EMPIRICAL RESEARCH ON SENTENCING

Julian Roberts
Department of Justice Canada
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Foreword

This paper was written for the Canadian Sentencing Commission in 1984. The intention was to review the research literature on sentencing (and public views of sentencing) that had accumulated since 1969, the year that the Canadian Committee on Corrections (now referred to as the Ouimet Committee) released its report. In addition, the aim was to present the material in a non-technical way that would be accessible to the members of the Canadian Sentencing Commission, most of whom were not professional social scientists.

Accordingly, this report is not written with the intention of analyzing the research to a depth associated with professional journals in the field of social science. Moreover, the review examines the major issues which have stimulated research, but it is not - and was not written to be - exhaustive. The focus is upon Canadian research. Now that the Sentencing Commission's report has been made public, the Department of Justice, Canada is publishing the research of the Commission. Each article provides useful information on some aspect of sentencing (e.g., plea bargaining; the opinions of judges; alternatives to incarceration), but this report, it is hoped, will serve as an introduction to the empirical research in this field. It will be of greatest use to criminal justice professionals who are not well acquainted with the empirical research on various aspects of sentencing. But, it does not provide more than an introduction, and a guide. For a full appreciation of an issue such as the nature of public opinion regarding sentencing, the reader will find it necessary to read further. For some issues there are other research reports from the Canadian Sentencing Commission that deal in far greater detail. Since the paper was written early in the life of the Commission, it does not include research completed by the Commission. The section on public opinion and sentencing encompasses research published until 1985, but does not incorporate the extensive public opinion work described in the Commission's final report.

Julian Roberts
Department of Justice Canada
May 1, 1987

Executive Summary

A recurrent theme in the literature on sentencing since the Ouimet report (1969) has been the necessity of adopting a formal statement of the aim(s) of sentencing and the purposes to be served by the sanctions provided by the Criminal Code. While consensus seems to exist that protection of the public is the over-riding aim, there is less agreement over the appropriate means of achieving this protection. It is important to address the topic of sentencing purpose for confusion or diversity of opinion at this stage may well cause disparity in disposition, a topic of concern to criminal justice professionals, members of the public, as well as offenders.

Despite the concern over the existence of disparity, there is an absence of consensual definition in the literature. It is clear that several forms of disparity exist, in varying degree, and solutions to one kind may do little to affect others. Consider two potential sources of disparity frequently mentioned by researchers: diversity in the appropriate purposes of sentencing (e.g., rehabilitation versus general deterrence) and disagreement over the appropriate mitigating and aggravating factors. Intervention to secure uniformity in one of these domains will not necessarily reduce disparity due to the other.

Disparity means different things to different people. Headlines in the newspapers (which may have a strong influence upon public perceptions) usually refer to disparity from a norm of proportionality. Disparity in the sentencing literature is more usually defined as a discrepancy between the sentences assigned to similar offenders convicted of similar offences. However, even when agreement is reached upon a definition, ambiguity remains: As one writer has pointed out, if sentences of six months and five years for essentially the same offence are evidence of disparity,

which of the two is disparate? Or are they both disparate from some previously-defined criterion? It is important to agree upon a definition of disparity, and upon the manner in which disparate sentences arise before an adequate estimate of the magnitude of the problem can be ascertained.

This said, there are many potential sources of disparity that have been identified in the sentencing literature. These include:

(a) substantial discretionary power at the disposal of judges;

(b) lack of an explicit statement of the purpose of sentencing, or of a ranking of the various sentencing aims;

(c) diversity in perceptions of the appropriate mitigating/aggravating factors;

(d) diversity in perceptions of the appropriate weight to be attached to these factors;

(e) diversity in the perceptions of the likelihood of parole, and of the legitimacy of incorporating these perceptions into the sentence;

(f) diversity in perceptions of the relative efficacy of various dispositions;

(g) absence of systematic feedback about previous decisions, and of the decisions of others;

(h) variability in the extent to which individuals incorporate information contained in the pre-sentence reports.

The aim of much research on sentencing has been two-fold: to assess the degree of disparity, and to identify the mechanism by which it arose. Empirical research in this country effectively began with Hogarth's 1971 study which examined the sentencing patterns of a sample of Ontario magistrates. One of the main findings of this investigation was that judicial attitudes accounted for considerable variation in sentences handed down. Hogarth attempted to predict sentence length using two

competing models. The first of these - known as the 'Black Box' model - employed facts of the cases to explain variation in sentencing. In this model, characteristics associated with the decision-maker played no role. This model proved substantially inferior to a 'phenomenological' model which incorporated the perceptions and attitudes of the judges. This approach, employing sentencing decisions of actual judges, is but one way of studying sentencing. Others include investigation of normative decisions (e.g. Vining and Dean, 1980), comparison of variation from court-to-court and simulation experiments.

Palys and Divorski (1984; 1986) provided 206 provincial court judges with five case summaries, and asked the participants to assign a sentence and answer several questions about the case. This study uncovered substantial disparity of sentence, and this outcome is congruent with the results of similar simulation experiments in the United States. Disagreement emerged as to the facts important to the sentencing decision, as well as the purpose the sentence was intended to serve. Thus the importance of the objectives of sentencing was underlined by this study: punishments of differing severity were consistently tied to different legal objectives. The results of research from all methodologies gives rise to the conclusion that some degree of disparity must exist; the challenge to researchers is to quantify the magnitude of the problem.

The Canadian public appear to view current sentences as being too lenient. In this respect they are no different from members of the public in the U.S. and elsewhere. There is the perception abroad that the courts, by handing down light sentences, are failing to control crime. In addition, the parole authorities are viewed as 'undoing' much of the work of the sentencing judges by releasing offenders into the community after a short proportion of their sentences have been served. Much of

the public's dissatisfaction with sentencing and early release springs from inaccurate perceptions. The public perceive sentences to be more lenient than they in fact are, and they perceive parole to effect a greater overall reduction in sentence length than is in fact the case. These misperceptions arise from inadequate media treatment of sentencing and parole, as well as from the tendency of the average member of the public to generalize from a few memorable incidents. Thus, reading of a particularly lenient sentence, or a serious crime committed by an offender on parole, leads people to form negative and enduring perceptions of the sentencing process and the parole system.

Given that the public have a negative view of the sentencing process, the aim of research in this area has been (and continues to be) determining the exact cause of this dissatisfaction. Early interpretations which simply ascribed a strongly punitive philosophy to the public appear to be oversimplications. In order to understand public views of the sentencing process it is necessary to consider their sources of information (i.e., the news media) and their beliefs about other, related aspects of the justice system (e.g. parole).

Part I: Research on Sentencing

The purposes and principles of sentencing

When the Canadian Committee on Corrections published its report (Canada, 1969) the importance of clarifying the aims of sentencing was clear:

> To assist the courts in deciding whether a custodial or a non-custodial sentence is proper, a sentencing guide should contain a statement of priorities and criteria to be considered in reaching such a decision.

This theme - the necessity of conceiving and promulgating an unequivocal statement concerning the objectives of sentencing - has been heard repeatedly in commentary from all quarters.

In the Criminal Law in Canadian Society (Canada, 1982) the issue was stated thus: "The basic problem...(is) a debilitating confusion at the most basic possible level, concerning what the Criminal Law ought to be doing." (p. 38)

Common and Mewett (1969) stated:

> In order to achieve uniformity in the application of sentencing principles, it is necessary at first to attempt to arrive at some agreement on and understanding of the objectives of punishment. (p. 2)

In a similar vein, Edwards (1969) noted: "Canada displays a marked absence of uniformity in the principles of sentencing, and this is to be regretted." (p. 19) The report of the Citizens' Commission on Corrections (Edmonton Social Planning Council, 1975) contained the following statement: "A stated purpose or rationale for sentencing is needed." (p. 36) And further: "A striking omission from the Criminal

Code, one which dates from its inception in 1892, is the lack of any statement of the purposes and principles which underlie the criminal law in general and sentencing in particular." (Canada, 1984, p.33)

This last quote is drawn from the most recent policy statement of the Government of Canada on Sentencing. It is no accident that this same publication devotes considerable space to the issue of sentencing disparity, for one major source of such disparity is the absence of clear, consensual aims of sentencing. Several commentators (e.g., Vining, 1982) have seen the absence of statutory guidance as to the priority of various sentencing aims as generating idiosyncratic rankings, which result in disparity. (Whether the enactment of legislation proclaiming such aims will have an ameliorative effect on sentencing disparity is an empirical question, one to which we shall return later.)

While a diversity of opinion exists regarding the specific purposes of sentencing offenders, there is at least some consensus over the general aim: "Protection of the public has been identified as the overriding purpose of sentencing." (Canada, 1984, p. 34) Also, Ruby in his volume on sentencing (1980) states that: "There is little difficulty in asserting that the principal purpose of the criminal process is the protection of society" (p. 1), and Grygier (1975): "all sanctions - and the sentence prescribing these sanctions have only one aim: The protection of society" (p. 267), and Nadin-Davis, also author of a monograph on sentencing, states (1982): "There seems to be little doubt that the aim of protecting the public is the true rationale of most sentencing." (p. 27) This advances the theory of sentencing but a short distance, for there then follows little consensus as to the route by which this protection can be most efficaciously achieved. Several aims are frequently included in

a single statement of purpose. Thus in R. v. Morrissette (1970) the following words were found:

> In my view, the public can best be protected by the imposition of sentences that punish the offender for the offence committed, that may deter him and others from committing such an offence and that may assist in his reformation and rehabilitation (p. 311).

The means of achieving the protection of society are manifold and include retribution, incapacitation, general and individual deterrence, and rehabilitation. The empirical component to many of these is readily apparent, for the potential of these mechanisms to protect the public can only be established through systematic empirical research.

These sentencing purposes have attracted research in varying degrees of quantity and quality, for some considerable time now, both in Canada and elsewhere. While we are considerably more knowledgeable about certain aims, it is still too early to declare any particular one as more effective than the others in reducing crime or as more appropriate to the concerns of contemporary Canadian society. While it is beyond the purview of this paper to evaluate the extensive research pertaining to deterrence, rehabilitation and incapacitation, the following paragraphs summarize current thinking on these topics.

