fallacy of independence, in practice, at least with regard to the judiciary, is demonstrated in such works as J. Hogarth's Sentencing as a Human Process, where the close and longstanding political and social class links between the legislative and judicial bodies are documented(11: pp. 50-64).

temporary removal of law breakers. The specific forms that this reaction has taken have comprised banishment or exile (only very occasionally resorted to in most countries today), death (used with increasing rarity), and long term imprisonment - the modern substitute for death or exile.

The manner in which society reacts to its law breakers offers a third approach to testing the conflict theory. According to conflict theory, the law is intended to be directed only at certain groups. However, the process is made operative not through ascriptive characteristics which distinguish them, as was the case with the Jews in Nazi Germany, but through specific forms of behaviour in which they indulge. This process also inevitably leads to invocation of the law against members of other groups not meant to be ostracized. If conflict theory adequately explains the social control process, then steps should be taken by society to ensure that those who are punished for the breaking of the law are only those who belong to the group chosen for ostracism, and not those who belong to other groups. Studies involving sentencing practices indicate the operation of such a discriminating factor(10, 21). Studies which have looked at the application of the penalty of death in the United States show that of those

sentenced to death, there is a disproportionate execution of the blacks and the poor(2).

What these studies reveal is an end result that permits an inference supportive of conflict theory. They do not indicate the operative mechanism. It is this operative mechanism, however, that permits a conclusion of evidence supportive of conflict thoery.

Until its abolition in 1976, the legislation relating to the application of the death penalty in Canada, because of the extreme severity and irreversibility of the sanction, provided for an even more elaborate system of safeguards than does other criminal legislation. Whereas with other penalties, the decision as to their application generally rests with the judiciary and its various levels of appeal, the final decision as to whether the death penalty would be applied, after exhaustion of all legal avenues of appeal, automatically rested with the Governor in Council, or the Cabinet, which had the authority to grant commutation of the death penalty to a life sentence, under the Royal Prerogative of Mercy. Whereas legal avenues of appeal could consider only information which related to the facts or the law, and could not amend the mandatory sentence of the death penalty for conviction of capital murder, the Cabinet was unrestricted in its authority, and could consider mitigating

and extenuating circumstances, and any other information which it considered pertinent to the case. In addition, the reasons for its decision were not subject to scrutiny or appeal. Thus, in the application of the death penalty, the legislative body was not only responsible for the formulation of the law, but also, ultimately, for its application, through discretionary use of the Royal Prerogative of Mercy.

This unusual allocation of power provides for a particularly interesting testing of conflict theory. If indeed the law reflects conflict in society, and if the will of certain groups is being imposed on other groups, through the enactment, and then enforcement of law, in this case by the same group, it should be found that, among those who are sentenced to death, those who are actually executed differ on social factors from those who are granted a commutation of their death sentence, through the Royal Perogative of Mercy.

If those whose sentences are commuted are different from those whose sentences are not commuted, the characteristics of those whose sentences are not commuted would reveal the nature of the group against whom the law is directed, and the characteristics of the offence committed by those whose sentences are commuted would provide a base

for alteration of the law so that the sentence of death would not be passed on them. Homicides, it is contended, would be so differentiated from one another, that those likely to be committed by the group against whom the law is directed would be murder punishable by death, while homicide committed by others would not be so. In short, it is claimed that when those behaviours which are criminalised are also committed by members of groups against whom the law is not intended to be directed, then certain conditions are attached to the behaviour specifying when that behaviour is criminal, so as to concentrate the effect of the law on select groups. For example, there are many ways in which death can be caused - and many conditions under which the death may be caused. Conflict theory contends that the permutations and combinations are invoked to criminalise only those deaths likely to be caused by members of certain groups. No law, at least at the enactment level, can be foolproof, as human behaviour is unpredictable, subject to imitation, influenced by others, etc. It can arise, therefore, that persons from among those groups against whom the law is not directed engage in criminally defined behaviours. When this is the situation, conflict theory would have, we contend, the politically dominant groups preventing the infliction of punishment on them in the first

instance and amending the law subsequently to ensure that they are not drawn into the criminal justice net in the future.

There has been very little research carried out on the use of the death penalty specifically within the conflict theoretical model. Numerous studies, however, conducted over the past forty years in the United States, have indicated that the death penalty has not been equitably administered, and these can be looked to as indirect support for this model. The research has focussed almost exclusively on the question of whether the death penalty has been disproportionately exercised for non-white, and particularly black people, who are, of course, typically among the least advantaged, least powerful socio-economic groups. A second racial aspect of concern with regard to the death penalty has been whether the race of the victim or the inter-racial relationships between offender and victim is related to use of the death penalty. This research has generated overwhelming evidence of racial discrimination, and has led to changes in United States death penalty statutes, although recent evidence suggests that these changes will not eliminate its discriminatory application.

Prior to the Civil War in the United States, the laws in the south provided different penalties for blacks and

whites, in that certain crimes were capital offences only when carried out by black persons. These differential penalties were abolished after the war, although the application of penalties continued to be discriminatory.

One of the earliest significant studies linking the use of the death penalty with race was conducted by Johnson in 1941(15). In a study of homicides occurring in Virginia, Georgia and North Carolina during the 1930s, Johnson found that cases involving black offenders and white victims were treated with greater severity than those involving other offender-victim racial combinations. These differences were evident at the different stages in the legal process - in conviction rates, sentence severity and actual carrying out of the death penalty. Similar evidence was obtained by Allredge in his 1942 study of convictions and racial characteristics of homicide in the South(1) and by Garfinkel in his 1949 analysis of North Carolina homicides during the 1930's(9). Garfinkel concluded from his study that the courts viewed the killing of a white by a black as self-evidence of guilt, the killing of a black by a white as probably involving a mitigating factor such as provocation, and the killing of a white by another white person as requiring "objective administration of justice," while the killing of a black by another black was seen as a routine affair.

A report by the Ohio Legislative Service Commission in 1961 found that while blacks accounted for only 6.5% of Ohio's population, they accounted for 37% of all death sentences and that the death sentence was carried out more frequently for blacks than was the case for whites(18).

Extensive research in relation to the discriminatory use of the death penalty has been conducted by Wolfgang. In a study of Pennsylvania inmates on death row during the years 1914 to 1958, Wolfgang et al found a significant relationship between race and execution, leading them to conclude that "some suspicion of racial discrimination can hardly be avoided"(25: p.306), and that this "constitutes a social and political violation of the principle of equal justice ..."(25: p.311).

Findings from other studies continued to support the evidence of discrimination. Tucker, for example, in 1969, found support in an analysis of 1960 U.S. census data for his proposition that capital punishment is a form of social control, used by the economically superior classes(20). In designating non-whites as an economically subordinate group, he found that a greater proportion of the economically disadvantaged group was executed.

The existence of racial discrimination appears most

clear in cases of death sentences for rape.. In a 1965 survey of the imposition of the death penalty in eleven southern and border states, Wolfgang collected data on more than 3,000 rape conviction cases over the period 1945 to 1965(22). While many non-racial characteristics of the defendant and victim were examined to determine their relationship to the death penalty, it was found that the only variable which consistently and significantly explained sentence outcome was race, leading Wolfgang to conclude that

> "there has been a systematic differential practice of imposing the death penalty on blacks for rape and, most particularly, when the defendants are black and their victims are white"(22: p.120).

Johnson, in a 1957 study of prisoners sentenced to death in North Carolina, from 1909 to 1954, found evidence of disproportionate black representation not only in relation to rape convictions, but also in relation to persons sentenced to death for burglary: 26 percent of blacks but none of the whites were executed(14).

It was discrimination that constituted the base of the argument advanced by the National Association for the Advancement of Colored Peoples before the U.S. Supreme Court in 1971, when it claimed in Aikens v. California that the death penalty violated the constitutional guarantee against cruel and unusual punishment(17). While contending that

the punishment itself was "atavistic barberism", NAACP was particularly critical of its discriminatory application, arguing that:

> "(t)hose who are selected to die are the poor and powerless, personally ugly and socially unacceptable ... (and) ... (i)n disproportionate percentages, they are also black"(17: p.51).

The Aikens case was dismissed as moot because the California Supreme Court, during the course of the Aikens case before the U.S. Supreme Court, ruled in People v. Anderson that the death penalty was unconstitutional under the State prohibition against cruel and unusual punishment. The following year, in Furman v. Georgia, the U.S. Supreme Court ruled that:

> "... the imposition and carrying out of the death penalty ... constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments ..."(5: p.15).

The Court was swayed by the discretionary application of the death penalty and the lack of standards for deciding upon its imposition. Over the following years, more than half the States enacted new death penalty statutes to meet the rather vague constraints imposed by the U.S. Supreme Court, either in the form of "guided discretion" statutes which required that aggravated and sometimes mitigating circumstances be considered by the court in deciding on the imposition of the death penalty, or in the form of "mandatory" statues which prescribed the death penalty for certain defined offences.

The State of Georgia enacted such a "guided discretion" statute, specifying that the death penalty could be imposed for the offences of murder, rape, armed robbery, and kidnapping, but only if there was at least one aggravating circumstance. In order to determine whether this new statute would overcome the element of racial discrimination, Wolfgang and Riedel reanalysed rape conviction cases in Georgia during the years 1945 to 1965, including in this new analysis many non-racial variables which might be deemed as mitigating or aggravating circumstances(23). They found that, despite the additional information, the reanalysis strongly supported Wolfgang's earlier finding that racial variables are statistically significant in the differential imposition of the death penalty. They concluded that the post-Furman statutes, which continue to permit substantial discretion, are unlikely to lead to greater equity in imposition of the death sentence.

Wolfgang and Riedel also report on the effects of mandatory death penalty statutes(24). The areas selected for examination were the States of New York and Massachusetts, and the District of Columbia. They looked at the number of guilty pleas for lesser offences following indictment for first-degree murder, as well as the number of death sentences passed following conviction. As

anticipated, they found that whites pleaded guilty to lesser charges more frequently than blacks but, contrary to expectations, that the death penalty was not always imposed upon conviction for first-degree murder, and that differential treatment on the basis of race was observable only in the District of Columbia. They concluded that the effects of mandatory statutes were not as traumatic or as racially discriminatory as might have been expected.

The effect of mandatory sentencing on discriminatory use was also assessed by Bowers, with somewhat different conclusions, as part of a larger analysis of 5,707 State executions over the years 1864 to 1967(6). While it might be assumed that mandatory sentencing would eliminate discriminatory use, an examination of the use of the death penalty in five States which, at different times, imposed executions under both mandatory and discretionary sentencing, indicated that disproportionate representation of blacks was no less evident in executions under mandatory sentencing. He found, in addition, that young blacks were particularly over-represented under mandatory sentencing and, as might be expected, that considerably more executions overall took place. Bowers suggests that racial discrimination may be a reflection of social class, but is unable to confirm this because the available data do not include any measure of this factor.

In a complementary study to the earlier-described Wolfgang and Riedel research on Georgia convictions, Riedel examined racial differentials between pre-and post-Furman offenders sentenced under mandatory and guided discretion statutes, and their victims(19). Part of his findings were that, while consistently over half of the victims were non-whites, 87% of the victims of death row offenders were white, and further, that 81% of victims under guided discretion and 92% under mandatory statutes were white. He concluded that there is no evidence that the post-Furman statutes have been successful in reducing either non-white over-representation in death sentences, or the inter-racial aspects of death sentencing.