Summary of empirical research pertaining to the utilitarian purposes of sentencing

These conclusions are derived largely from research outside Canada, nevertheless there is little reason to suppose the results would be different here. It is customary to consider retribution from a non-utilitarian perspective, and from this perspective no empirical component is present. However, it is possible that retribution serves a crime-control function that would manifest itself in empirical research. For instance, the presence of a retributive function may service to enhance social cohesiveness and thereby reduce the probability of further offending. There appear to be no actual data on this topic, although it is referred to by proponents of the retributive model.

General Deterrence

It is not possible to make many summary statements about research on this purpose of sentencing. The literature is vast, complex, and frequently inconsistent. The first point to appreciate is that while on a popular level the notion of deterrence is straightforward ("Does punishing one offender deter others from offending?"), an empirical test is not so elementary. One needs to take into account the tripartite distinction of certainty, severity and celerity of punishment, and to distinguish between perceived and actual levels of each variable. Thus when we examine one of these - severity for example - is it prescribed severity (as stated in statutory penalties), or perceived severity (what potential offenders think actual offenders serve) or actual severity (time served) that is important? Already we can see that an adequate test of the general deterrence doctrine would require gathering a great deal more information than has been collected in many deterrence studies to date (see Gibbs, 1974). However, certain aspects of general deterrence are clear. It seems that

of the three components, certainty is the most important in terms of deterring offenders and perceived rather than objective or actual certainty in particular (see Ross, 1982).

Most research studies addressing the issue of deterrence have examined the deterrent effect of the death penalty. This question remains controversial, for while the preponderance of evidence shows no relative deterrent effect (relative that is, to life imprisonment; see, for example, Bedau, 1967, Zimring and Hawkins, 1973) it would be a misleading over-simplification to state (as some have done) that there is no evidence for an increased deterrent effect due to the use of capital punishment. For example, there is Ehrlich's (1975) econometric analysis which show positive (although controversial) results (i.e., significantly lower homicide rates) and more recent work such as that by Phillips (1980) claiming to show a short-term deterrent effect. At the present this issue is not relevant to sentencing in Canada, so it will not be discussed further.

To conclude this section, we should note that the belief in the ability of punishment to deter others is exactly that, a belief, rather than a conclusion founded upon a sound body of empirical data. It is a belief however, that is shared by the majority of the Canadian public, and appears to provide the foundation of peoples' support for the death penalty (see Thomas and Howard, 1971). Proponents (among the public) of general deterrence argue, presumably, on the basis of limited personal experience, or the intuitive plausibility of the deterrence notion, rather than from unassailable scientific evidence. Finally, we should note that this is a public attitude very resistant to change (see Lord, Ross and Lepper, 1979 and Roberts, 1984).

Incapacitation

"Wicked people exist. Nothing avails except to set them apart from innocent people" (Wilson, 1975).

Incapacitation promises substantial reductions in the amount of crime through longer, flat time sentences of incarceration for a select group of offenders, the multiple recidivists. The idea had its origins in the United States where recidivism rates are higher than they are in Canada. This notion has intuitive appeal, and can be expected to be popular with the layperson, whose views of recidivism rates tend to be considerably inflated. The fact that members of the public do not spontaneously generate this sentencing aim as their preferred option (see discussion below) presumably reflects the relative novelty of this approach compared to more traditional aims (such as deterrence). Certainly incapacitation is perfectly congruent with the most-quoted overall sentencing purpose: the defence of the public.

What then is the evidence for the efficacy of incapacitation as a crime-control mechanism? Unfortunately for proponents of this view, recent research has demonstrated the futility rather than the utility of incapacitative sentences. This conclusion derives from a recent major study conducted upon this topic in the United States. Van Dine and his colleagues (Van Dine, Conrad and Dinitz, 1979) conducted a retrospective examination of the crime-reduction potential of several incapacitative sentencing strategies. For example, what effect would a mandatory 3-year prison term have upon the Uniform Crime Rate (UCR)? The results of these (and other more punitive strategies) were surprisingly meagre. For example, a 3-year mandatory sentencing policy for all convictions would result in a reduction of only 2.1% of the UCR. A 5-year policy would have an effect of approximately twice this, and would accordingly still be under 5%.[1]

These data have dampened enthusiasm for incapacitation as a primary sentencing purpose. Van Dine et. al. conclude by stating that "Incapacitation is the strategy of failure, the failure of intimidation and of rehabilitation."

Rehabilitation[2]

The rehabilitative ideal has appeared and receded several times this century. Currently on the wane, this is largely due to a pessimistic review of the rehabilitation literature published in 1975 by Lipton, Martinson and Wilks.

The difficulty with the rehabilitative ideal, derived from a quasi-medical model which stresses the inability of a decision-maker (e.g. physician, judge) to foresee the pint of success (restoration of health; restoration of status of non-offender) is that it assumes this decision-maker will be able to make a valid determination of success. Research employing a diversity of professionals (e.g. psychologists, psychiatrists, social workers, parole officers) has amply demonstrated the inability of such experts to correctly classify any given offender as one who is now "rehabilitated". In fact, these professionals demonstrate no greater ability than the average layperson to predict future behaviour (e.g., Hakeem, 1961). The case is not closed upon the ameliorative effects of sentencing however. Recent publications suggest that the notion of rehabilitation (like that of deterrence) has yet to be adequately tested (e.g., Martin, Sechrest and Redner, 1981,; Palmer, 1975).

Summary

The necessity of adopting an unequivocal statement of sentencing priorities has been recognized by commentators from all quarters. The absence of such a statement in Canadian law has been decried as a source of disparity. While it is acknowledged that protection of the public is the over-riding purpose of sentencing, little consensus exists as to the most effective route by which this protection can be achieved. Of the various sentencing aims acknowledged by authorities in this field, most research has focused upon general deterrence. Research upon the various aims of sentencing has failed to demonstrate the superiority of any one strategy, although least empirical support appears for incapacitation or rehabilitation.

Effects of sentencing purposes upon sentencing patterns

Discussion about the sentencing purpose most appropriate to the Canadian judicial system is not merely academic theorizing. The particular strategy adopted has a major impact upon the kind of disposition and the severity of the sentence. There has been indirect evidence of this for some time. For example, Hogarth's (1971) study demonstrated that judges adhering to different sentencing aims selected sentences of different severity. One difficulty with this inference from Hogarth's data is that other variables correlated with sentencing strategy may have determined sentence length and strategy. For example, some personality difference between judges endorsing different sentencing strategies may have directly determined the severity of the sentences they assigned.

Most recently, Palys and Divorski (1984, 1986) conducted a sentencing experiment involving 206 Canadian judges. These researchers found that sentences of differing severity emerged as a consequence of different sentencing purposes. For example, judges stressing protection of the public and specific deterrence were more likely to assign long periods of incarceration than were judges advocating alternate punishment objectives such as rehabilitation of the offender. In fact legal objectives emerged as the best predictors of sentence severity.

Experiments by McFatter (1978, 1982) have established the importance of sentencing purpose as a cause of disparate sentences. In the first of his studies McFatter employed a simulation. College students were assigned to make sentencing decisions in a series of cases while following one of three sentencing aims: retribution, rehabilitation or deterrence. McFatter found that the group which sentenced to achieve general deterrence assigned the most severe sentences.

McFatter summarizes the experiment:

> major differences in length of sentence imposed may be induced by having subjects make their judgement in accord with different punishment strategies (p. 1499)

In the second of his experiments, McFatter (1982) found a similar pattern of results. The perceived utility of different penalties varied with the nature of the sentencing purpose. This emerged both with student subjects and six district judges in the United States. (This second study will be discussed at greater length later in another context).

Summary

Research has demonstrated the importance of sentencing purpose in determining sentence severity. To the extent that judges adhere to different purposes, this divergence is one clear source of disparity.

Empirical Research on Sentencing in Canada

Whether unwarranted sentencing variation exists is a complex and controversial questions. The central focus of this paper is upon the empirical research that has investigated such sentencing disparity. Most empirical work upon sentencing - both in this country and elsewhere - has approached the issue of sentencing from the perspective of the problem of unwarranted disparity.

Most discussions of sentencing in Canada begin by noting the wide discretion afforded judges in this country. For instance, Hogarth noted that " The magistrates' court in Canada has a broader jurisdiction to try cases and wider sentencing powers, than that given to any other lower court exercising criminal

jurisdiction in the world" (1971, p. 38) (Several commentators since then have taken issue with this statement, citing the dearth of comparable data - see Schubert, 1972).

Cousineau and Veevers (1972) stated that Canada had the highest incarceration rate in the Western world. This conclusion was based upon data derived from 1960 showing an incarceration rate of 240 per 100,000 (compared, for instance, to a rate in the United Kingdom of 59 per 100,000). This conclusion has been refuted by Waller and Chan (1974) who examined more recent data (1971) and found a far lower rate (93.3/100,000). It appears that Canada has an incarceration rate in the mid-range of western nations, incarcerating fewer individuals than the United States (Doleschal, 1979). The most recent data from the Correctional Services of Canada place Canada's imprisonment rate at approximately half that of the United States (82 us 140.6 for U.S.) and very close to the level of the United Kingdom (85 per 100,000).

Summary

In comparison to the U.S. and the U.K, then, Canada does not appear to emphasize incarceration over other dispositions.

Sentencing Disparity

The authors of a prominent Criminal Justice text (Griffiths, Klein & Verdun-Jones, 1980) begin their discussion of sentencing disparity in Canada with the following assertion: "There is no doubt that disparity in sentencing exists." (p. 188) And yet there are many who would demur from this opinion, feeling that disparity has been inappropriately defined, or that there is insufficient evidence for its existence. Despite the consensus on the purpose of sentencing research, there is considerable disagreement as to what constitutes lack of uniformity in sentencing. Controversy

surrounds both the definition of disparity as well as quantitative estimates of the problem.

For example, while "similar sentences for similar offenders committing similar offences" has an intuitive appeal, it fails to address the issue of how dissimilar sentences can be and yet still be considered equitable. Considerable disagreement can be expected as a function of different social roles: co-accuseds may view slight variations in sentence to be grossly inequitable, as may members of the public, who, according to some observers at least[3] adhere to a sentencing model which minimizes the importance of offender characteristics. Likewise, exponents of the 'just deserts' view of sentencing (such as von Hirsch (1970)) may also be dissatisfied with variation attributable to offender characteristics. On the other hand, judges responsible for sentencing would presumably regard information about the offender as an important factor in determining sentence.