Further empirical support for the position that the death sentence is discriminatorily administered is provided by Bedau, a long time opponent of the death penalty(2). Using demographic statistics of death row persons and executions since 1960, Bedau concludes that the poor, the uneducated, and minority defendants have received a disproportionate share of death sentences.

The influence of the victim's race on the use of the death penalty, already indicated by Garfinkel in 1949 and documented by Wolfgang and Riedel, is further supported by

Lewis and Mannle's research on 83 death row persons in Florida in 1977(16). They found that, while more than half of all murder victims in Florida during 1973 to 1976 were non-white, over 92% of the victims of death row prisoners were white. These data are very similar to those obtained by Riedel, and the authors similarly conclude that non-white persons who kill a white victim are more likely to receive a death sentence than are non-white or white persons whose victim is non-white.

Recent unpublished research by Bowers and Pierce in Texas, Georgia and Ohio bears out these findings in Florida(7). In Texas, for example, from 1973 through 1977, the likelihood of receiving a death sentence for killing a white person was eighteen times higher than for killing a black person. In Georgia, it was found to be 12 times higher, and in Florida, 10 times higher. As these death sentences were handed down following the Furman decision, the researchers conclude that the new statutes have not overcome the inequity in death penalty sentencing.

Finally, as part of a broad review of the nature and extent of discriminatory justice in the United States, French looked at death penalty statistics since 1930(8). He found that, in contrast to their one-eighth representation in the population, black persons account for over half of

all executions, and 89% of those executed for rape. He concludes that there is a dual system of justice - one for the "acceptable in-group" (as illustrated by the handling of the Watergate charges, such as the use of plea bargaining, judicial delay tactics, unsupervised probation, unconditional pardons, etc.) and one for the "unacceptable out-group" (as illustrated by the over-representation of blacks at every stage of the system). He suggests that if this process of latent discriminatory justice continues and is carried to its extreme, it could provide the political and criminal justice control agencies with virtually unlimited power.

Research on murder and the death penalty has, for the most part and as would be expected, focussed on the sentencing and sentence execution points in the criminal law process, although there is considerable evidence, with respect to other criminally defined behaviour, that the law is discriminatory in application at every decision stage of the process. In a recent empirical study, for example, Boris examined the nature of decision-making at the preliminary hearing stage for persons charged with criminal homicide(4). He was interested in whether, for the two homicide categories of crime-specific murder (i.e. occurring during the commission of another crime) and social-conflict

murder (i.e. resulting from social interaction), the decision to dismiss or prosecute can be predicted from extra-legal (sociodemographic and previous criminality) characteristics of the offender or victim, whether these factors are more explanatory for crime-specific homicide, and whether the social distance between offender and victim is related to the decision. He observed that the race, occupation and age of both offender and victim were significantly related in the expected direction to disposition for crime specific homicides. While these associations were less apparent after being subjected to multiple regression, it was observed that occupation was the most powerful predictor. Unemployed offenders were found to have their cases prosecuted to a significantly greater degree than employed offenders, while the employment status of the victim had the converse effect on the decision. The originally observed relationship of race to decision was lost in this analysis, while younger offenders were found to run a greater risk of prosecution. Boris, however, observed that the combined factors of race and occupation were more strongly predictive together than separately, i.e. that the lower the social value of the combined factor for the offender, the lesser the chance of dismissal, with the victim's characteristics having the reverse effect. In his

opinion, his findings thus supported the claim made by others that:

> "(t)the legal system represents and protects the values of the powerful (of interest groups) and evaluates the behaviour of those without political power"(4: p.143).

In Canada, the Royal Prerogative of Mercy had been used with increasing frequency since a movement to abolish the penalty of death began with a private members' bill introduced in Parliament in 1950. Those who were opposed to the abolition claimed that the government was putting into effect a policy which the legislature had not approved - a claim that the government vehemently denied. Those who supported the abolition demanded that the government stop all executions until the question of the death penalty was finally settled - it was then under review by a Joint Committee of the Senate and House of Commons. This demand the government categorically rejected, claiming that it was unwise, by Executive action, to bring about, in effect, a change in law that only Parliament could effect(13). In an analysis of the fate of offenders condemned to death during the period 1957 to 1962, during which period the penalty of death was on the statute books, Jayewardene shows that the sentence was invariably commuted when the offender

was under 20 years of age, when there was no apparent motive, or the motive was jealousy, a murder and suicide pact, a sudden quarrel, and when the death sentence carried a jury or judge recommendation for mercy. Where those characteristics did not exist, the commutation was apparently made on a random basis(12). Jayewardene points out further that, with this pattern of commutation, execution was possible in only 3 cases of convicted murder - in the years 1963, 1964 and 1965. This evidence does not support the conflict theory unless, of course, it is claimed that murder (as legally defined) is ceasing to be a behaviour indulged in by the group against whom the law was directed, and is becoming increasingly a behaviour indulged in by the group against whom the law was not directed.

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CHAPTER 3

EXAMINING THE USE OF THE DEATH PENALTY IN CANADA: METHODOLOGY

In this present study, the use of the Royal Prerogative of Mercy to commute the death penalty will be examined, to ascertain whether extra-legal factors contributed to the decision to exercise this Prerogative, as would be predicted by conflict theory.

The study focusses on the decision-making process in relation to the final disposition of persons convicted of capital murder and sentenced to death. The question to be examined is whether the use of the death penalty in Canada supports the conflict theory of society through disproportionate application to members of less socially powerful social groups. The study will examine whether the final decision to execute or commute appears to be based on legal factors associated with the crime, or whether it is related to extra-legal factors associated with the individual. If the latter is the case, this would suggest that there is an inequitable application of the death penalty, and add support to the conflict explanation of society.

The study will also examine the relationship between

the final decision and the recommendations made by various parties with regard to the final decision. According to Canadian criminal procedure during the period that capital punishment was in effect, a murder conviction, while automatically requiring the death sentence, could be accompanied by a mercy recommendation from the jury, the presiding judge, the Deputy Minister of Justice, and the Minister of Justice. Of particular interest here is the question of which party's recommendation is most consistently reflected in the final decision and, related to this, whether the most consistently followed recommendation is made within the judicial sphere (the jury or judge), within the bureaucracy (Deputy Minister), or at the political level (Minister).

The death penalty as an act of public vengeance was brought to Canada by the earliest Old World visitors as one of many Old World customs unknown to the native inhabitants.

One of the earliest death sentences noted in the land that is now known as Canada dates back to 1749, when a sailor aboard a ship in Halifax harbour murdered a fellow crewman and wounded two others. He was sentenced to death by a Captain's Court and hung from the vessel's yardarm (1: p.5). According to some, such a final punishment was

unknown to the native Indians(1: p.5), but even if it was known, it was inflicted not in vengeance, but as the last resort in safeguarding the community(23: p.383).

The introduction of formal criminal law into this country, with specified offences and punishments, cannot be traced to a common date. French and English settlers brought their own country's system of justice with them. Until the middle of the 17th century, the law was that of France, but as English settlers began to colonize, the law of England was introduced, primarily in the Canadian West in 1670, with the arrival of the Hudson's Bay Company. Following the British conquest of the country, the formal application of English criminal justice was introduced with the Royal Proclamation of 1763(21: p.45). At this time, the British Criminal Code listed between 220 and 230 capital offences punishable by death, ranging from stealing turnips to being found disguised in a forest(20: p.16). The methods of death were harsh, including being drawn by cart to the public place of execution, hanging, and disembowelment before dying.

As each new colony was proclaimed and a legislature was

established, the law of England was adopted, after which the new territory began to enact its own laws. The criminal laws, however, continued to closely reflect those of England, prescribing the death penalty for a very broad range of offences. These were often seemingly trivial, such as "removing or defacing a boundary marker", which was pronounced as a capital offence in Upper Canada in the early 1800's(1: p.11).

From the beginnings of colonization, then, given the wide range of acts for which the death penalty was applied, we can surmise that a great number of death penalties were pronounced throughout the land, although they were frequently not carried out, and the convicted was banished or, more often, held in prison for some length of time (1: p.17; 23: p.383). This increasing rejection of the death penalty in practice probably contributed in great part to revised laws which greatly reduced the number of acts punishable by death. In 1833, for example, the legislature of Upper Canada reduced the number of capital offences from over 100 to 12, reserving the death penalty for the offences of high treason, murder, petit treason, rape, carnal knowledge of a girl under ten, sodomy with man or beast, robbery, robbing the mail, burglary, arson, and accessory

before the fact. Similar revisions were shortly after introduced in Lower Canada and the Maritimes (New Brunswick and Nova Scotia). Within ten years, the capital offence list in Upper Canada had been further reduced, with the removal of robbery and robbing the mail(1: p.17).

By 1859, the penalty of death in Canada (Ontario and Quebec) was reserved for high treason, murder, poisoning or wounding with intent to murder, rape, carnal knowledge of a girl under ten, buggery with man or beast, robbery with wounding, burglary with assault, arson, casting away a ship, and endangering a ship by false signal(3: c.XCI). Further revisions to the law in Canada in 1865 reduced the list of capital offenses to treason, murder and rape. In the case of rape, the death penalty was not mandatory, and a lesser penalty of life imprisonment could be pronounced(20: p.17).

The next few years brought further changes. In 1869, public executions were abolished following the public hanging in Ottawa of Patrick Whelan for the murder of D'Arcy McGee(24: p.384). In 1886, the penalty for rape was modified to allow for seven years or more of imprisonment, although death or life imprisonment could still be pronounced(4: c.162,s.37). From 1867, when complete

records of Canadian capital convictions began to be maintained, until 1875, when the last capital conviction for rape was recorded, there were 26 capital rape convictions, but no instance in which the execution was carried out(18). The possibility of the death penalty for rape remained on the books until 1955(10: c.51,s.136).

In 1892, the various separate Acts pertaining to criminal offenses and punishments were brought together into a single Criminal Code(5: c.XXIX). At this time, the acts of murder, attempted murder, wounding, or endangering life during the commission of piracy were made punishable by death, although this penalty was not mandatory. At the same time, the death penalty for treason was also made discretionary. For the next several decades, until 1947, there were no changes to the Criminal Code in respect of the death penalty. Murder, rape, treason and the offences described above associated with piracy continued to be subject to the death penalty. In practice, with the exception of the execution of Louis Riel in 1855 for high treason, the death penalty was reserved strictly for murder.

The legal act of murder has always been subject to a complex definition. The 1906 Revised Statutes of Canada described the death of a human being caused by another, directly or indirectly, by any means, as homicide, either

culpable or non-culpable. Culpable homicide was either murder or manslaughter, while non-culpable homicide was not an offence.

Culpable homicide was defined as murder:

> "(a) if the offender means to cause the death of the person killed;
>
> (b) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
>
> (c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;
>
> (d) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one"(6: c.146,s.259).

In simpler terms, this section attributed murder when death occurred, whether intended or not, as a result of an act which was known to be likely to cause death.

In addition, murder was attributed when death occurred during certain offences as a result of injury intended to facilitate commission of the offence, or escape following the offence(6: c.146,s.260). The distinction here was that the act causing death need not be one which would be known to be likely to cause death.