Conceptualization of Disparity

An entire working paper could be spent upon the definition of disparity. For the present purposes, some preliminary remarks will have to suffice. First, it is clear that researchers have focused upon inter-judge (or inter-jurisdictional) rather than unwarranted variation within the sentences assigned by any particular individual. Accordingly, we know far more about the former kind of disparity. Variation within decisions made by the same judge should not be overlooked however. It is possible that individuals shift from one sentencing purpose to another as they get older, or more experienced, and this would presumably have an effect upon the severity of assigned sentences. Likewise, after reviewing a series of cases involving some particular offence, a judge might decide to employ a deterrent sentence where

hitherto he or she had employed one aimed at rehabilitation. (Exemplary sentences in light of a 'rash' of incidents of some particular offence are an example of just such a shift.)

Thus it is clear that we are not addressing the disparity that arises when a sentence fails to establish a proportion between offence seriousness and punishment severity. When the Montreal Star referred to sentencing in the following terms:

> Few aspects of the administration of justice in Canada are more arbitrary, potentially unfair and actually unjust than the sentencing of convicted persons. (6/9/69)

it was referring presumably to this latter form of disparity.

By disparity then, we mean inter-judge and court-to-court variation. It can be argued that court-to-court disparity is legitimate variation, that the seriousness of the offence is partly determined by the immediate social context. Thus when an offender sentenced in a small town received a different sentence than he would have received if he were sentenced in an urban centre, this is frequently attributed not to differences between the judges, but to the differential impact of the same offence in the two communities. Finally, let us note that inter-judge disparity corresponds to "First-order Judicial Disparity" in the categories advanced by Brantingham, Beavon and Brantingham (1982).

We can conceive then, of two broad categories of disparity, which can be referred to as **primary** and **secondary**. This distinction focuses upon the locus of differential sentencing. (In addition, the reader should be aware that disparity here refers to sentences handed down, and does not include other factors which affect time actually served, such as intervention by the parole board. Offenders' views of sentencing disparity are more likely to include the latter. This is probably also true of the public, who focus on time served, rather than time assigned by the court.[4])

By primary disparity we mean differences among judges as to the purposes or aims of the sentencing process. The most frequently-cited aims of sentencing are: general deterrence, special or individual deterrence, rehabilitation or reformation, retribution or punishment, and incapacitation.[5] If two judges disagree over the purpose of sentencing an offender, if one elects general deterrence and the other rehabilitation, and this disagreement manifests itself in disparate sentences for the same or similar offenders, this would be considered an example of primary disparity.[6]

By contrast, secondary disparity concerns variation arising from differential weights applied to characteristics of the offender and the offence. Thus the offender's age may augment the sentence pronounced by one judge and may have no effect on the decision of another.

While this distinction clarifies the locus of disparity and suggests what may - and may not - lead to greater uniformity, the picture is more complicated still. Data from Himmelfarb's study (undated) support the view that similar principles of sentencing may generate different sentences from different judges. For instance, two judges (or the judges in two jurisdictions) may agree as to the importance of the various aims, they may settle upon general deterrence as the pre-eminent principle and yet still render diverse sentences. Two years may be deemed a sufficient deterrent by one judge while another may feel that others can only be deterred by a sentence of three years. Similar reasoning applies to secondary disparity: judges may concur perfectly as to the number and nature of mitigating and aggravating factors, and yet differ over the power of those factors to augment or diminish severity of sentence.

At this point we shall turn to empirical work. Research on the sentencing process has taken one of four methodological approaches: phenomenological,

experimental, cross-jurisdictional, and normative. A true picture of sentencing in Canada can only be gained by examining all approaches.

Approaches to Research

A. Phenomenological: this approach is best represented by Hogarth's study (1971) which is now regarded as a landmark in sentencing research (see Murrah, 1972; Schubert, 1972; and Parker, 1972 for commentary on Hogarth's monograph). Hogarth approached the issue by examining the sentencing behaviour of a sample of 71 judges. By treating the judge as an active fact-finding agent, Hogarth was able to demonstrate the importance of the decision-maker in explaining sentencing disparities. The penal philosophy and judicial attitudes of the magistrates in Hogarth's study emerged as highly significant predictors of sentencing variation. The interpretation of relevant facts was crucial to the sentencing decision: once magistrates viewed cases in a similar way they tended to dispense highly consistent sentences. This is important for several researchers have suggested that punitiveness per se varies greatly from judge to judge. Hogarth's data suggest this is not the case.

Having gathered a great deal of information about both the judges and the cases, Hogarth was in a position to compare the relative utility of two competing models of sentencing. The 'Black Box' model attempts to predict variations in sentencing by reference solely to the facts of the case. These include aspects of the offence (severity, type of victim, number of counts, plea) and the offender (age, sex, marital status, occupation, length of criminal record and date of most recent previous conviction). Multiple regression analyses predicting sentence length using these twelve objectively defined facts failed to account for more than 23% of the total variation (see p.349). This is, of course, a statistically significant amount of

variation; but as Hagan (1974) points out, explaining sentencing behaviour requires more than simply achieving statistical significance.

Meaningful interpretation of the proportion of variance accounted for by the 'Black Box' model can only be made by comparing it with the amount of variance explained by an alternate model, the one Hogarth describes as the phenomenological model. This attempts to explain sentencing variation by recourse to the magistrates' perceptions of the facts of the case. Variance accounted for was close to 50% with this model. Hogarth stated:

> From this it was concluded that once one knows how a magistrate defines the case before him, it becomes unnecessary to seek additional information about the case. In fact, it appears from the analysis that one can explain more about sentencing by knowing a few things about the judge than by knowing a great deal about the facts of the case. (p. 350)

The implications of Hogarth's study for the problem of sentencing disparity are clear. With the perceptions of the judge accounting for so much variation, disparity in sentencing is inevitable.

One of the conclusions drawn by Hogarth that has attracted criticism concerns the exact source of disparity. Hogarth, it will be recalled, attributed variation in sentence length to the judicial attitudes and philosophies of his magistrates. Sutton (1978) and others have pointed out that it is not possible - given Hogarth's data alone - to eliminate the variable of community standards. Are the magistrates in Hogarth's study sentencing differently on account of their own attitudes, or what they perceive to be the attitudes of the communities they serve? Is it the judge or the force of public opinion acting through the judge? This question addressed the <u>locus</u> of disparity rather than its existence.

A study by Warner and Renner (1978) can be viewed as an attempt to replicate some of the findings emerging from Hogarth's research. On this occasion the data

were drawn from Halifax courts during a one-year period (1976-1977). These included all offences (except those related to driving) handled by magistrate and county court. Unlike Hogarth's research, this study did not include measurement of the attitudes of judges, rather it focused upon the effects, upon sentence severity, of nine dependent variables (age, employment status, marital status, sex, educational level, residence, race, physical appearance, and prior record) as well as severity of charge and type of counsel.

Given the large proportion of variance accounted for by judges' attitudes in Hogarth's study, it would be reasonable to expect the total unexplained variance in Warner and Renner's study to be greater. Moreover, these latter researchers also failed to measure possible aggravating and mitigating factors related to the offence itself (see Vining and Dean, 1980, for an elaboration of this criticism). Proportion of variance accounted for, however, was much greater in the Halifax study: 37.5% of the variance.

This raises a puzzle: measure fewer variables, omit several known to be effective predictors of the dependent measure (see Vining and Dean, 1980) and predictive ability increases dramatically. Warner and Renner (see pp. 78-79) offer two possible explanations: a more homogeneous sample of subjects (i.e. judges) was employed in this study, as was a less sensitive dependent measure (categories of severity rather than the number of days in prison, which Hogarth used.) It is hard to attribute differences of this magnitude (i.e. 37.5% versus the figure of 23% in Hogarth's study) to simply these explanations alone. In addition, the necessary information to quantify the effects of inter-judge variability is not provided. Whether the Warner and Renner study can be viewed as replicating the earlier study depends, presumably, upon one's interpretation of Hogarth's findings. If one adheres to the

view than less than 23% of sentencing variation was accounted for by the best available regression equation, then the later study implies far greater consistency among judges. However, if one's view is simply that surprisingly little variation was accounted for by offender/offence variables, and one views 37.5% as also surprisingly little, then clear parallels between the studies emerge.

The discrepancy between the studies in terms of the critical measure of variance accounted for demonstrates the importance of methodological decisions. Sampling variation (of judges), the number and nature of predictor variables and the exact measure being predicted can all affect the outcome.

> Although the offence and offender variables were important determinants of the sentence, nearly two-thirds of the variance in sentence severity was unaccounted for by these factors. (p. 91)

We are left to question whether only 37.5% of explained variance is evidence of disparity in sentencing. (Warner and Renner are inclined to attribute the unexplained variation to "variables reflecting the behaviour and attitudes of judges and lawyers".)

Vining and Dean (1980) take issue with this conclusion, noting that Warner and Renner failed to measure important mitigating/aggravating factors associated with the offence (e.g., nature of the weapon, degree of force, etc.) Had these been measured, so the argument runs, variance accounted for would have been considerably greater.

This problem remains even when the approach is carried out on a much larger scale. The most ambitious sentencing project to date has employed a variation of this approach. It was conducted by the U.S. Department of Justice (see Sutton, 1978a; 1978b; 1978c; 1978d). Sutton examined national sentencing data and attempted to predict variation in sentencing by regression equations employing up to 24 predictor variables. These included variables relating to the offender (age, sex, race, prior record); the offence (category) and the administration of the court (e.g., type of

counsel, ratio of jury trials to all trials, percentage of convictions, and so forth). Notably absent was information relating to the judge (e.g., attitudes towards punishment, demographic data) and fine-grained factors such as whether firearms were involved in the commission of the offence).

One deficiency of this approach is then apparent: a great deal of consistency in sentencing could remain obscured in the unmeasured variables. This objection is, of course, germane only to the extent that the regression equation fails to explain a substantial amount of variation, but this is the case with Sutton's analyses. Almost half the variation remains unaccounted for when Sutton's 24 predictors have been exhausted. This remains a recurrent problem in research on sentencing: it is generally impossible to gather information on all potentially relevant factors (legal and extra-legal) and yet without so doing the unexplained variance remains enigmatic.