Manslaughter was defined as any culpable homicide which was not murder, and a number of other sections covered other issues surrounding death, such as time between injury and death, and death by mind influence(6: c.146,s.262).

The penalty for murder was prescribed as death and, for manslaughter, as life imprisonment.

The legal definition of culpable homicide and murder remained unchanged until 1947, when indecent assault was added to the list of offences which could result in a murder charge if death occurred in order to facilitate either its commission or escape following commission(9: c.55,s.6).

A year later, in 1948, the definition of culpable homicide was amended to include infanticide as an offence separate from murder and manslaughter(9: c.39,s.6). Infanticide was defined as the death of a newly born caused by wilful act or omission of its mother if, at the time, the mother had not fully recovered from the effects of giving birth. The punishment for infanticide was prescribed as imprisonment of up to three years(9: c.39,s.40). This new offence of infanticide, thus, could carry all of the intent to kill or recklessness of murder, but was differentiated on the reasoning that a newly-delivered mother might be temporarily mentally disturbed as a result of the birth.

Several years later, in 1955, two amendments were made to the Criminal Code which were of relevance to the penalty of death. Firstly, as mentioned earlier, death was removed as a penalty for rape, and secondly, the death penalty became mandatory where murder, attempted murder, or any life endangering act was committed during piracy(10: c.51,s.75).

In 1961, a major amendment to the Criminal Code in respect of murder was introduced, defining murder as capital or non-capital, and retaining the death penalty only for capital murder. In addition, death continued to be discretionary for certain forms of treason, and mandatory for the piracy-related offences described earlier.

Specifically, the new definitions were as follows:

> "(1) Murder is capital murder or non-capital murder.
>
> (2) Murder is capital murder, in respect of any person, where
>
> (a) it is planned and deliberate on the part of such peson,
>
> (b) it is within section 202 and such person
>
> (i) by his own act caused or assisted in causing the bodily harm from which the death ensued,
>
> (ii) by his own act administered or assisted in administering the stupefying or over-powering thing from which the death ensued,

(iii) by his own act stopped or assisted in the stopping of the breath from which the death ensued,

(iv) himself used or had upon his person the weapon as a consequence of which the death ensued, or

(v) counselled or procured another person to do any act mentioned in subparagraph (i), (ii) or (iii) or to use any weapon mentioned in subparagraph (iv), or

(c) such person by his own act caused or assisted in causing the death of

(i) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties, or

(ii) a warden, deputy warden, instructor, keeper, gaoler, guard or other officer or permanent employee of a prison, acting in the course of his duties,

or counselled or procured another person to do any act causing or assisting in causing the death.

(3) All murder other than capital murder is non-capital murder." (11: c.44,s.1)

The sentence for capital murder was death and, for non-capital murder, life imprisonment. Exception from the death penalty was provided for any person who was under 18 at the time of committing the capital murder, the sentence instead to be life imprisonment(11: c.44, s.2).

Essentially, this amendment restricted the death penalty in respect of murder to persons convicted of planned and deliberate killing, or the killing of a peace or prison officer on duty, and introduced in law an age restriction which had been applied in practice almost without exception since Confederation.

A further major change in the murder legislation occurred in 1967, when a Criminal Code amendment restricted capital murder and the death penalty to persons convicted of killing a peace or prison officer on duty, or contracting for murder(12: c.15,s.1). This amendment severely reduced the concept of planned and deliberate that had been introduced in 1961. Under Section 4 of this amendment, these new restrictions on capital murder were to be in force for five years.

On 29 December 1972, these restrictions were extended for a further five years, until 31 December 1977, unless the law was earlier amended. At the same time, the terms "capital" and "non-capital" were eliminated. The revised definition stated instead that murder is "punishable by death or is punishable by life imprisonment"(14: c.38,s.10).

These various changes to the murder legislation, greatly restricting the instances in which the death penalty could be invoked, were unquestionably a reflection of an

increasingly abhorrent view within the Government towards the death penalty. This view, which was carried over even through party changes in government, was manifested in the increasing frequency with which the Royal Prerogative of Mercy was being invoked to grant commutation. This Royal Prerogative was a legal provision enabling the granting of commutation by the Governor in Council. Over time, it was frequently used and, during the years 1957 to 1962, when there were over 100 death sentences pronounced, the penalty was carried out in only 14 instances. Some of these cases resulted in a new trial or a reduction in charge, but the greatest majority by far were commuted(19).

The second five-year limited moratorium on the death penalty was due to expire on 31 December 1977. On 26 July 1976, a Criminal Law Amendment Act which abolished the death penalty in entirety for civil offenses was proclaimed(15: c.105, s.214).[1] Murder was redefined as first or second-degree, punishable by a mandatory life imprisonment sentence.

The definition of first-degree murder in effect today is similar to that for capital murder as first defined in

1. The penalty of death remains in effect in military law, for certain offences described in the National Defence Act (13: cN-4,ss.63-69).

1961, in that it applies to all planned and deliberate murders, as well as the killing of any police, peace or prison officer. It is broader, however, in that it also includes murder caused during an aircraft hijacking, kidnapping or forcible confinement or attempted commission of these offences, and murder caused during rape, attempted rape, and indecent assault on a male or female. All other murders are second-degree murder.

The same Criminal Law Amendment Act removed the death penalty for high treason, and repealed the existing section identifying certain acts committed in the course of piracy, for which the death sentence had become mandatory. The penalty for high treason is now life imprisonment, and the penalty for piracy remains a sentence of life imprisonment, as before.

The 1976 law established very severe parole eligibility conditions for high treason and first and second-degree murder. A person convicted of treason or first-degree murder must serve a minimum of twenty-five years before parole eligibility and, for second-degree murder, the minimum term of imprisonment before parole eligibility is ten years, unless a longer term, up to twenty-five years, is pronounced at the time of sentencing. The Act provides for the possibility of a judicial review, after 15 years, of the

period to be served before parole eligibility for all persons whose minimum sentence is more than 15 years.

Records of capital cases maintained since 1867 show that there were approximately 1500 capital convictions over the years up to abolition in 1976 and in just over 700 of these, or slightly less than 50 percent, the death penalty has been carried out(18, 19). The rate of execution was not steady during this time, varying from 33 percent in the 1860s and 1870s to a high of 75 per cent in the 1930s. Over the following years there was a steady decline, leading to de facto abolition after 1962.

Between 1962, the year of the last executions, and 1976, when the death penalty was abolished, there were over fifty death penalty convictions. The majority of these were commuted case by case up to 1968. Early in that year, shortly after the December 1967 amendment, all outstanding death penalties for murder which did not meet the new restrictions were commuted by order of the Governor-in-Council. By the date of abolition in 1976, all but six convictions had been commuted, and these six were automatically converted, under the new law, to first-degree murder and life imprisonment.

The last executions in Canada occurred on 11 December 1962, when Ronald Turpin, convicted of murdering a police

officer, and Arthur Lucas, convicted of the premeditated murders of an informer and a witness, were hanged at the Don Jail in Toronto(17: Q.42).

Information on Canada's capital cases are obtainable from Orders in Council and supporting documents - the official records of decisions taken by the Cabinet of the Federal Government (and approved by the Governor General). These documents are maintained in the Public Archives. An annual index of Orders in Council contains a list of all capital cases which were considered in that year, the decision reached as to commutation or execution, and the date of the Governor General's confirmation. Orders in Council themselves are filed chronologically, with those relating to capital cases filed along with all other decisions made on that day.

A number of documents are submitted to Cabinet with respect to each capital case. Firstly, there is a summary of the case, submitted by a representative of the Deputy Minister of Justice in the form of a Memorandum to the Honourable the Minister of Justice, ranging from 2 to 30 pages in length, and concluding with the representative's recommendation as to the appropriate course of action in the circumstances. The major part of this document is a direct citation of the trial judge's report, which contains "a

substantial summary of the salient facts of the case", together with any personal remarks or recommendations from the judge which may relate to Executive Clemency.[2] In more recent years, beginning in the early 1950s, this Memorandum was preceded by a Condensed Summary, also prepared by the representative of the Deputy Minister of Justice. In some cases, at the discretion of the trial judge or the Justice representative (this is not clear from the documents), the summary is accompanied by other documents, such as the defendant's statement to police or, in cases where insanity is a serious contention, there may be a brief written opinion by an independent psychiatrist or, in other cases, there may be a separate submission from the representative of the Deputy Minister of Justice summarizing previous cases involving a significant factor common to the case under consideration and noting the executive decision made in these cases. In every case, the summary is accompanied by a Memorandum from the Minister of Justice to His Excellency the Governor General in Council, referring to the conviction and supporting documents submitted, and concluding with a recommendation for either execution or commutation.

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2. The judge was required to submit a report under long-standing government procedures relating to capital cases. These are described in Capital Cases Procedure(7), which sets out how to establish the date of execution, how to prepare the transcript and trial report for the Minister of Justice, and how to carry out the execution.

Finally, in every case, there is the document known as the Order in Council, signed by the Governor General, which pronounces the decision to commute or execute. Examples of the Order in Council and Memorandum from the Minister of Justice, in the case of both execution and commutation, are provided as Appendix A.

Capital cases for which a final disposition was made during the seven years 1946 through 1952 form the sample for this study. These years were selected as the most recent period for which full documentation was available in the Public Archives. The starting year of 1946 was selected in order to avoid any possible effects of the war years on the application of the death penalty. The period, during which 111 capital cases were submitted to Cabinet for decision, was one during which the death penalty was still the legal penalty for all murder convictions and was frequently applied. While inclusion of more recent cases would have been desirable, this was precluded by the inaccessibility of documentation. Special permission was sought to examine more recent case documents, but the permission obtained excluded access to the Judge's report, which contains most of the relevant information. Two cases disposed of at the end of 1952 were also excluded for lack of information, leaving a total of 109 cases.

A total of 21 items of information was obtained on each of the 109 cases disposed of during the period under study. The final decision is the dependent variable in this study. The independent variables consist primarily of legal and extra-legal factors, i.e. factors of a legalistic nature pertaining to the murder, and factors which are related to the convicted or his victim, and which one might assume are not related to the judicial process. These variables are presented in Table 1, grouped into four major categories: offence characteristics; offender characteristics; victim characteristics, and decision characteristics. A description of the variables, and the rationale for their selection follows.

A. Offence Characteristics

i) Year of Decision

This item relates to the year in which the decision as to execution or commutation was made, and was collected in order to show the distribution of cases over the period.

Table 1

Description of Variables

Reference	Variable	General Description	Categories
	A. Offender Characteristics		
A.i)	Year of conviction	Self-explanatory	Self-evident
A.ii)	Province of conviction	Self-explanatory	All Canadian Provinces and Territories
A.iii)	Other crime involved	Whether murder occurred during the commission of another crime	Sex assault Robbery Prison escape Avoiding arrest No other crime
A.iv)	Premeditated	Whether murder was premeditated	Not stated Yes No
A.v)	Brutality/ Indignation	Whether, in the opinion of jury and/or judge, the murder involved an unusual degree of brutality and/or invoked public indignation	Not stated Yes No

Table 1 (continued)

Description of Variables

Reference	Variable	General Description	Categories
	B. Offender Characteristics		
B.i)	Age at time of murder	Self-explanatory	Not stated Under 19 years 19-28 29-38 39-48 59 and over
B.ii)	Sex	Self-explanatory	Female Male
B.iii)	Occupational status	Determined from occupation	Not stated Unemployed Unskilled Skilled White collar and Professional
B.iv)	Ethnicity	Ethnic origin	Not stated Anglo French Native Black Oriental European Other
B.v)	Mental abnormality	Whether the offender was judged by expert opinion to be in an abnormal mental state	Not stated Yes No
B.vi)	Previous criminal record	Self-explanatory	Not stated Yes No

Table 1 (continued)

Description of Variables

Reference	Variable	General Description	Categories
	C. Victim Characteristics		
C.i)	Number of victims	Self-explanatory	Self-evident
C.ii)	Age at time of murder	Self-explanatory	Infant Under 16 16-19 years 20s 30s 40s etc.
C.iii)	Sex	Self-explanatory	Female Male
C.iv)	Occupational status	Victim's occupation (or that of the husband or father in the case of housewives and children)	Same as for Offender, but with additional category of Police Officer or Prison Guard
C.v)	Ethnicity	Ethnic origin	Same as for Offender
C.vi)	Relationship to offender	Self-explanatory	Family Member Friend Business Relationship Police Officer or Prison Guard Stranger

Table 1 (continued)

Description of Variables

Reference	Variable	General Description	Categories
	D. Decision Characteristics		
D.i)	Jury recommendation	Whether recommendation was for mercy or against mercy	Not stated Mercy Against mercy
D.ii)	Judge recommendation	Same as D.i)	Same as D.i)
D.iii)	Department of Justice recommendation	Same as D.i)	Same as D.i)
D.iv)	Minister of Justice recommendation	Same as D.i)	Same as D.i)

ii) Province of Conviction

As with Year of Decision, this is mainly a descriptive item, to illustrate the distribution of convictions and dispositions across the country. It was also utilised to examine the possible existence of different regional patterns of commutation.

iii) Whether Murder Occurred during the Commission of Another Crime

The commission of murder during the course of another crime has traditionally been viewed as exacerbating the seriousness of the murder, and this has always been reflected in Canada's murder legislation. During the period under study, this factor was incorporated in the legislation under a sub-section whereby a killing occurring during an unlawful act, whether intended or not, was viewed as murder. More recent legislation, which distinguishes between degrees of murder, provides for the most serious degree of murder charge for a killing during the commission of certain offences such as kidnapping and rape. Murders occurring during the period under study involved other offences falling into four categories: Sex assault; Robbery; Prison escape; and Avoiding arrest. In some of the analyses, this factor was collapsed into a

simple binary item indicating whether or not another crime was involved.

iv) Whether the Murder Was Premeditated

As with the previous item, the presence of premeditation is viewed as adding to the seriousness of the murder, and this has always been reflected in the murder legislation.

v) Brutality/Indignation

A preliminary examination of the files indicated that the fact of whether the murder was particularly brutal and whether it invoked a public expression of indignation (either because it involved an extreme degree of violence or because of the nature of the victim) had been cited by the judge as a reason for either the jury's or his own recommendation against mercy. This factor was therefore included in the data collection, for analysis as a legal attribute.

B. Offender Characteristics

i) Age at Time of Murder

This is an important item, in that youth and advanced age are usually considered as mitigating circumstances, if not at the time of conviction, at least in determining grounds for commutation.

The factor of youth has been recognized in established judicial procedure as warranting commutation. The Canadian practice derives from British tradition, formalized in English law in 1932:

> "Sentence of death shall not be pronounced or recorded against any person under the age of 18 years ...". (25: s.19, ss.2)

No such law prevailed in Canada until 1961, and the courts pronounced the death sentence regardless of age. However, there had been a practice to exercise clemency on the grounds of such youth(23: p.368).

With regard to advanced years, while this is frequently cited as the reason for commutation, this practice does not appear to be grounded in either law or convention. In addition, neither the law nor the literature provides any consistent number of years as representing advanced age.

During initial case review and data collection, the age in years of all convicted persons was obtained. For descriptive purposes, this information was then collapsed into six age categories: Under 19 years, 19 to 28, 29 to 38, 39 to 48, 49 to 58, and 59 and over.

The first category was determined by the overriding consideration given to youth. The remaining 50 year age

spread (the oldest subject was 68 years) was divided into five categories of 10 year ranges each. Because of the extremely skewed distribution of ages across the full range, these categories were collapsed into four categories for further analysis, the categories each containing approximately one-quarter of the cases.

ii) Sex

This item was collected for descriptive purposes. Given the few number of females convicted of murder, the variable is of relative unimportance.

iii) Occupational Status

For the purposes of conflict theory testing, the most relevant information is that which indicates social position in society. Ideally, this variable would be derived from a weighted combination of social, economic and cultural indicators such as education, income, occupation (of self - or father or husband, given the period under study), race, and religion. Of these, the only indicators consistently available were occupation and race, the latter in the form of ethnic heritage. As these two factors alone are not sufficiently informative of social class, they were collected and analysed separately.

During initial data collection, the occupation of the convicted, as described in the judge's report, was noted. These occupations were then grouped into five categories, adapted from the occupational index used by Chandler(20: p.219). A number of modifications were made to his index to better suit the information available for the cases under study. Of his eight occupational categories, "Labourer" was retitled "Unskilled" and included all forms of manual activity. His separate categories of "White Collar and Sales", "Lower White Collar" and "Professional" were collapsed into a single "White Collar and Professional" category, and his "Housewife" and "Police and Prison Guard" categories were dropped, the former because the few women included in this study seemed to more appropriately fit into another category, and the latter for lack of cases in this category. The four categories, then, were Unemployed, Unskilled, Skilled, and White Collar and Professional. The number of empty categories at the higher end of the scale, and the overwhelming preponderance of cases in the "Unemployed" and "Unskilled" categories, required that the five categories be collapsed into "Unemployed" and "Employed" for some analyses.

iv) Ethnicity

Information was initially collected on the ethnicity of each individual, and this information was then grouped into seven categories, adapted from Chandler's ethnicity index(20: p.218), but again with a number of modifications. Whereas Chandler distinguished among English-Canadian, English and Scottish, these were all included in a single "Anglo"category; his "Indian" category was relabelled "Native"; his categories of "Ukrainian" and "German" were collapsed into a "European" category, to include all those of continental European origin; and an additional category of "Oriental" was included, given the number who fell into this category. The seven categories used were Anglo, French, Native, Black, Oriental, European, and Other. As with "Occupational Status", and for the same reasons, these categories were modified to four categories of "English", "French", "European", and "Minority" for some analyses.

v) Mental Abnormality

This variable relates to whether the convicted was judged by expert medical opinion to be of a mental state which would mitigate criminal responsibility and therefore provide a reason for considering commutation, although the mental state had not been judged as meeting the legal "insanity" provisions.

vi) Previous Criminal Record

The presence of a previous criminal record is frequently taken into account at all levels of judicial decision-making, and is considered to warrant a more serious treatment of the case, especially as far as the punishment to be inflicted is concerned.

C. Victim Characteristics

i) Number of Victims

The number of deaths involved in each murder case was noted. In every multiple-victim case, it was either clearly specified in or apparent from the documentation that the murder trial involved only a single murder charge. This, for the most part, must be seen as a legal technicality, as the fact of there being other victims was mentioned in the jury's presence, as an unavoidable aspect of describing the incident. For this study, other than noting the number of victims in each incident, only information on the victim mentioned in the charge was included. In multiple-offender cases, where more than one individual was convicted for the murder of a single victim, information on that victim was included in each case of conviction, i.e. the same victim information was included for each of the multiple offenders.

ii) Age

In most cases where age was referred to at all, it was noted as falling in a particular decade of years (e.g. "a woman in her 40's"), except where the victim was a child, where the specific age was usually mentioned. Adult victims were therefore assigned, where possible, within a 10-year age group (20-29, 30-39, 40-49, etc.) and, for young victims, the categories were Infant (under 2), Under 16 Years, and 16 to 19 Years.

iii) Sex

Whether the victim was a female or male was noted. This factor was considered relevant, in that the fact of the victim being a female might be expected to have some influence on the outcome.

iv) Occupational Status

Victims were classified according to five occupational categories: Unemployed; Unskilled; Skilled; White Collar and Professional; and Police Officer or Prison Guard. These categories and the rationale for their selection are similar to those for the offender, except for the last category, which was considered to be a necessary distinct category, given the different and serious view with which the murder of law and penal enforcement agents is regarded.

v) Ethnicity

The same ethnic classification was used for victims as was used for offenders.

vi) Relationship to Convicted

Several methods of classifying the victim-offender relationship are available. Statistics Canada uses six categories: Immediate Family; Other Kinship; Common-Law Family; Social or Business Relationship; During the Commission of Other Criminal Act; and No Known Relationship (16: p.85). Most homicide studies in Canada, when dealing with the victim-offender relationship, use this classification, or a modification.

In this study, the victim offender relationship categories were slightly modified, and classified into five groups: Family Member - including members of the immediate family, other kinship, and common-law relationships; Friend; Business Relationship; Police or Prison Guard; and Stranger - including no relationship. As a homicide is generally considered a very personal crime, a consistent classification of the victim-offender relationship in terms of interactional intimacy was considered as more meaningful. With the possibility of the victim making a

contribution to her or his own death, with some sort of provocation being taken into consideration in the determination of the gravity of the offence, interactional intimacy as an index of this possibility could be a factor considered in the final decision.

D. Decision Characteristics

As was described earlier, the jury was entitled to make a recommendation for mercy, to be taken into consideration in the Cabinet review. While the judge was required to pass a sentence of death, he was also entitled to make a recommendation in his report to the Department of Justice. In addition, the representative of the Department of Justice, in submitting the case to Minister of Justice, made a recommendation as to the appropriate decision, and the Minister of Justice made a recommendation when he submitted the case to Cabinet for final decision. The nature of the recommendation made by each party was noted as a variable related to the decision process.

Analysis

A simple frequency analysis was first conducted, in order to obtain the distribution of cases across categories within each of the variables. A second analysis involved cross-tabulations between each variable and the final

disposition of execution or commutation, in order to obtain absolute and percentage relationships, for descriptive purposes. This cross-tabulation analysis also produced bivariate correlation coefficients (Pearson r), from which was obtained an indication of which variables were univariately related significantly to the final decision.

A final analysis was conducted using multiple regression. The advantage of multiple regression is that it enables an assessment of the relative influence of each independent variable on the dependent variable, while controlling for the inter-relationships or multi-collinearity among the independent variables.

A multiple regression model used by Boris(2) was adapted to suit the present data. As was described earlier, Boris was interested in the role of extra-legal factors in decision-making. In his study, extra-legal, or social attributes included race, occupation and criminal history. In addition to bivariate analysis (Pearson r correlations) between outcome and social attribute variables for the accused and the victim, he combined these variables in a multiple regression in order to determine the most influential among all variables on the final decision.

In the present study, a similar analysis using multiple regression has been conducted, although the procedure adopted here was somewhat different. A multiple regression was first conducted on offence characteristics, to determine the relative impact of each variable on the final decision. Similar separate regressions were also conducted for offender and victim characteristics. A final multiple regression was conducted, combining the most explanatory variables from each of the three regressions, in order to determine the most influential among the three sets of variables on the final disposition.