A second, more subtle problem, raised in a critique of Sutton's research (Partridge and Leavitt, 1979) concerns the problem of inferring causality. These critics argue that in the absence of a true experimental design, one cannot with much certainty attribute variation in sentence length to only the predictor variables with much certainty. Partridge and Leavitt suggest that sentence severity - the putative dependent variable - may affect some of the so-called independent variables, such as the proportion of jury trials. They argue that defendants are more likely to elect trial by jury in a jurisdiction known to have judges who assign severe sentences. This alternate explanation is also consistent with the pattern of results described by Sutton. While this particular example is compelling, the argument cannot accommodate most of the remaining predictors in Sutton's analyses (e.g. offender's age, sex). Thus this criticism infirms the conclusions drawn from Sutton's research, but not irreparably.

A third difficulty springs from the interdependence of general predictor variables. Sutton found, for example, that defendants retaining their own counsel were treated more harshly than unrepresented defendants or defendants employing duty counsel. This relationship is susceptible to the alternate explanation that retaining one's own counsel is not uniformly distributed across offences: it is conceivable that defendants facing more serious charges are more likely to hire their own counsel. If this were true, there could be a relationship in the opposite direction (i.e., these defendants could receive more lenient sentences) which is masked by a more powerful association. Analyses testing these possible alternate explanations - based upon inter-correlated variables - are not presented, or are impossible to compute given the number of cases in some offence categories.

A related study using this method was carried out by Brantingham, Beavon and Brantingham (1982). These researchers examined the degree of disparity present in sentencing decisions from courts in two Canadian communities. They discuss, and present data relevant to, several kinds of disparity. One was termed first-order disparity and refers to discrepancies between judges, although each judge sentences consistently (i.e., 'between' rather than 'within' judge variation). In contrast to previous research, there was little evidence for this kind of unwarranted variation. Only when a judge had a sentencing pattern substantially different from his colleagues (and there were few such individuals) did the 'judge' factor improve predictability. In comparison to other factors such as number of prior convictions, the characteristics associated with the particular judge explained little variation in sentence length. In keeping with this finding, Brantingham et al. also found very little court-to-court variation. The sentencing patterns of the two courts were very similar. However, the fact that only two courts were used, and that they were drawn from the same

metropolitan area, suggests that we should not infer that court-to-court variation is not a problem on the basis of this study alone.

In short, the study by Brantingham et al. is an exception to the other research conducted in this fashion, in that Brantingham et al. found a great deal of uniformity in sentencing. Since they employed a similar conceptual approach and analyses, it remains unclear why this study should have uncovered an anomalous result.

B. Experimental Research (Simulations)

The experimental approach to sentencing research has the greatest degree of internal validity. Judges are given simulated cases which contain information comparable in quality (if not quantity) to that available to a judge in an actual sentencing hearing. A recent (and controversial)[7] example of the experimental simulation approach was published by Palys and Divorski (1984, 1986).

This experiment employed 206 Provincial Court judges who were attending judicial conferences. This number of 'subjects' is unusual for experimental work upon sentencing (McFatter (1982) for example, used only six judges) and obviously increases our confidence in the reliability of findings. Participants read five cases which contained: (a) a description of events antecedent to the crime; (b) the pre-sentence report and (c) victim-impact information. On the basis of this information judges were asked to assign a sentence, as well as answer questions relating to information relevant to the sentencing decision.

Palys and Divorski found substantial inter-judge variation. For example, in one case (assault causing bodily harm) the assigned sentences ranged from a $500 fine (with six months probation) to imprisonment for five years. This pattern - of

considerable variation in sentencing severity across judges - is typical of experimental studies.

The Palys and Divorski experiment also uncovered data which address the issue of the locus of disparity. Sentences were classified into three groups: (a) 'out' sentences, which permitted the offender to remain on the street (fine or suspended sentence), (b) 'short-in' sentences (brief incarceration) and (c) 'long-in' (long incarceration). The proportion of each type of disposition as a function of sentencing purpose chosen by the judge was noted. Consistent with other work (e.g., McFatter, 1978), sentences of varying severity were associated with the different sentencing purposes. Thus judges endorsing rehabilitation were less likely to assign 'in' sentences. To return to the distinction outlined earlier, this was evidence of primary disparity. These data emphasize once again the importance of sentencing purpose, and the necessity of employing a common purpose or priority of purposes in order to promote uniformity.

Similar results emerge from other studies employing simulated sentencing decisions. The district court judges in the study by Partridge and Eldridge sentenced 20 cases on the basis of information contained in pre-sentence reports. The disparities were egregious: two often-quoted examples are income-tax evasion, which drew a range of three to twenty years; and robbery, which generated sentences from five to eighteen years. One additional experiment is worth noting. Austin and Williams (1977) gathered data from 47 district court judges. They were given five cases and asked to generate a sentence. As with the Palys and Divorski study there was considerable disparity across judges. There was also substantial variation in the magnitude of disparity across different offences. This suggests that a systematic review of the sentencing literature might uncover offences which would generate little

disparity and others which would generate a great deal. This point has not received much attention in the literature.

Deficiencies of Experimental Studies of Sentencing

While the advantages in terms of internal validity[8] are apparent with the experimental method, caution should be exercised, for at least five reasons, when evaluating this kind of research: (a) **Representativeness of cases** - typically only a few offences are included (to minimize the proportion of judges who reject the experimental task). Usually these cases are the more serious ones, which means they are also the ones most infrequently sentenced. Differences may thus emerge and be attributed to unwarranted disparity and yet the percentage of unexplained variation when looking at the entire population of offences may be considerably smaller. In short, unwarranted variation uncovered through this route may over-estimate the amount of disparity in the sentencing process.

(b) **Context of decision** - experiments involving the sentencing of hypothetical offenders require decisions stripped of the usual court-room environment. Research in psychology has frequently demonstrated the difference in decision-making strategies depending upon the context in which the decision-maker is placed. Thus one investigator has shown that experts in various professions make less reliable, less valid decisions when those decisions are not made in their usual professional environment.

(c) **Awareness of the experiment itself.** Experimental social psychology has demonstrated the difficulties associated with gathering data from people who are aware that an experiment is being conducted[9]. The responses subjects give are inevitably affected by this awareness, and the effects are frequently subtle and

unpredictable. No attempt was made in any of the simulation studies to assess the effects (on responses) of this awareness[10].

(d) **Comparability of simulations to court-decisions: process variables.** Decisions made by judges in experiments are made in a much shorter time than most decisions made in the course of actual sentencing (with the exception of courts with particulary high caseloads). Moreover, the amount of information is not comparable. (The effect of this latter distinction on whether it makes experimental results less or more cogent will be discussed later.) When people make decisions quickly and with little information at their disposal, those decisions are likely to be less internally consistent. This would have the effect of increasing the variability of decisions 'within judge' but whether it would increase or decrease inter-judge variation beyond that which exists in actual sentencing is unclear. The authors of one simulation experiment (i.e., Palys and Divorski, 1984) argue that the disparity emerging from a simulated case (with less information provided) is more impressive because it underestimates the amount of unwarranted variability that exists in the 'real world'. One could argue, however, that the opposite was the case, that 'snap' judgments based upon little information are more rather than less likely to elicit between-subject variation.[11]

(e) **The consequences of the decision.** Sentences assigned to hypothetical defendants have no real consequences for the judges participating in the experiment. This distinction has been shown to be a critical one in research upon decision-making in simulated juries. The decisions made by simulated jurors tend to differ from the decisions of actual jurors principally on account of the absence of consequences.[12] There appears to be no way around this problem; it remains the most important weakness associated with the experimental investigation of sentencing decisions.

These are the primary reasons for exercising caution when evaluating sentencing simulations.[18] Whether they totally vitiate the conclusions drawn from such research depends upon the extent to which we accept that they distort the process under investigation.

C. Normative Approach to Sentencing Research.

The empirical approach which examines sentencing decisions (real or simulated) and uncovers 'disparity' or judge-derived variance has been faulted by some critics. Vining and Dean (1980) suggest that researchers may have overlooked the possibility that uncoded - but legally relevant - aspects of the case influenced the sentencing decision. The route which they favour (and others - see below) involves the examination of appellate decisions to uncover the factors affecting sentencing. Thus, they analyzed the appeals against sentence in British Columbia to produce a taxonomy of factors. Having established the factors which emerge in this analysis, Vining and Dean argue that one can explain much of the unexplained variation in earlier research which has prematurely been attributed to the influence of extra-legal factors. (For a complete discussion of the mitigating and aggravating factors taken into account by judges in Canada, see Ruby (1980) and Nadin-Davis (1982, Part II)).

A related, innovative approach to predicting sentencing severity is the Sentencing Factors Inventory (Andrews, Robblee and Saunders, 1984). The purpose of this approach is to forecast sentence length on the basis of aggravating and mitigating factors recorded in, and derived from, probation files. The reasoning behind this approach is that since judges consider pre-sentence reports to constitute an important source of information relevant to sentencing, this information should shed light on the factors which determine sentence severity. Two findings are

noteworthy. First, there was substantial inter-rater reliability in the classification of information derived in this manner. Second, with reference to the issue of disparity, a substantial proportion of variance (over 20%) was explained by extra-legal factors such as gender, employment status and marital status. Thus, while substantiating the position advocated by Vining and Dean, namely that a more careful examination of legal-relevant factors will explain large amounts of variation, the S.F.I. study also provides further evidence for the existence of extra-legal influences on sentencing.

Himmelfarb (undated) and associates conducted an analysis of appeal court decisions with a view to uncovering the general principles underlying sentencing in Canada. While the representativeness of the data-base is questionable, (a point discussed by the authors - see pp. 8-9) this study provides much important information concerning sentencing. With regard to the primary issue of sentencing purpose, these researchers found that appeal court decisions provided few systematic guidelines. General sentencing principles were referred to only en passant and there was little consensus regarding the priority of various aims, with the exception that general deterrence was the most frequently-cited principle across all jurisdictions.

The data from Himmelfarb's study addressing this issue are summarized in Table 4, which is reproduced here.