Because all 9 persons aged 18 years or younger in this study had been systematically commuted on the basis of their age, they were excluded from the regression analysis. Their inclusion would have meant that information on variables other than age could have falsely contributed to the explanatory power of these other variables. The size of the study group for the regression analysis, then, was 100.

Because of very low cell values, the variables of occupational status and ethnicity were recoded for both offender and victim. In the case of the offender's occupational status (see Table 8), cases were recoded according to whether the offender was unemployed or

employed. The victim's occupational status (see Table 12) was recoded into Unemployed, Unskilled, Skilled/White Collar, and Police or Prison Guard. The offender's ethnicity was recoded from the seven original categories (see Table 10) into four categories. Those of American origin (Other) were included with Anglo, and Black and Native Canadian (there were no orientals) were combined to form a Minorities categories. The victim's ethnicity was similarly recoded. In addition, for the offence variable Other Crime Involved (see Table 6), Avoiding Arrest and Prison Escape were combined.

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CHAPTER 4

WHO RECEIVES THE DEATH PENALTY: FINDINGS

During the period of study (1946 to 1952), there were a total of 111 capital cases for which the Cabinet had to make a decision. In the 109 cases for which data were available for analysis, there was commutation in 35 (32.1%) cases. In 74 (67.9%) cases, the condemned offender was executed. Over the seven year period, the commutation rate varied from a low of 21.1% in 1949 to a high of 50% in 1947. There was no consistent pattern of increase or decrease (see Table 2).

The cases came from all the provinces of Canada except Prince Edward Island and Newfoundland. Over half of the cases were from Ontario (29.4%; n=32) and Quebec (25.7%; n=28). The highest rate of commutation was for cases from Nova Scotia (100%). The numbers involved (n=2), however, were too small for this to be of any significance. The lowest rate of commutation was for cases from Manitoba (11.1%). The numbers involved here (n=9) were larger than those for Nova Scotia, but still relatively small. The rates of execution and commutation for cases from Ontario and from Quebec, from where the highest numbers came, are similar to those for the group as a whole (see Table 3).

Table 2

Final Disposition by Year of Decision

Year	Number Executed	Number Commuted	Total	Commutation Rate (%)
1946	18	8	26	30.8
1947	6	6	12	50.0
1948	11	5	16	31.3
1949	15	4	19	21.1
1950	10	6	16	37.5
1951	6	2	8	25.0
1952	8	4	12	33.3
Total	74	35	109	(32.1)

Table 3

Final Disposition by Province of Conviction

Province	Number Executed	Number Commuted	Total	Commutation Rate (%)
British Columbia	7	3	10	30.0
Alberta	11	5	16	31.3
Saskatchewan	2	3	5	60.0
Manitoba	8	1	9	11.1
Ontario	20	12	32	37.5
Quebec	21	7	28	25.0
New Brunswick	4	1	5	20.0
Nova Scotia	0	2	2	100.0
Prince Edward Island	0	0	0	--
Newfoundland	0	0	0	--
N.W.T. and Yukon	1	1	2	50.0
Total	74	35	109	(32.1)

Table 4 presents the product-moment correlations between all independent variables and the final disposition. These variables, it will be recalled, have been grouped together as offence characteristics, offender characteristics, victim characteristics, and decision characteristics.

Among the offence characteristics, the only variable significantly related to outcome was whether or not the homicide was committed in the execution of another crime (Variable A.iii) ($r=0.20$, $p<.05$). Looking at specific crimes, the only significant correlation was for sex assault (Variable A.iii.a); $r=0.18$, $p<.05$). Among the offender characteristics, the presence of age (Variable B.i); $r=-0.18$, $p<.05$), mental abnormality (Variable B.v); $r=0.42$, $p<.01$) and previous criminal record (Variable B.vi); $r=-0.40$, $p<.01$) were significantly related. The only variables among the victim characteristics which were significantly related to the final disposition were the victim being an infant (Variable C.ii.a); $r=-0.20$, $p<.05$), and the family connection in the offender-victim relationship (Variable C.vi.d); $r=-0.18$, $p<.05$). Among the decision characteristics, the recommendations of the jury (Variable D.i); $r=0.49$), the judge (Variable D.ii); $r=0.64$), the Department of Justice (Variable D.ii); $r=0.91$), and

Table 4

Correlations (Pearson r) between Final Disposition and Independent Variables

Independent Variable	Pearson r
A. Offence Characteristics	
i) Year of Decision	-0.03
ii) Province of Decision	0.03
iii) Other Crime Involved	0.20*
a) Sex Assault	0.18*
b) Robbery	0.06
c) Prison Escape	0.07
d) Avoiding Arrest	0.08
iv) Premeditation	-0.01
v) Brutality/Indignation	0.08
B. Offender Characteristics	
i) Age	-0.18*
ii) Sex	0.12
iii) Occupational Status	0.09
iv) Ethnicity	
a) Anglo	-0.05
b) French	0.13
c) Native	-0.01
d) Black	0.10
e) Oriental	N/A[1]
f) European	-0.10
g) Other	0.06
v) Mental Abnormality	0.42**
vi) Previous Criminal Record	0.40**

Table 4 (continued)

Correlations (Pearson r) between Final Disposition and Independent Variables

Independent Variable	Pearson r
C. Victim Characteristics	
i) More than 1	0.15
ii) Age	
a) Infant	-0.20*
b) Under 16 years but not Infant	0.15
iii) Sex	0.02
iv) Occupational Status	-0.11
v) Ethnicity	
a) Anglo	0.07
b) French	0.19
c) Native	-0.07
d) Black	N/A[1]
e) Oriental	0.12
f) European	-0.28
g) Other	-0.18
vi) Relationship to Offender	
a) Family Member	-0.18*
b) Friend	0.05
c) Business	-0.03
d) Stranger	0.04
e) Police or Prison Guard	0.13
D. Decision Characteristics	
i) Jury Recommendation	0.49**
ii) Judge Recommendation	0.64**
iii) Department of Justice Recommendation	0.91**
iv) Minister of Justice Recommendation	1.00**

** $p < .01$
* $p < .05$

1. No cases fell in this category.

of the Minister of Justice (Variable D.iv); r=1.00) were all significantly related ($p < .01$).

These high correlations in relation to recommendations for or against mercy indicate that the Cabinet invariably followed the recommendation of the Minister of Justice, so that, de facto, the decision to commute a death sentence was made by him. In his decision, he was closely guided by, though he did not invariably follow, the recommendation of the Department of Justice.

Among the 109 cases analyzed in this study, commutation was recommended by the Department of Justice in 36 (33.0%) cases. This recommendation was followed in all but one case (97.2%).

Why this single exception was made is somewhat difficult to understand. The representative of the Department of Justice, following his summary of the case, concluded with a recommendation for mercy after noting, firstly, that an independent psychiatrist had asssessed the convicted as "prepsychotic, and definitely psychotic within the next few years" and that the Crown psychiatrist concurred with this opinion and, secondly, that "... (a)part altogether from the problem of insanity, none of the officials (in the Attorney General's Department in the province of conviction) will quarrel with commutation",

adding that "(t)his takes into account a certain degree of intoxication, a lack of planning and meditation, (and) the apparent attempt to commit suicide". The recommendation of the Department of Justice appeared to be influenced by the psychiatrist's diagnosis of psychosis as well as by the view of an official of a provincial government department that there were other mitigating factors, so much so that commutation would not be unacceptable. In a handwritten note added to his formal recommendation not to interfere with the sentence, the Minister of Justice stated: "(a provincial Attorney General official) tells me ... that all he told (the Department of Justice representative) was that he would not object to commutation. He was in no sense recommending for or against commutation." This note, which is the only indication of an explanation for not accepting the recommendation of the Department of Justice, suggests that the Minister of Justice felt that the provincial Attorney General's position had been misrepresented, although "none will quarrel with" and "would not object to" seem to be substantively identical in meaning. In addition, the Minister of Justice appears to have either not taken the independent psychiatric opinion into account, or not found it to be a sufficiently mitigating factor. It is also interesting to note that this was the single case in which an independent assessment of mental illness did not result in commutation.

In 73 cases, the Department of Justice recommended against commutation and all cases resulted in execution.

Mercy was recommended by the judge in 20 (18.3%) of the 109 cases, and 19 (95%) of these resulted in commutation. In 41 cases, the judge recommended against mercy, and 37 (90.2%) resulted in execution. In one of the four cases resulting in commutation, the judge's recommendation against mercy was somewhat qualified, in that he noted: "It is difficult to see any extenuating circumstances, except youth." (The convicted person was 23 years old, and had murdered his 3-week old child.)

Of the remaining 48 cases, in which no recommendation was made, 12 (25%) resulted in commutation. Documentation suggested that the judge did not always appear to have been fully informed about his right to make a recommendation. In one case, for example, he states: "I have no recommendation to make. I am not familiar with departmental practices in this regard." This was a rare instance, however.

The jury recommended mercy in 20 (18.3%) of the 109 cases, and 16 (80%) resulted in commutation. Only a single recommendation against mercy was made, and this case involved extreme brutality and resulted in execution. In the remaining 88 cases, for which no recommendation was made at all, 19 (21.6%) resulted in commutation. There are a

number of indications throughout the documentation overall that, for many of the cases, the jury was not aware and was not advised that it could make any recommendation.

Recommendations made by the various parties and the final disposition resulting in these cases are presented in Table 5. As can be seen from these comparative data, the level of concurrence by Cabinet with mercy recommendations was lowest when it was made by the jury, and increased with each subsequent recommending party. In the case of a recommendation against mercy, concurrence was unanimous for all parties except the judge.

Table 6 presents details on the significantly related offence characteristic of association of the homicide with the commission of another crime. As can be seen, another crime was committed at the time of the murder in over half of the cases (51%, n=56). The overall commutation rate for these cases (19.6%) was considerably lower than that for those where no other crime was involved (43.4%). When the other crime is specifically considered, the lowest commutation rate was for murder occurring during a prison escape (0%, n=1), although the single case precludes attaching any significance to this finding. The next lowest commutation rate was for murder associated with sex assault (8.3%, n=12). Commutation in homicide cases involving avoidance of arrest was 12.5%. Here, too, the numbers were small (n=8).

Table 5

Final Disposition by Recommendations For or Against Mercy

Recommending Party	For Mercy	Commuted No.	%	Against Mercy	Executed No.	%
Minister of Justice	35	35	100	74	74	100.0
Department of Justice	36	35	97.2	73	73	100.0
Judge	20	19	95	41	37	90.2
Jury	20	16	80	1	1	100.0

Table 6

Final Disposition by Type of Other Crime Involved

Other Crime	Number Executed	Number Commuted	Total	Commutation Rate (%)
Sex Assault	11	1	12	8.3
Robbery	25	10	35	28.6
Avoidance of Arrest[1]	7	1	8	12.5
Prison Escape	1	0	1	0.0
Total	44	12	56	19.6
No Other Crime	30	23	53	43.4
TOTAL	74	35	109	(32.1)

1. In all cases, the avoidance of arrest followed a robbery or intended robbery. For simplicity of analysis, robberies occurring in these cases were included in this category.

In all these cases, the murder was of a police officer and each one involved a robbery or intended robbery. When the associated crime was robbery alone, the commutation rate was considerably higher (28.6%). There were 35 such cases.

Not significantly related were the variables of premeditation, brutality/indignation, year of decision, and province of conviction.

Over a third of the murders involved some degree of premeditation (36.3%), n=37), and the commutation rate for these murders was 35.1%, as compared with a surprisingly lower rate of 33.8% where there was no premeditation. In 7 cases, there was insufficient information on file from which to make a judgment as to whether the murder was premeditated.

According to comments made by the judge in his report, very few murders involved a marked degree of brutality, or of public indignation (5.5%, n=6). The commutation rate for these cases was 16.7%, compared with a rate of 33.0% for those in which this factor was not noted as present.

The 109 offenders were involved in a total of 95 separate incidents, i.e. a number of incidents (n=11) led to more than one murder conviction. In the majority (n=9) of these multiple conviction incidents, there were two

perpetrators, while one led to three convictions and one of them to 4 convictions.

The commutation rate for the 25 persons who were not singly responsible for the murder was 24% (n=6), contrasted with a commutation rate of 34.5% (n=29) among the 84 lone killers.

The offender characteristics of significance to the final disposition of the case were age, mental abnormality, and previous criminal record.

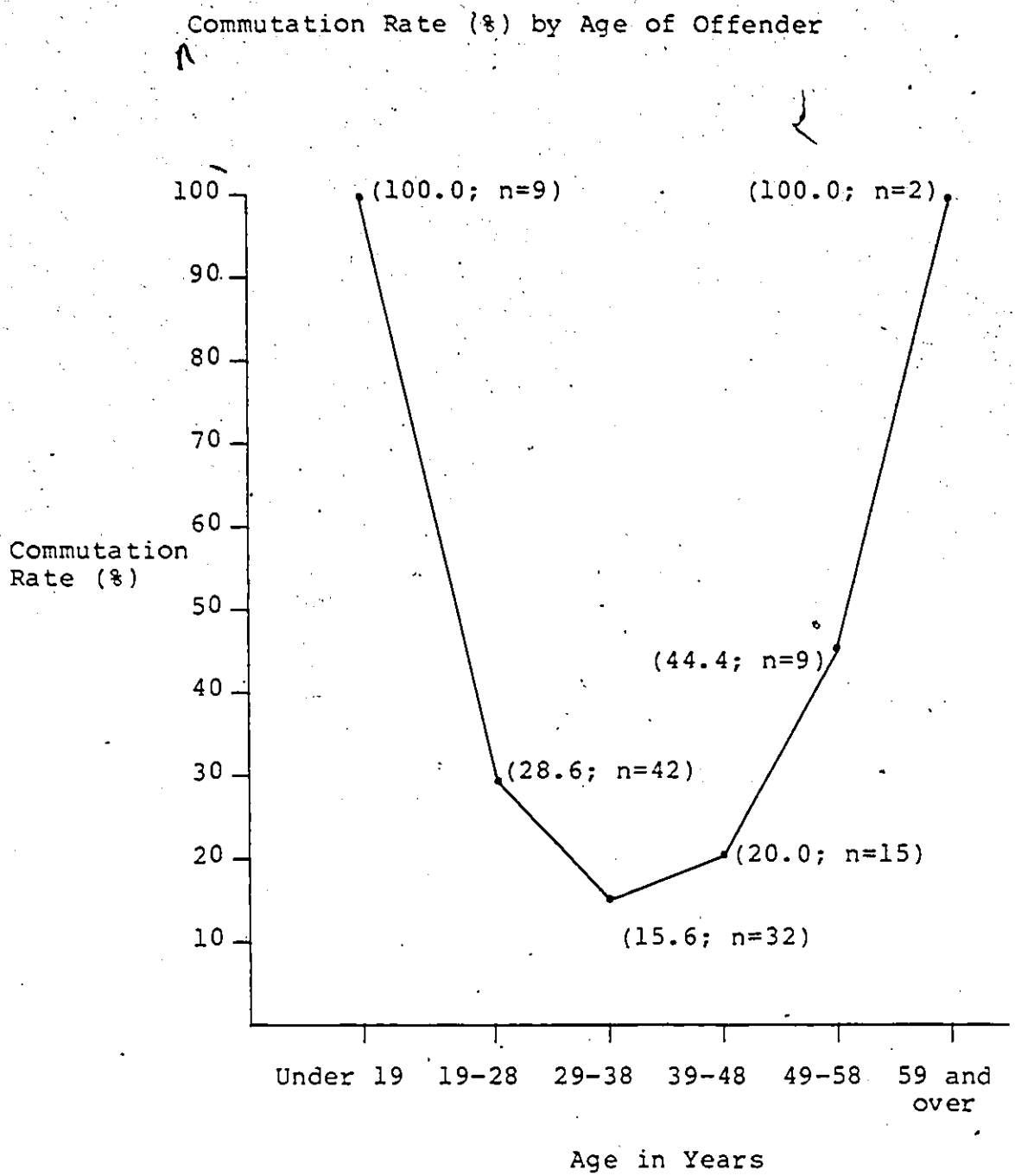
The ages of the murderers ranged from 15 to 68, although over half were under 30 (51.3%, n=56). The rate of commutation varied considerably with age (see Table 7), and indicated a U-shaped ralationship (see Figure 1), with the rate being highest for the youngest and oldest age categories. All those in the Under 19 and 59 and over age groups were commuted (n=9 and 2, respectively). The 19 to 28 age group is the only group whose commutation rate (28.6%) was even close to that for the whole group (32.1%), and presumably the large size of this group heavily influenced the overall rate. It is interesting to note that offenders in this age group was ultimately less harshly dealt with than those falling in the next two older categories, given that this younger group is typically the most highly represented in the criminal justice system and regarded as

Table 7

Final Disposition by Age of Offender

Age	Number Executed	Number Commuted	Total	Commutation Rate (%)
Under 19 years	0	9	9	100.0
19 to 28	30	12	42	28.6
29 to 38	27	5	32	15.6
39 to 48	12	3	15	20.0
49 to 58	5	4	9	44.4
59 and over	0	2	2	100.0
Total	74	35	109	(32.1)

Figure 1


Commutation Rate (%) by Age of Offender
Commutation Rate (%)
100
90
80
70
60
50
40
30
20
10
(100.0; n=9)
(28.6; n=42)
(15.6; n=32)
(20.0; n=15)
(44.4; n=9)
(100.0; n=2)
Under 19
19-28
29-38
39-48
49-58
59 and over
Age in Years

the most problematic. The higher commutation rate could reflect a reluctance to execute younger offenders, even if they are over 18. If the age grouping is adjusted to include a slightly older group - 25 to 35 - the commutation rate drops noticeably, to 6.3%, which suggests that youth may be a factor influencing the final decision.

Mental abnormality included any form of mental disturbance or retardation that was considered sufficient to act as a mitigating factor, even though it had not been sufficient to sustain a diagnosis of legal insanity. The defence of insanity was raised but not sustained in a number of cases. In some cases, it had not been seriously addressed by the defence counsel and in other cases, it was not supported by expert court testimony. Nonetheless, it had been profferred as one of several defences. The manner in which this was done seems to suggest that it is a defence strategy frequently adopted in capital cases as a matter of course.

The existence of mental abnormality of such a nature as to act as a mitigating factor was suspected in only 16 cases. In 5 of these cases, an independent psychiatrist reported the existence of no evidence of serious mental impairment. In 11 of the cases, the offender was considered to have a serious degree of mental impairment in the form of

either a psychiatric disturbance or mental retardation. Commutation of the sentence occurred in 10 (90.9%) of these cases, compared with a commutation rate of 25.5% for cases where the presence of mental abnormality was not seriously raised.

Information of the existence of a previous criminal record was available on only 55 of the 109 cases. Of these 55, about two-thirds (61.8%; n=34) had some previous criminal involvement. Occasionally, the involvement was detailed in the files, but most frequently it was simply mentioned without elaboration. Of those with a previous criminal record, only 4 had their sentences commuted - a rate of 11.8%. This compares with a rate of 47.6% for those without such a record, and a rate of 38.9% for those on whom the information was not available (see Table 8).

Offender characteristics that were not related to the final disposal were the sex, the occupational status, and the ethnicity of the offender. As far as sex was concerned, there were only 3 females among the 109 offenders, and two of these (66.7%) had their sentences commuted. The commutation rate for male offenders was 31.1%.

As can be seen from Table 9, almost the entire group were either unemployed or unskilled (84.4%, n=92). There

Table 8

Final Disposition by Previous Criminal Record

Previous Criminal Record	Number Executed	Number Commuted	Total	Commutation Rate (%)
Yes	30	4	34	11.8
No	11	10	21	47.6
Unknown	33	21	54	38.9
Total	74	35	109	(32.1)

Table 9

Final Disposition by Occupational Status of Offender

Occupational Status	Number Executed	Number Commuted	Total	Commutation Rate (%)
Unemployed	33	10	43	23.3
Unskilled	30	19	49	38.8
Skilled	6	2	8	25.0
White Collar and Professional	0	1	1	100.0
Unknown	5	3	8	37.5
Total	74	35	109	(32.1)

were 8 skilled workers and one white collar worker convicted of murder. The commutation rate was lower for the skilled workers (25.0%) than for the unskilled (38.8%) and again lower for the unemployed worker than for the skilled worker.

With regard to the ethnicity of the offender, there were equal numbers of individuals of Anglo and French origin (28.4%, n=31 in each category). Those of European origin constituted an almost equally large group (27.5%, n=30). This last group had the highest commutation rate (40.0%). The commutation rate (35.5%) for those of Anglo ethnicity was higher than for those of French origin (22.6%). The remaining cases involved 6 Native Canadians, 2 Blacks, 5 Americans and 4 of unknown ethnicity, and the commutation rates for these four groups were 33.3%, 0%, 20.0% and 50%, respectively (see Table 10).

With regard to the characteristics of the victim, it must be pointed out that the 109 capital cases involved 130 victims in a total of 95 incidents, i.e. a number of incidents (n=13) involved more than one victim, one of them involving 23 victims in a bombing. Four of these multiple victim incidents involved more than one perpetrator. Among the 18 perpetrators of multiple-victim incidents, 2 (11.1%) were commuted, contrasted with a commutation rate of 36.3%

Table 10

Final Disposition by Ethnicity of Offender

Ethnicity	Number Executed	Number Commuted	Total	Commutation Rate (%)
Anglo[1]	20	11	31	35.5
French	24	7	31	22.6
Native	4	2	6	33.3
Black	2	0	2	0.0
Oriental	0	0	0	--
European	18	12	30	40.0
Other[2]	4	1	5	20.0
Unknown	2	2	4	50.0
Total	74	35	109	(32.1)

1. This includes British origin.
2. All cases in this category were Americans, of unknown ethnic origin.

for single-victim incidents. The two commuted killers involved in these multiple-victim incidents were both under 19. These results suggest, without considering other factors, that the factor of there being multiple victims was strongly related to the final decision. They also add strong confirmation to the mitigating nature of the youth factor.

As mentioned earlier, only information on the single victim to which the charge related has been included in this analysis. It should also be noted again that where more than one individual was convicted for the murder of a single victim, information on that same victim was included for each conviction case.

Among the victim characteristics, age (but only where the victim was an infant), and the relationship to the offender (family member) were significant as far as the final disposition of the case was concerned.