General Sentencing Principles Emphasized in
Sample of Appeal Court Decisions (Source: Himmelfarb)

Principle cited	Relative frequency (N=650) %
General Deterrence	34.5
Rehabilitation	19.7
Special Deterrence (and Incapacitation)	4.8
Retribution	3.7
Mixed (and other)	37.3

Despite the primacy of general deterrence, it is worth noting that there was substantial variation across jurisdictions in terms of the sentencing purposes cited. In Saskatchewan, for example, general deterrence was emphasized in 75% of the decisions, whereas in Alberta the figure was 20%.

Himmelfarb also uncovered evidence suggesting that offence seriousness was affected by prevailing offence rates. This has important consequences for the issue of disparity, for it suggests a mechanism by which such disparity arises. We know that offence rates vary considerably from jurisdiction to jurisdiction. Himmelfarb's study implies that this variation may generate disparity in sentencing .

An important unresearched issue then is the effect, upon judges, of changes in the occurrence rates of various offences. Are they sensitive to such changes if not manifested in their own actual court? Do they in fact shift from one sentencing purpose to another (e.g. towards general deterrence following a actual or perceived increase in offence rates)?

Validity of Self-Reports Concerning Factors Affecting Sentencing Decisions

> I am in favour of giving the judge a wide discretion in terms of sentencing. It is not random. We are guided by precedent, by a kind of range, but given the discretion to take into account personal matters. Those personal matters are not distinctions between a rich person and a poor person or a native person and a non-native person, but between a person who is penitent and one who is not. (Justice MacDonald).

The major difficulty with examining what are essentially self-reports by decision-makers on the reasons for their decisions is that one must assume accurate insight into the decision-making process. While we may accept that judges can report accurately upon the number and nature of factors taken into account in any

sentencing decision, it requires a far greater act of faith to accept that they can accurately state the relative weights of those factors. Insight on the part of judges is also assumed in some sentencing experiments. Palys and Divorski (1984) make this assumption when they address the explanation for sentencing disparity uncovered in their research. One of the tasks required of the participants in that experiment was to cite the case facts that had been relevant to the judges' decisions.

In a recent series of experiments, Nisbett and his colleagues (e.g. 1977, 1980) have demonstrated subjects' inability to state the relative importance of factors influencing their decisions. People tend to search for plausible, (but not necessarily correct) interpretations or theories to explain their own decision-making; they do not engage in a systematic examination of their thoughts and actions. Awareness of this problem is not restricted to experimental social psychologists, however. Two sentencing researchers (Partridge and Leavitt, 1979) recently noted the same point: "It is true, of course, that asking people about the reasons for their behaviour is not always well calculated to produce understanding of their true motivations" (p. 71).

To the extent that this is true - and there seems to be substantial empirical support for this proposition - 'observers' and 'actors' are likely to have similar explanations for actors' behaviour. Thus, under some conditions, we would do as well to ask observers to speculate about the factors determining someone's responses. The conditions under which people are no better than observers at explaining their own behaviour include instances in which people have strong pre-conceived notions of what should have influenced their behaviour. Clearly this is the case with formal decisions made in the course of professional duties. This suggests that judges' descriptions of the factors that influenced them, and the weight they attach to those factors, may be at odds with reality. As an illustration, Slovic and Lichtenstein (1971) studied the

ability of experts to report accurately on the weights they assign to different stimulus factors in making evaluations. These investigators were able to compare subjective weights derived from subjects' self-reports with the objective weights ascertained by means of statistical analyses. Using stockbrokers, clinical psychologists and other groups, Slovic and Lichtenstein found substantial discrepancies between the combination of factors that subjects thought influenced them and the combinations that actually produced the decision.

There is also evidence in the sentencing literature that judges are not as accurate in identifying the influences over their decisions as intuition would lead us (and perhaps them) to expect. McFatter (1982) compared the objective weights attached to different sentencing aims with self-reports about these aims. The concordance between these two variables was not substantial: for example, the subjects who rated 'just deserts' as highly important were not necessarily the ones whose objective weights on this aim were the most significant. Similarly, Levin (1966) found that a sample of judges in Michigan imposed sentences on the basis of relatively simple criteria, but appeared not to recognize this pattern.

Other data bearing on this issue derive from the experiment in sentencing conducted upon judges drawn from the second circuit in the U.S. (Partridge and Eldridge, 1974). In two cases, information about the defendant's drug-taking habits was manipulated. For example, some judges read a pre-sentence report indicating the defendant had no record of addiction, while others read that he was currently addicted to heroin, and had been addicted at the time the offence was committed. This information had no statistically significant effect upon sentencing patterns of the judges. However, when judges in the 'no addiction' group were asked if their sentences would have been different "if it were established that the defendant was

currently addicted to heroin" (p. 45), 23/28 indicated their sentence would have been different. Moreover, some of the differences were substantial: one judge indicated his sentence would have been reduced from five years incarceration to two. Similar results emerged when judges were asked if a defendant's decision to plead guilty rather than stand trial would have affected their sentences. Nineteen out of 43 indicated it would have decreased sentence, and yet comparison between two conditions, one in which the defendant stood trial, and another in which the same defendant had pleaded guilty, yielded no difference in severity of sentence. Thus, there does appear to be a discrepancy between judges' reports of the effects of various factors and the actual effects of those factors upon their sentencing decisions[14]. In a similar vein, Haines (1958) writes of the difficulty of generating the true determinants of a sentence:

> while it may require considerable effort to give adequate reasons for the verdict, it seems to me that it requires even greater effort to give suitable reasons for the sentence (p. 59)

The purpose of this digression, then, is simply to make the reader aware of the difficulties of interpreting, at face value, judges' accounts of the factors that influenced them in assigning a sentence.

D. Inter-Jurisdictional Comparisons

Another source of information, although an imperfect one, about the existence of sentencing disparity, is research documenting variable sentencing practices across jurisdictions. This kind of variation has been apparent for some time in Canada. Jobson's (1971) examination of 1963 data comparing the differences of incarceration rates between Nova Scotia and New Brunswick is an early example. While conviction rates were approximately equal across the two provinces (316 and 347 per 100,000),

incarcerative sentences varied considerably: Forgery: from 57.9 to 85.0, assault: 11.0 to 21.8 (see also Jaffary, 1963; MacDonald, 1969).

Sentencing Practices and Trends

Sentencing Practices and Trends: The Criminal Law Review Project

The major obstacle to obtaining an accurate picture of sentencing patterns has been the absence of annual, national sentencing statistics. In fact, they have not been routinely available since the early 1970's. The most up-to-date sentencing data provided by Statistics Canada is for the year 1970. Any picture of sentencing must come from special studies which draw upon data collected essentially for other purposes. Data-collection varies from province-to-province making the task even more difficult.

One such special study was published in 1983 (Hann, Moyer, Billingsley and Canfield). It contains a portrait of sentencing derived from seven court groups and ten correctional jurisdictions. The results are available in the form of individual offence category reports and an overview. The study found substantial variation in type and length of dispositions handed down across the country. The degree of variation depended upon the nature of the offence. For some offences, there was little variation in median sentence lengths. The median sentence for break and enter was between six and eleven months in all the jurisdictions studied. Likewise for forgery and uttering, all medians were between two and three months, indicating little inter-jurisdictional variance. For other offences, however, there was more variation. The median sentence length for common assault in Quebec was one week versus five months in Saskatchewan. Likewise, for assault causing bodily harm, the median was one month in Québec compared to five months in Saskatchewan.

The author of these reports issued the following important caveat:

> Since we did not have sufficient data to categorically state that the cases sentenced in one jurisdiction were similar in all such respects to the cases sentenced in other jurisdictions, previous Chapters have been careful to point out that the differences observed in sentences cannot be interpreted with adequate confidence as differences in sentencing practices. Such data certainly cannot be interpreted as evidence of unwarranted sentencing disparity. (p. 57)

Murray and Erickson (1983), in a recent study upon the treatment of cannabis offenders, found substantial evidence of court-to-court variation. Five jurisdictions in the province of Ontario were examined. Substantial variation in disposition emerged across the five locations. For example, the percentage of possession cases that received fines ranged from 8.3% in one area (Metropolitan Toronto) to 55% in another (Kingston). The authors of this study concluded: "These data indicate widespread disparity in the sentencing of cannabis possession offenders in five Ontario locales" (p. 90).

The difficulty with a study of this nature is that before attributing such variation to an unwarranted source, one has to assume approximately comparable cases were sentenced in each court. (In fact, in this study there was evidence that the offenders were not comparable: for example, the percentage of individuals with post-secondary education varied from 0% in Barrie, to 40% in Kingston.)

The report on sentencing practices (Hann et al., 1983) already referred to provides data germane to this issue. Disparity can be investigated by examining the variation in some disposition, say custodial sentences, from jurisdiction to jurisdiction. Restricting ourselves first to the best data available from this report (comparisons among three jurisdictions providing data on both summary and indictable offences) we can observe evidence of considerable variation. For example, the percentage of

alcohol-related driving cases (impaired, refusal to take test and registering over .08) which received a custodial sentence was 4% to 10% in Winnipeg but 18% to 23% in British Columbia.

Variation was greater in jurisdictions providing only indictable cases. Cases of assault causing bodily harm in Atlantic Canada received an average 39% custodial sentences, while the Ontario statistic was 63%. Likewise for Uttering, the percentage receiving custodial sentences in Saskatchewan was 33%, compared to 60% in the province of Québec.

Similar patterns of findings emerge for the use of fines. For example, common assault ranged from 20% to 40% across three jurisdictions, wilful damage 33% to 57%, and theft 29% to 52%. It is worth bearing in mind that these latter two offences are both high-frequency ones, accounting for a substantial proportion of total criminal code charges. Disparity in high-frequency offences affects more individuals, offenders and non-offenders alike, and can only foster the perception that disparity is a widespread problem within the criminal justice system.

The obvious objection to any inference of unwarranted disparity on the basis of these data, is that they are simply evidence of <u>variation</u>, not disparity, and that the one does not automatically imply the other. It is conceivable that gross differences in the seriousness of offences being heard in different jurisdictions is responsible for the variation. As the authors note:

> It is therefore always possible that any difference in sentences could be attributed to difference in the characteristics of the cases - rather than to differences in sentencing practices. (p. 23)

and further

> the above noted differences cannot be taken as evidence of warranted or unwarranted disparity in sentencing practices. (p. 24)

The attribution of variation uncovered in this fashion remains problematic. It is highly unlikely, however, that case characteristics would be responsible for these variations. Why, for example, would the more serious Uttering cases gravitate to Québec? Or the most heinous assaults to Ontario? In order to explain this pattern of variation by means other than some form of judicial disparity requires an explanation that would lack parsimony and plausibility. Many alternate explanations exist, but only some form of unwarranted disparity explains all the variations, even if it does not reveal the exact mechanism by which the variation arises. For example, sentences may be more severe in one jurisdiction because judges feel there has been a recent local surge in offences of that category. The application of more stringent sentences in this fashion in order to deter others is usually termed an exemplary sentence[15]. In this instance, the variation comes about because judges in one jurisdiction now emphasize a strategy of general deterrence, with a corresponding change in severity.

Data of the kind derived from this study serve an important function: They establish the existence of substantial cross-jurisdictional variation. It seems highly probable that this variability is due to some form of unwarranted sentencing disparity. The gathering of data that would permit an unequivocal attribution to one or another cause, is a priority. While it has its own methodological deficiencies, to which attention has been drawn here (and in the original report), this approach has features absent in the other kinds of research.

Co-Accused Analyses

This appears to be a poor way of gathering data on the issue of disparity. The assumption is made that since the offence is constant, all variation in sentence type (or severity) can be unequivocally attributed to offender characteristics. Brantingham et al. (1982) state the logic behind the co-accused analysis as follows: "In a sentencing process without disparity individuals convicted of the same criminal event are more likely to receive similar sentences" (p. 68). Brantingham et al. found that in 55% of the cases in their study, co-accuseds received the same sentence. The difficulty arises in knowing whether the researcher had access to information about the offence and offender comparable to that which was available to the sentencing judge. To prove the existence of disparity by this route, one has to establish that no legally-relevant information escaped the attention of the researcher. For example, the attitude and conduct of the accuseds may differ, and content analyses have shown this to be a significant factor affecting sentence outcome (see Vining and Dean, 1980, p. 125). (This variable was not included in the Brantingham et al. study.) Of course, this difficulty does not arise if the co-accused analysis fails to uncover substantial disparity, it simply weakens the argument to the extent that disparate sentencing is present. Since few studies have addressed the issue of sentencing disparity by means of co-accused analyses, this method will not be discussed any further.

Sentencing of Native Offenders

A great deal of research in the U.S. has addressed the question of whether certain groups of offenders receive disparate sentences. With the important exception of the death penalty, that research has demonstrated little bias in favour of any

particular racial group. Hagan (1974) who has provided the most extensive summary of that work concluded

> The central finding of this review of past research is that there is generally a small relationship between extra-legal attributes of the offender and sentencing decisions. (p. 375)

The problem with comparisons between two groups of offenders concerns equating the groups upon all other possible variables such as seriousness of offence and prior record. These legally-recognized variables could account for any variation that emerges when the researchers fail to control for their influence. Comparison, then, of the sentences handed down to native offenders can only be made within offence category, and even then there exists the possibility that one group systematically commits more serious instances of the same offence.

A recent study by Billingsley (1984) begins by noting the kind of discrepancy that led researchers to this problem initially: while natives represent only 2% of the Canadian population they comprise fully 14% of Criminal Code admissions to provincial jails and penitentiaries. Naturally there is a great deal of province-to-province variation: in Saskatchewan, native offenders make up 54% of admissions, and are responsible for over 70% of four high-frequency offence categories. Thus the data from the Billingsley study are highly suggestive of disparity in the treatment of offenders as a function of whether they were native or non-native.

Sentencing Disparity and Sentencing Aims

Finally, it is important to bear in mind that before one can conclusively demonstrate unwarranted variation, one must establish the purpose sentencing is supposed to serve. Disparity under one sentencing model may not be disparity under another. For example, consider the case of two accuseds receiving markedly disparate

sentences for the same offence. One is employed while the other is not. The rehabilitative prospects are a priori (on the basis of research) better for the former than for the latter. If rehabilitation (or individual deterrence) is the sole aim of sentencing, the more lenient sentence accorded the employed offender is justified; there is no disparity. If general deterrence is the aim of sentencing, then there is a disparity, for a more lenient sentence for one offender will not ensure a greater deterrent effect upon other potential offenders. Likewise, a desert-based sentencing would require equivalent sentences for the two offenders, since characteristics such as employment status are extra-legal within a desert-based rationale. (Employment status was explicitly designated on extra-legal factor by the Minnesota Sentencing guidelines Commission, (Preliminary Report, 1982)).

Summary

The nature of the purpose served by sentencing is clearly a determinant of sentence length. This much is clear from empirical work both here and elsewhere. The problem of disparity has been at the centre of sentencing research. While definitional problems abound, most researchers have focused upon judge-to-judge variation as being most important. A distinction can be made between two kinds of disparity. Primary disparity refers to disparate sentences arising as a result of judges employing different purposes in sentencing offenders. Secondary disparity concerns disparate sentences which arise by virtue of the fact that disagreement exists over the nature and power of mitigating and aggravating factors. Four main approaches to research in this area were identified: The phenomenological, the experimental, the normative and the cross-jurisdictional. Since each has unique merits and deficiencies, a true picture of sentencing can only be gained by examining them all. It appears to

be the case that disparity does exist; the challenge to researchers is to identify the mechanism by which disparate sentences arise.

The Role of Public Opinion in the Sentencing Process

> Reform of sentencing law should neither blindly follow public opinion polls, and surveys of public sentiment, nor should it ignore public opinion altogether. The feelings of the community as discovered and understood should be carefully considered along with other factors. (p. 32)

As this quote from the report of the Law Reform Commission of Australia makes clear, public opinion must be neither directly considered nor totally excluded from consideration. It has generally been held, both in this country and the United Kingdom, that public reaction should not directly enter the sentencing process. Nadin-Davis (1982) cites the case of an alcohol-related driving case in which the trial judge adjourned prior to sentencing in order that members of the public might have the opportunity to make submissions regarding the appropriate sentence. On appeal by the accused for a prohibition (Re Gamester and the Queen) this unusual procedure was held to be a "violation of the principle of natural justice". Nor can appeals for leniency on the part of interested parties be entertained prior to sentencing, as was demonstrated in a much earlier case (R. v. Lim Gim).

Nor, in fact, can public reactions indirectly affect the quantum of punishment, in that a judge when sentencing, may not adjust the sentence so that it may conform more closely to public opinion. Thus in the case of R. v. Porter (1976) the appeal court described as "inappropriate" the trial judge's words that he "must consider the deterrence of the public and indeed the reaction of the public".

These decisions notwithstanding, the concept of public opinion hovers constantly in the background. (The study by Hogarth is instructive here. Almost two-thirds of the judges surveyed in that research indicated that the views of the public were an important consideration in sentencing. The remaining one-third stated that they never considered public opinion when determining a sentence.) One frequently finds reference in sentencing decisions or appellate reviews to public opinion or public reaction. Thus Thomas (1979) quotes from the judgement in Winnett (an English case) in which the Court of Appeal endorsed the trial judge's opinion, while noting that "the public would be surprised...to think that a sentence of that level is appropriate for a man who has behaved in this way" (p. 11). The reasoning behind this opinion was that reducing the sentence to a briefer term would have had the undesirable effect of diminishing, in the eyes of the public, the gravity of the offence. Research upon this topic, it should be noted, has consistently failed to demonstrate such an effect. Evaluations of the perceptions of seriousness of an offence appear to be unaffected by changes in the prescribed sanctions (see Walker, 1980, for a description of this research).

The trend to including public opinion in the determination of sentence reaches its apotheosis in a work by Leslie Wilkins, entitled, appropriately, Consumerist Criminology. In this work Wilkins argues that the sentencing process should reflect the desires of an informed public. Wilkins' views members of the public as constituting a legitimate source of opinion regarding most aspects of sentencing.

Thus he states:

> it would be helpful to measure (by adequate scientific means) public attitudes towards factors which the courts take into account in either aggravation or mitigation of offences. Public opinion should also be consulted in regard to the rating of the seriousness of crimes and factors which indicate culpability of the offender (p. 86).

Parole and the Sentencing Process

From the sentencing process and the parole process arise two important questions: (a) should the sentencing judge consider the possibility of parole in determining sentence? and (b) what is the effect of such consideration upon sentence length?

We shall first address the question of whether it is appropriate to consider parole in determining sentence. The effects of the parole system upon sentencing have received little attention, and yet they may well be considerable. These effects could take several forms. First, consideration of the likelihood of parole may lead to more severe sentences than would otherwise be handed down. The probability of this occurring, and its legality, will be discussed later. A second effect concerns disparity. To the extent that judges disagree as to the likelihood of parole, or the appropriateness of taking parole into account, this is likely to generate disparate sentences. The very nature of the parole decision makes it likely that judges (or anyone else for that matter) will not have particularly consistent or valid opinions as to who will be released early. This variation in opinion is then likely to manifest itself in sentencing disparity.

While the distinction between the sentencing court and the parole board may once have been clear, it is apparent that there is now some considerable degree of overlap. It is presumably the perception of encroachment by the parole board upon

the sentencing process that has led some judges to anticipate the actions of the board, with consequences for sentence length.

Consideration of early parole can result in a longer sentence, it would appear, from two directions. They represent opposing sentencing philosophies, and yet their net effect upon sentencing is the same. In the first case, rehabilitation is uppermost in the mind of the sentencing judge. Thus in R. v. Holden the sentence consisted of a substantial period of imprisonment in order that the offender might benefit from institutional programs. In the second case, sentence length is increased in order to achieve some goal not associated with this particular offender. For example, general deterrence: a heavy sentence is handed down in order to deter others, while it is left to the parole board to ensure that the offender does not suffer disproportionately. (See Ruby, (1980) for a discussion of this approach.)

The status quo in Canada appears to be that it is improper for judges to consider remission or parole when determining sentence. One often-quoted case is R v. Wilmott (1967) in which appeal was allowed against a sentence of twelve years. The sentencing judge had considered the possibility of parole, and this consideration cost the offender an additional four years. On appeal the sentence was reduced from twelve to eight years. The appeal decision summarized the issue thus:

> the Court...must not...impose a longer term of imprisonment than it would impose under all the circumstances and given proper weight to the factors governing sentencing, in order to keep the offender under the control of the parole board for a long time.