In 48 cases, there was no direct reference to the victim's age, although it was clear from other information, such as a reference to the victim as adult or taxi-driver), that the victim was an adult in each of these cases. In the 61 cases where the age of the victim was known, they were as follows: 2 infants, 6 under 16 years (exclusive of

infants), 2 between 16 and 19 (inclusive), 13 in their 20s, 6 in their 30s, 6 in their 40s, 7 in their 50s, 9 in their 60s, 9 in their 70s, and 1 in his 90s. Because of the large number of cases in which the victim's age was unspecified, no analysis was conducted of the relationship between victim's age and final disposition, except for those victims under age 16.

The two infant victims resulted from separate incidents, and in both cases the sentence was commuted. In each case, the infant had been killed by one of its parents, in one instance the parent being a 23 year old mother, and in the other a 23 year old father. In the case involving the mother, the representative of the Department of Justice raised the possibility of the case being regarded as infanticide, but noted that the judge found the evidence to be insufficient to support such a reduced charge. The representative recommended that the sentence be commuted to life imprisonment, with "any further clemency to be determined in the light of future developments", a qualification which he had not made in any other case. In both these cases, the "youth" of the offender was mentioned as a mitigating factor, a consideration which had not been mentioned in several other cases where the offender was

of similar age. The few number of cases precluded further investigation of the relationship between commutation and the victim being an infant victim.

In the 6 cases involving a victim under 16, the offender was executed in all cases except one, the offender in this case being under 18 years himself.

With regard to the victim's relationship to the offender, in well over half of the cases, the victim was known to the murderer, either as a family member (25.7%, n=28), friend (22.9%, n=25) or through a business relationship (10.1%, n=11). Overall, 58.7% (n=64) of victims were known to their killer. Among the remaining cases, the victim was a stranger in 36 (33.0%) cases and a police officer or prison guard in 9 (8.3%) cases. Murders involving a family member most frequently resulted in commutation (46.4%, n=13). The commutation rate was 36.4% (n=4) where the offender-victim relationship was a business relationship. Where the relationship was that of friend, the rate was 28.0% (n=7) and where it was stranger, the rate was 27.8% (n=10). As mentioned earlier, only one case involving the death of a police or prison officer resulted in commutation (see Table 11).

Table 11

Final Disposition by Victim's Relationship to Offender.

Relationship	Number Executed	Number Commuted	Total	Commutation Rate (%)
Family Member	15	13	28	46.4
Friend	18	7	25	28.0
Business	7	4	11	36.4
Stranger	26	10	36	27.8
Police Officer of Prison Guard	8	1	9	11.1
Total	74	35	109	(32.1)

The victim characteristics that were not significantly related to the final decision were sex, occupational status and ethnicity.

Thirty-three cases involved a female victim and in one-third of these, the sentence was commuted (33.3%, n=11). The commutation rate in cases where the victim was male was almost identical (31.6%, n=24).

About half of the victims were in a low occupational status - 4 unemployed (3.7%), 46 unskilled (42.2%), and 4 skilled (3.7%). Of the remaining cases, 26 (23.9%) victims were white collar or professional, 9 (8.3%) were police officers or prison guards, and the victim's occupational status was unknown in 20 (18.3%) cases. Commutation most frequently resulted when the victim was either unemployed or a skilled worker (50%). However, the very few number of cases in both these categories (n=4) precludes any interretation from these findings. The commutation rates for cases where the victim was unskilled or white collar/professional were very similar to the overall rate, at 32.6% and 30.8% respectively. As would be expected, commutation in cases involving the murder of a police officer or prison guard (n=9) was very infrequent (11.1%), and in the single instance of commutation, the offender was under 18 years

of age. For the 20 cases where the victim's occupational status was unknown, the commutation rate was 35.0% (see Table 12).

In well over one-third of the cases (38.5%, n=42), the victim's ethnicity was not mentioned in the documentation. Among those for which information was available, there were almost equal numbers of victims of Anglo (20.2%, n=22), French (19.3%, n=21) and European (17.4%, n=19) ethnicity. The remainder included 2 Native Canadians (1.8%), 2 Oriental (1.8%) and 1 American (0.9%) of unknown ethnic origin. Ignoring the categories with very small numbers, commutation occurred most frequently when the victim was of European origin (52.6%, n=10). The commutation rate in cases where the victim was of Anglo ethnicity was 27.3% (n=6), and where the victim was of French ethnicity, it was 19.0% (n=4). In neither of the two cases where the victim was an Oriental was the sentence commuted.

The single case where the victim was an American and one of the cases where the victim was a Native Canadian resulted in commutation. Of those cases where the victim's ethnicity was not known, 31.0% (n=13) resulted in commutation (see Table 13).

Table 12

Final Disposition by Occupational Status of Victim

Occupational Status	Number Executed	Number Commuted	Total	Commutation Rate (%)
Unemployed	2	2	4	50.0
Unskilled	31	15	46	32.6
Skilled	2	2	4	50.0
White Collar and Professional	18	8	26	30.8
Police Officer or Prison Guard	8	1	9	11.1
Unknown	13	7	20	35.0
Total	74	35	109	(32.1)

Table 13

Final Disposition by Ethnicity of Victim

Ethnicity	Number Executed	Number Commuted	Total	Commutation Rate (%)
Anglo	16	6	22	27.3
French	17	4	21	19.0
Native	1	1	2	50.0
Black	0	0	0	--
Oriental	2	0	2	0.0
European	9	10	19	52.6
Other[1]	0	1	1	100.0
Unknown	29	13	42	31.0
Total	74	35	109	(32.1)

1. Includes an American of unknown ethnic origin.

Multiple regression analysis was conducted on only 100 cases - those where the offender was over 18 years. Cases where the offender was under 18 years were excluded from analysis as commutation consistently resulted on the basis of the offender's age alone. Their inclusion in the analysis, it was thought, would tend to bias the results. Four multiple regression analyses were conducted. The first was with those variables categorized as offence characteristics, the second with offender characteristics, the third with victim characteristics, and the fourth with those variables that explained at least 1% of the variance in the other three regression analyses.

The multiple regression on offence characteristics included all five variables described earlier under this category. The "other crime" variable, however, was entered as three separate dummy variables, to take into account the particular offences involved, and the offences of "prison escape" and "avoiding arrest" were combined, as there were so few cases in total (n=6), and only 1 prison escape.

As can be seen from Table 14, the most influential offence factor in the final decision was murder occurring during a robbery, which explained 4.9% of the variance. This was followed by murder occurring during a sex assault (4.3%),

Table 14

R^2 and Change in R^2 between Offence Characteristics and Final Decision

Offence Characteristics	R^2	Change in R^2
Murder occurring during a robbery	0.049	0.049
Murder occurring during a sex assault	0.092	0.043
Premeditation	0.112	0.020
Murder occurring during a prison escape or avoidance of arrest	0.132	0.192
Year of Decision	0.141	0.009
Province of Conviction	0.150	0.009
Brutality/Indignation	0.150	0.000

the presence of premeditation (2.0%) and murder occurring during a prison escape or avoidance of arrest (1.9%). The remaining variables each explained less than 1% of the variance, and were thus not considered to merit further analysis. Overall, variables relating to the offence explained 15% of the variance in the final decision.

The regression on offender characteristics included five variables. The variable of sex was omitted, as all but 3 cases were male. In addition, the four ethnicity categories were entered as separate dummy variables.

The most influential among the offender characteristics (Table 15) was the presence of mental abnormality, which explained 20.3% of the variance. The only other factors to explain at least 1% of variance were European ethnicity (1.7%), and previous criminal record (1.4%). Offender characteristics overall explained 24.9% of the variance in the final decision.

The regression on victim characteristics included five variables - all except age, which was omitted because of the large number of cases for which this information was either not available or only roughly indicated or, in the case of the victim being an infant, because there were only two cases. The categories within ethnicity and occupational status were entered as separate dummy variables.

Table 15

R^2 and Change in R^2 between Offender Characteristics and Final Decision

Offender Characteristics	R^2	Change in R^2
Mental Abnormality	0.203	0.203
Ethnicity - European	0.221	0.017
Previous Criminal Record	0.235	0.014
Age	0.244	0.009
Ethnicity - French	0.247	0.003
Ethnicity - English	0.249	0.002
Ethnicity - Minority	0.249	0.001
Occupational Status	0.249	0.000

Among the victim characteristics (Table 16), those which explained at least 1% of variance were a family member relationship, accounting for 4.9% of the variance, followed by European ethnicity (3.9%), the fact of there being more than one victim (3.1%), a stranger relationship (1.9%) and a police officer or prison guard relationship (1.5%). Victim characteristics overall explained 18.2% of variance.

Results of the final regression, on all characteristics from the previous regressions which had explained at least 1% of variance in the final decision, are presented in Table 17. The factor of mental abnormality was found to explain the highest amount of variance (20.3%), and accounted for more of the variance than all of the other factors together. This was to be expected, given its relatively high correlation coefficient, and its R^2 value in the regression on offender characteristics. Other variables which explained at least 1% of variance were the fact of there being more than one victim (2.8%), premeditation (2.4%), murder occurring during a robbery, or during a sex assault (each 2.3%), the victim's relationship to the offender being that of a police officer or prison guard (2.2%), the offender being of European ethnicity (1.2%), and the offender having a previous criminal record (1.2%). All of the variables together explained 35.4% of the variance in the final decision.

Table 16

R^2 and Change in R^2 between Victim Characteristics and Final Decision

Victim Characteristics	R^2	Change in R^2
Relationship - Family Member	0.049	0.049
Ethnicity - European	0.088	0.039
More than one victim	0.119	0.031
Relationship - Stranger	0.138	0.019
Relationship - Police or Prison Guard	0.153	0.015
Ethnicity - French	0.161	0.008
Occupational Status - Unskilled	0.169	0.008
Occupational Status - Unemployed	0.176	0.007
Sex	0.182	0.006
Ethnicity - English	0.182	0.000
Ethnicity - Minority	0.182	0.000

Table 17

R^2 and Change in R^2 for Characteristics which had explained at least 1% of Variance in Final Decision in Regressions by Category

Characteristics	R^2	Change in R^2
Offender - Mental Abnormality	0.203	0.203
Victim - More than one victim	0.231	0.028
Offence - Premeditation	0.256	0.024
Offence - Murder occurring during a robbery	0.279	0.023
Offence - Murder occurring during a sex assault	0.302	0.023
Victim - Relationship to Offender - Police or prison guard	0.324	0.022
Offender - Ethnicity - European	0.336	0.012
Offender - Previous Criminal Record	0.348	0.012
Victim - Relationship to Offender - Stranger	0.353	0.005
Victim - Relationship to Offender - Family Member	0.354	0.001
Offence - Murder occurring during a prison escape or avoidance of arrest	0.354	0.000

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CHAPTER 5

THE DEATH PENALTY AND DISCRETIONARY DECISION-MAKING

The question being examined here was whether, among persons sentenced to death, those who were executed could be differentiated from those whose sentence was commuted, on the basis of extra-legal characteristics.

Correlation analysis on all 109 cases indicated that three extra-legal characteristics were significantly related to the final decision - the offender's age, whether the victim was an infant, and whether there was a family relationship between the offender and victim. Among the variables that could be considered legal characteristics, those that the correlation analysis showed to be significantly related to the final decision were the fact of the murder occurring during another crime, mental abnormality, and previous criminal record.