Ruby (1980) quotes the Newfoundland Court of Appeal in R. v. Coffey:

> The duty of any court in imposing sentence is to determine the length of the term of imprisonment without consideration of any reduction due to the grant of parole, or any other reduction...In imposing punishment we may not consider the matter of subsequent parole; this is not within our sphere. (p. 323)

This much is clear. However, in Ontario, there appears to be some support for the position that remission is a relevant consideration when the object of sentencing is the reformation or rehabilitation of the offender. A relevant case here is R. v. Pearce in which the Ontario Court of Appeal stated that

> In considering the latter aspect of sentencing (i.e. rehabilitation of the offender) it is proper to take into account that the appellant need only serve four years and one month of the sentence imposed and that he will be eligible for parole in two years from the time of sentence.

The variable interpretation of the relevance of parole to the sentencing process may well give rise to disparities across provinces. Ruby concludes:

> it would certainly be desirable that some measure of uniformity on this issue be attained, as a prisoner serving a lengthy term in Ontario will quite rightfully have a sense of grievance with regard to the consideration given there to his parole possibilities as compared to that of his follows in other provinces - especially if, as it usually the case, the parole board refuses to grant parole. (p. 327)

Effect of Parole on Sentencing

> Although this is not the place to debate the proper use of parole, it does appear, with all respect, that regardless of what courts of appeal may say, judges, being practical men, will bear in mind the possibility of parole in assessing sentence. It may be that in practice sentences today are somewhat longer than they might otherwise be because of the assumption that the parole board will interfere at a future date. (Ruby, 1980, p. 317)

It is clear that consideration of parole release may have the effect of increasing sentence length, but it may also constitute a source of disparity, as the following comments make clear:

> Has anyone realized how often the judge imposes a long sentence on the assumption that parole will be accorded at the one-third point? Many have decried disparities among sentences imposed on seemingly similar offenders for similar offences. Has anyone realized how frequently the different sentences simply reflect the different expectations of the sentencing judge as to what proportion of the sentence the offender will serve before being paroled? (Newman, 1975, p. 812)

Thus consideration of parole can affect sentence length and generate disparities in time served. More has been written about the former than the latter. Many people hold the view that parole boards significantly reduce sentence length. This is certainly true of the public (see Part II of this report), but it also appears to be the case for judges. Scism (1976) found that although 35% of offenders in the U.S. were granted parole; in a survey, judges over-estimated the proportion released after completing their minimum sentences. This view appears to be erroneous however. The best data we have suggest that this perception is an exaggeration of the true state of affairs. Mandel (1975) has demonstrated that the maximum overall reduction in sentence length effected by early release on parole is less than 10% of the total time to which offenders are sentenced. This is what Mandel refers to as the direct effect, derived from the percentage of eligible offenders granted parole and the average reduction in time (31.9%). There is, however, also the indirect effect, which may well be in the opposite direction. That is to say, judges may lengthen sentences by the factor they perceive will later be remitted by parole authorities. There is evidence that this is, in fact, the case. The Committee for the Study of Incarceration noted as much in their report ("Many judges now impose long sentences in the

expectation (not always fulfilled) that a parole board will permit earlier release" - p. 102; see von Hirsch, 1976). Hogarth (1971) states the following:

> Magistrates were asked to indicate whether they adjusted their sentences in the light of the possibility of parole being granted. Two out of three admitted that they sometimes increased the length of sentence imposed. (p. 176)

It would be hard, if not impossible, to quantify the indirect effect, but it does raise the possibility that parole has a net positive effect on sentence length, and that if parole was abolished, the immediate effect would be a decrease in length of assigned sentence.

Summary

Continual reference is made to the importance of public opinion in the sentencing process. Several cases have, however, circumscribed the exact role of the public in sentencing. Nevertheless, considerable discretion still exists for judges to reflect public views in their sentences. Despite the importance of the parole system, little work has addressed the inter-relationship between sentencing and the parole process. It does appear that in most of Canada, a judge may not anticipate the possible action of the parole board when determining an offender's sentence. However, there is evidence that current sentences (in this country and elsewhere) are affected by judges' perceptions about the likelihood of early release on parole.

Part II

Research upon public opinion concerning sentencing

> There is also need for research into the view of sentencing practice held by members of the public and by offenders. For the latter, it seems that sentencers pay some attention to what they believe to be the attitudes of offenders and it might be helpful to know to what extent, for example, probation orders and suspended sentences are regarded as 'let-offs' or the threat carried by 'conditional' sentences affects their conduct. Research into public attitudes to (what they believe are) sentencing practices might be informative in some respects, and it would be wrong to neglect the issue of public satisfaction or dissatisfaction with sentencing. However, what passes as public opinion may well be based on incomplete information and imperfect understanding. In some circumstances it is political and practical folly to ignore public opinion. What must be attempted, however, is an improvement in the quality of the inferences publicly drawn from published statistics and from particular sentences. (Ashworth, 1983, pp. 441-442).

Research on the Canadian public's view of sentencing has been sporadic over the past 15 years. Public opinion polls have documented pubic dissatisfaction with contemporary sentencing trends. The percentage of respondents expressing dissatisfaction with sentencing severity has been rising: In 1966, people perceiving the courts to be insufficiently harsh constituted the minority (43%). This was not to remain the case for long, however. The percentage endorsing this view rose to 75% by 1977 (see Fattah, 1982) and in the most recent nation-wide poll, (Ottawa Citizen) fully 78% of respondents perceived Canadian courts to be too lenient towards offenders. Moreover, while there was substantial variation across demographic groups in the perception of judicial leniency a few years ago (see MacDonald, 1976), this is not the case now (Doob and Roberts, 1983). It should be

noted, however, that this is not an exclusively Canadian phenomenon; the results of survey data from the U.S. are even more striking. Nock and Sheley (1979) report that 96% of respondents in a nation-wide poll expressed dissatisfaction with sentencing trends. This figure also represents the apex of a steady increase over the past decade (see Hindelang, 1974). Data from Australia (O'Connor, 1984) and Great Britain (Hough and Moxon, 1985) indicate this phenomenon is not restricted to North America.

Caution should be exercised in interpreting this finding however. It is not clear that the phenomenon is as simple as it appears at first glance. For example, people perceive the parole system to be more lenient (i.e. to be releasing more offenders)[16] than it is, and they over-estimate the proportion of parolees who commit violent crimes following release.[17] In short, we do not know whether the public are dissatisfied with current sentencing trends because they violate some basic view of appropriate metric of punishment or because they perceive intervention by the parole board to be responsible for unwarranted abbreviation of sentence length. This issue remains to be explored empirically.

Another important consideration is whether the public have a realistic appreciation of the sentences being handed down. Members of the Canadian public have erroneous perceptions of the sentences being dispensed by Canadian judges: nation-wide data from 1982 (Doob and Roberts) indicated people under-estimated the extent to which Canadian judges incarcerate convicted offenders. This was true of several offence categories.[18] Thus, part of the public's attitude springs from their mistaken belief about the actual state of sentencing in this country.

It is also most probable that there are deficiencies in public knowledge of the range of penalties available. While we do not have Canadian data bearing directly upon this issue, research in the U.S. has shown that people under-estimate the

severity of statutory penalties. Williams, Gibbs and Erickson (1980) found that members of the public had a very imperfect grasp of the possible range of penalties for various offences. People were unaware of even a well-publicized legislative intervention to increase minimum penalties. The California Assembly Committee on Criminal Procedure (1968) stated the point baldly: "The General Public simply does not know what the penalties are for various crimes" (p. 17). This is important because it suggests that people may be reassured as to the severity of sanctions merely by a better understanding of the penalties contained in the Criminal Code. It also bears upon another problem relating to this general attitude towards the courts: are the public displeased with the sentencing behaviour of their judges, or with the maxima prescribed by the Code? The answer to this question will obviously determine the route by which public satisfaction with sentencing decisions can be increased.

Finally, it is also important to realize that while members of the public may express blanket disapproval of judicial 'leniency', they may be less punitive when evaluating individual decisions. The research conducted for the Department of Justice, Canada, by Doob and Roberts (1983, 1984) demonstrated substantial shifts in evaluations of sentences when subjects were given information comparable to that which is at the disposal of a judge at a sentencing hearing. In one study, members of the public were randomly assigned to read one of two descriptions of a sentencing hearing: the newspaper account, or a summary based upon court documents. Afterwards, all participants were asked their opinion of the sentence. People who read the newspaper account were significantly less satisfied with the sentence; they were far more inclined to the view that the sentence was too lenient. This was not the only effect, however. Subjects in the 'news media' condition had significantly more negative views of the offence, the offender, and the sentencing judge. The

sentence in the two accounts was exactly the same. This experiment demonstrates the tendency of the news media to faster inaccurate perceptions about, and negative attitudes towards, the sentencing process. Now, however, we shall address the issue of public views of the issue of sentencing disparity.

Summary

Most respondents to opinion polls in Canada and the U.S. express the view that sentencing patterns are overly lenient. Interpretation of this finding is not easy, however. We do not know the exact cause of public dissatisfaction. It may in large part be due to the perception that the majority of sentences are significantly reduced by the actions of the parole authorities. Whatever the cause of public dissatisfaction with sentencing, there are substantial public misperceptions of the magnitude of penalties available, the severity of penalties handed down, and the duration of time served.

Public Perceptions of Disparity

The policy paper on sentencing published by the Government of Canada in 1984 ("Sentencing") makes several references to public concern with, and awareness of, the problem of unwarranted disparity in sentencing (e.g. "The focus of public concern on unwarranted disparity is a concern that similar cases are given dissimilar treatment for no apparent reason: (p. 14) and further: "The problem of perceived inequity in sentencing on the part of the public" (p. 16)). Similar awareness of public concern with disparity was expressed in the report of the Law Reform Commission of Australia (1980): "There is little doubt that members of the public are also concerned about a perceived lack of uniformity in the imposition of punishment" (p. 90). And yet we do not have adequate data to fully document this putative concern of the Canadian public.