Multiple regression analysis conducted separately with the offence, offender and victim characteristics showed that the extra-legal characteristic of offender's age made no contribution to the explanation of the variance. The loss of the impact of the offender's age may be due to the exclusion from the analysis of the 9 cases where the offender was under 18 years of age, all of which had been commuted on the basis

of the offender's age alone. Of the other significantly correlated extra-legal characteristics, the fact of the victim being an infant had been excluded from the regression analysis because there were only two cases, and the victim's family relationship was found to be an important explanatory factor. The regression also found the extra-legal characteristics of European ethnicity on the part of either the offender or victim, and a stranger relationship between the offender and victim, to explain some of the variance. The significantly correlated legal characteristics of the murder occurring during another crime, mental abnormality, and previous criminal record were all found to be important. In addition, the legal characteristics of premeditation, the fact of the murder involving more than one victim, and a police or prison guard relationship, were also found to be factors that contributed to the explanation of variance in the final decision.

The final regression analysis, with those variables which had explained at least 1% of the variance in the separate regression analyses, showed that the most important variables were the legal characteristics of mental abnormality, the murder involving more than one victim, premeditation, murder occurring during the crime of robbery or sex assault, the victim being a police officer or prison guard, and previous criminal record, together with the

extra-legal characteristic of European ethnicity on the part of the offender.

These findings indicate that the final decision is based largely on legal attributes, although extra-legal attributes do play some part. The findings do not reveal sufficient evidence that the conflict theory can explain the application of the death penalty. No, however, do they reveal evidence that its application could be explained in terms of consensus theory.

There are numerous qualification which need to be taken into account in considering the findings of the study. Some of them are of a methodological nature, relating to the information available, the size of the study, and the methods of analysis. Others relate more to the conduciveness of the decision-making process to conflict theory testing.

Some serious limitations were presented by the unavailability of more detailed information, particularly in respect of socio-demographic characteristics for both the offender and victim. We can perhaps assume that the representative of the Department of Justice and the Minister of Justice made their recommendations on the basis of the information contained in the documentation and so had access only to the same skeleton socio-demographic information as

was available for this study. The judge, however, whose recommendation was highly correlated to the final decision, was present in the courtroom, and his recommendation could have been influenced by much finer social class distinctions than could be gleaned from the documented information. A related fact here was the absence of information on some of the independent variables in some cases. All cases with missing data were retained in the analyses. It was assumed that this missing information was not available to the decision-makers, and the fact of it not being available and consequently not used appeared to be just as relevant as the information that was available and consequently used. However, some of this missing information may have been known to the judge and have influenced his recommendation.

In this regard, it may have been more illuminating in examining the factors operating in the final decision to look at individual cases. In an assessment of criminal sentencing, Gibson(1) found that aggregate data could mask the presence of structural factors, in this case discrimination on the basis of race. It was only when he examined the decisions of individual judges that the element of discrimination became apparent, in that some judges dealt with blacks more harshly than with whites. Attitude and personal data that he obtained from judges themselves suggested, among

other things, that the judge's associations to political culture were a factor in differential sentencing. For this study, stronger evidence of structural effects may have been obtained by grouping cases according to trial judge before examining the relationship to final decision, particularly if it could be asssumed that the judge's recommendation itself, distinct from the factors on which it was based, influenced the final decision.

The period chosen for study, and consequently the size of the study group, may be problematic. The post-war period was chosen for the reasons outlined earlier, but it is possible that an unknown factor (for example, an unstated recognition given to war service) was operating during this period, and this would invisibly contaminate the effects of other variables. The selection of a longer period might have avoided the possibly distorting effect of such an invisible artifact. Another more general concern in working with a relatively small study size is the questionable validity of statistical results for a larger population. This is not a problem here, as the findings are not being generalized beyond the group under study.

Another limitation of a methodological nature related to the analytic techniques which were applied, given the size of the study group. Correlation and regression analyses were

conducted in order to be able to explore relationships among the variables and develop an explanation for the decision-making process as it occurred for the cases under study. This is a methodologically acceptable use of these techniques, even if they were theoretically and empirically developed for application to a large base of data which is assumed, among other things, to have been drawn from a normally distributed population. In the case of this study, however, with only a relatively small number of cases, the application of regression analysis to a large number of variables may have stretched the capabilities of the regression technique, and produced some unreliable results. That this may have occurred was suggested by the fact that the regression summary tables were not entirely consistent on repetition. This instablility only occurred for variables which were found to explain a very small amount of the variance, and was therefore not considered to be of sufficient seriousness to throw the overall results into question. At the same time, it does indicate that a larger number of cases would have allowed for greater confidence in the findings.

A possibly significant conceptual limitation to the study was the fact that it focussed on the final stage in the

decision-making process. There are clearly advantages in choosing this stage, as it provides the rare combination of judicial and political decision-making. At the same time, the fact that it is the final stage in the process means that the cases under study are likely to be those which remain after selective enactment and enforcement and the judicial process have already been effective to some extent in selecting out those against whom the law is not meant to be directed or, at least in the case of the death penalty, the full weight of the law. If this is the case, then there would be relatively little in the way of social position information by which to distinguish among the cases under study. The fact, for example, that only 9 out of 109 offenders were known to be of a higher occupational status than unemployed or unskilled lends some weight to this suggestion.

The low commutation rate for those with a previous criminal record could also be an indicator of structural discrimination at other points in the system. Almost two-thirds of the 55 offenders for whom this information was available had a criminal record, and only 4 of them were commuted. The practice of taking an individual's previous criminal involvement into account in making decisions about that individual would seem to be reasonable and appropri-

ate. However, the existence of a criminal record could itself be the result of some discrimination in the past. Where this is the case, discrimination is being continued when this factor is taken into account in processing the case and reaching a final decision. The fact that a previous criminal record was not found to have made a large contribution to the final decision in this study was probably due to the large number of cases where this information was not available. In order to test this possibility, a regression analysis was conducted on offender characteristics, using a pair-wise deletion procedure for missing data (i.e. eliminating those cases in which the information was not known from calculations involving that particular variable). Under these conditions, the presence of a previous criminal record was found to explain over 10 percent of the variance in the final decision. The extent to which the presence of a criminal record for cases in this study reflects discrimination in the past can only be conjectured upon.

The major difficulty, however, in attempting to test conflict theory, or any theory, from information contained in the written documentation which serves as the basis for a discretionary decision is the inescapable limitation of the written account. It is impossible to know just what items of information were actually used by the decision makers,

including, in this study, those whose recommendation may have contributed to the final decision. Neither can it be determined how that information was selectively combined and interpreted in the minds of these parties. One would need to know whether the specific information provided in the written record served directly and exclusively as the basis for the recommendation of the trial judge and the representative of the Department of Justice, or whether this information and the reasons given for their recommendations represent a rational ex post facto explanation for a decision already arrived at and based, partially or entirely, on less objective, less visible information which would reveal discrimination if documented.

The regression results suggest that many factors not apparent in the written record were related to the final decision. Even with all of the conventional legal factors relating to the case included, as far as they were available, in the regression analysis, these, together with the selected extra-legal factors, explained only approximately one-third of the variance in the final decision. It does appear, then, that one or more extra-legal factors which were not immediately apparent from the written documentation had some influence on the final decision.

Perhaps the process in operation is one whereby the

judge and the representative of the Department of Justice base their recommendations on information at least partly outside of legal factors, develop an acceptable objective rationalization to support their recommendation, and the Minister of Justice and the Cabinet are sufficiently confident that their own intentions with respect to use of the death penalty are reflected in the views of judges (who are politically appointed) and, to an even greater extent in those of bureaucrats (whose role is to serve the political body), that they tend to ratify, for the most part, the recommendations presented to them. The high correlationbetween the final decision and the judge's recommendation, where he made one, and the single exception in the case of the recommendations made by the Department of Justice, suggest that this may be occurring. The fact that the correlation between the jury's recommendation and the final decision was lower than those for either the judge or the representative of the Department of Justice could also be taken to add support to this contention. While these two latter parties arrive at a recommendation which will fit with the official view, the jury, whose members need not be expected to prescribe to the same political or social motivations, arrives at a recommendation which is less likely to be officially acceptable. The apparent failure of the

court to advise the jury in every case of its right to make a recommendation, together with the apparent failure of the system to rectify this omission or at least ensure that it did not occur in the future, may also be related to the relatively lower importance given to the jury's recommendation.

The extent to which one must conjecture about the reasons behind fundamental decisions in the criminal justice process provides a strong argument against the validity of consensus theory. If society was operating on the basis of consensus, we should expect that society's rules would be applied and that decisions would be based on criteria which are visible to and verifiable by the observer.

The frequent practice of invisible decision-making, together with the many legal opportunities for making exceptions to society's rules, at all points in the system, serve to add support to the claim of conflict theorists that the rules are ultimately intended to work in favour of certain members or groups in society and to be used against others. The established use of hidden procedures and rule by exception simply provide an acceptable escape route when strict application would result in an unwanted outcome. Paradoxically, the process, by its very nature, is not easily subject to investigation.

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APPENDIX A

THE DEPUTY MINISTER OF JUSTICE
OTTAWA

OTTAWA 19

TO HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL:

The undersigned has the honour to submit herewith report of the Honourable W. R. Howson, C.J., in the case of , convicted of murder at Sittings of the Supreme Court of Alberta, held at the City of Medicine Hat, during the months of February and March, 1946, and sentenced to be executed on the twenty-sixth day of June, 1946, together with transcript of the evidence adduced at the trial, and other documents relating to the case.

Upon careful consideration of all which, the undersigned respectfully recommends that the law be allowed to take its course.

Respectfully submitted,

Louis St. Laurent

Minister of Justice.

APPENDIX A

AT THE GOVERNMENT HOUSE AT OTTAWA

FRIDAY, the 21st day of JUNE, 1946.

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUN CIL:

The Governor General has been pleased to lay before the Privy Council the report of the Honourable W. R. Howson, C.J., in the case of , who was tried before him at Sittings of the Supreme Court of Alberta, held at the City of Medicine Hat, during the months of February and March, 1946, for the crime of Murder; and having been convicted thereof, was sentenced to death - such sentence to be carried into execution on the twenty-sixth day of June, 1946.

The Governor General has also laid before the Privy Council a transcript of the evidence adduced at the trial and other documents relating to the case.

The circumstances of the case having been fully considered by the Governor General in Council, together with the report of the Minister of Justice adverse to the commutation of said sentence -

The Governor General is unable to order any interference with the sentence of the Court.

Approved

from 21st 1946

APPENDIX A

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OTTAWA

OTTAWA 19

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Upon careful consideration of all which, the undersigned respectfully recommends that the death penalty be commuted to a term of life imprisonment in the Saskatchewan Penitentiary.

Respectfully submitted,

Louis St. Laurent

Minister of Justice.

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The Governor General has also laid before the Privy Council a transcript of the evidence adduced at the trial and other documents relating to the case.

The circumstances of the case having been fully considered by the Governor General in Council, together with the report of the Minister of Justice in favour of the commutation of said sentence -

The Governor General is pleased to order and it is hereby ordered that the sentence of death so passed upon the prisoner be commuted to a term of life imprisonment in the Saskatchewan Penitentiary.

Approved.

Alexander of Tunis