As already noted, the focus of most public opinion research in this area has been upon the dimension of leniency-severity. It is not clear that concern with disparity is widespread, and nor is it obvious that public concerns over disparate sentences mirror the concerns of the justice system. For example, research upon disparity as a function of extra-legal factors has focused upon variables such as race. In the Canadian context there is the perception (for which there is some empirical support - see Billingsley, 1984) that native offenders are or have been receiving disproportionately severe sentences. The public appear, from the few data available, to be more concerned with disparity as a function of socio-economic status. Mandel (1984) for example, reports the results of a poll in which almost two-thirds of respondents expressed agreement with the statement "the legal system favours the rich and the powerful". Likewise, in the G.R.A.C. survey (1981), 66.6% of respondents

agreed with the statement "Justice today favours the rich over the poor" - (Table 17 (see Brillon, 1983 for similar results)). Of course, this may reflect concern over unwanted disparities in other stages of the judicial process (e.g., discretionary prosecution of lower-income offenders, a perception often expressed over traffic offences).

Since little research has addressed the issue of disparity from the view of the public, this is an important research topic. It would be worth knowing the extent to which disparity is perceived as a problem among members of the Canadian public, and to know the kind of inconsistencies to which they object most strongly. The question of public perceptions of disparity can also be approached from the direction of the punitiveness dimension: lenient sentences are a manifestation of disparity from a norm which would prescribe harsher penalties. It may be the case that the public can tolerate sentencing variation of the kind acceptable to the courts. It is quite possible that here - as elsewhere - the public are flexible and responsive to the requirements of the individual offender.

Sentencing and the News Media

> It is a very small percentage of sentences which is reported in the news media. National newspapers, radio and television are very selective, reporting only sentences which are in some way unusual. (Walker, 1981, p. 114)

Research (Doob and Roberts, 1983) has demonstrated that the public and the criminal justice system can be reconciled by simply providing the former with more, or better, information. To this end, it is important to understand what people know and believe about sentencing in Canada, and how they came to acquire this knowledge. The first part has, to some extent been documented already (see, for example,

Doleschal, 1978; Doob and Roberts, 1983). In order to understand the second part, we need additional information about news media treatment of the sentencing process.

It is clear that for the vast majority of the Canadian public, the mass media constitute their primary source of information about all aspects fo the Criminal justice system, including the sentencing process.[19] Views of sentencing, then, can be expected to be greatly influenced by what people read, see, and hear in the news media. While a great deal of content analysis has been carried out upon mass media treatment of crime, the focus has generally been upon pre-verdict phases of the arrest-to-disposition sequence.[20] Little is known about the quantity and quality of media coverage of sentencing decisions. That which we do know suggests the media provide little systematic data about sentencing. As Ashworth (1983) has noted: "Newspapers tend to print headlines such as "Rapist gets only 18 months" rather than "First offender of exemplary previous character imprisoned for 18 months" (p. 143).[21] When sentences are reported, they receive little space[22] except when the sentence is atypically lenient. Thus, the cases that receive most attention, and the ones upon which the public are most likely to base their opinions, constitute a very selective sample.

Judges appear to share this concern with the coverage of sentencing in the news media. Hogarth described the judges participating in his research in the following way:

> Many of them feel that the press presents an inaccurate image of the court to the public and nearly all are concerned about the effect of publicity on the way in which the public views the court (p. 197).

Research in social psychology upon the formation of attitudes has shown the ease with which people generalize from a single case to the larger population from which the case is drawn. Thus, reading about one lenient sentence can lead to

unwarranted inferences about sentencing trends in general. Reading of a 'lenient' sentence may colour perceptions of all judges as being 'soft' on offenders. Moreover, attitudes founded upon a few atypical cases can be extremely intransigent. People appear to persist in adhering to beliefs even when there is little or no empirical justification for them.[23]

Thus, while members of the public respond to polls in a way that implies considerable divergence from judges' decisions, these responses are founded upon a very poor data-base. We must distinguish between informed and uninformed public opinion. As already noted, the amount of information at the disposal of the public is a strong determinant of their opinions of sentencing decisions.[24]

Several commentators have urged judges to be more active in educating the public, through the news media, about sentencing decisions. Thus, Haines noted over 20 years ago:

> equal sentences for equal offences is neither desirable nor possible, particularly if rehabilitation is contemplated. But the public doesn't know that, unless he (i.e. the judge) tells them. Inequalities from the law must make sense, and it is for the Courts to recognize they alone can bring this information and understanding to the public.

and further

> Unless you explain your disposition in clear and unmistakable language in a careless driving charge where there has been a fatality the newspaper headlines will read "Kills man, pay $150.00" or in a case of indecent assault "attacks girl, gets suspended sentence". The illustrations are legion, and not all of them can be laid to the perversity of the press. (p. 60)

Finally, let us note that the importance of the media, and their propensity to provide incomplete reasons for sentencing, were noted over 100 years ago by Stephen (1883) who wrote:

> I must however observe...that in my opinion the difference between sentences (which must exist to some extent) is not nearly so great as those who derive their notions upon the subject from reading reports of trials in the newspapers would suppose. (p. 90)
>
> Newspaper reports are necessarily much condensed, and they generally omit many points which weigh with the judge in determining what sentence to pass. A person in the habit of being present at trials would, unless I am mistaken, soon discover that he could foretell pretty accurately the sentence which would be passed in any case which he watched. (p. 90)

Summary

We do not know much about public perceptions of sentencing disparity. It appears that the extra-legal variable that most people are concerned about is socio-economic status: high status offenders are perceived to receive preferential treatment. It is clear that media coverage of a few, high profile sentences has a great deal of impact upon public views of all aspects of sentencing, including the issues of leniency/severity and uniformity versus disparity. A content analysis of news media may provide important information about the basis for public misperceptions, and the best way to correct those erroneous beliefs.

Public Views of Sentencing Aims

Much has been written about the aims of sentencing, and reference is often made to the desire of the public for one purpose or another. The aim most frequently attributed to the public is retribution. For example, the Law Reform Commission of Australia wrote that:

> Although no detailed examination has been made of the levels of differential public support for different philosophies of punishment, there seems to be good reason to believe that notions of retribution and deterrence feature predominately in the minds of many citizens when expressing views on this subject. (Law Reform Commission of Australia, 1980, p. 23)

In fact, little is known about public support for various sentencing aims, and the assumption that people adhere to a relatively simple 'just deserts' model may be unfounded.

Several investigators have examined public preferences for various sentencing aims, but the results have been inconsistent, suggesting little consensus among the population. Warr and Stafford (1984), for example, found retribution to be the most frequently-cited sentencing aim, endorsed by 42% of respondents. (This was a mail survey carried out in the U.S.) McFatter's (1982) subjects, on the other hand, rated special deterrence as the most important purpose of sentencing offenders. These latter data were drawn from undergraduates in the U.S. Interviews with residents of Metropolitan Toronto provided data for Waller and Okihiro's study (1978) which found substantial support for rehabilitation (57% of respondents). A poll conducted for the Ministry of the Solicitor General (1981) also supported the view that the public favoured rehabilitation:

> While it would appear that there is no agreement among Canadians about the preferred aim of sentencing or incarceration, slightly more Canadians, 5 or 6 in 10, would seem to favour "rehabilitation". (p. 30)

Other Canadian data, G.R.A.C. (1981), showed yet another pattern: deterrence was cited as the most important objective of the sentencing process (see Guerin et Brillon, 1983)[25]. Research by Thomas and Cage (1976) provides indirect support for the importance, to members of the public, of general deterrence as a sentencing purpose. These investigators found that estimates of crime rates were positively

related to punitivenss, suggesting belief in the ability of sentencing to deter other potential offenders. While statistically significant, however, the relationship was not overwhelming in magnitude. In all these investigations substantial support was found for one sentencing aim over others. Visitors to the Ontario Science Centre, who represent a diverse if not representative sample of the Canadian public, produced another pattern of results (see Roberts, 1984). Support was substantial for all five primary sentencing aims (rehabilitation, general deterrence, special deterrence, incapacitation and retribution). Slightly more importance was attached to rehabilitation (51% endorsed 'Very important' option, compared to from 41 - 46% expressing a similar opinion about the other aims.)[26]

In short, there is as much variation in public support for various sentencing aims as there is among criminal justice professionals. Different samples of people from the general population are likely to endorse different aims. The exact determinants of public views of sentencing aims are unknown. Presumably these preferences are malleable and are influenced by variables such as perceptions of crime rates, recidivism rates, the efficacy of rehabilitative programs, and so forth.

Summary

Public support for different sentencing aims is far from uniform. While some writers refer to the public's desire for retribution, research has demonstrated support for all the frequently-mentioned sentencing goals. Different sentencing aims may appeal to different segments of the population.

Public Opinion and Parole

As already noted, part of the public's dissatisfaction with sentencing severity springs from perceptions that sentences are being undercut by early release mechanisms. While we have no data on the issue, it seems likely that the public favour tightening the mechanisms by which offenders serve part of their sentences in the community. Certainly that is the case if the public are influenced by newspaper editorials, of which the following are some recent examples:

"Our too lenient Parole Laws" - Toronto Star, 12/5/84

"Parole Law Change Needed" - Toronto Star, 3/2/83

"Stricter Parole Makes Sense" - Toronto Star, 16/5/83

"Parole Boards demean courts, breed insecurity" - Globe and Mail, 14/12/77

There appears to be a discrepancy between public opinion as expressed in letters to the editor, articles in newspapers, and the few research findings on this topic. While the former suggest widespread opposition to parole, the few research studies upon public opinion and parole suggest otherwise. One of the G.R.A.C. survey questions, for example, found that the vast majority of respondents favoured parole in certain cases, so it does not appear to be the principle of serving part of the sentence in the community to which people are objecting, but rather their perceptions of current practice.

How are we to explain the public's theory that parole boards are substantially decreasing the severity of sentences? Presumably it is another illustration of the tendency to generalize from a small number of cases. Reading of a few sentences in the media (e.g. "Killer paroled after serving 7 months" - Toronto Star, 12/4/84) leads readers to unwarranted generalizations about the system.[27]

It is worth concluding this section with a quote from Dewalt (1970), who noted:

> An enlightened public opinion is essential to provide the necessary support to legislators and legislation when under attack because of particular incidents that will occur; for example the back-tracking on parole legislation as the result of the unfortunate incident of a paroled murderer committing another murder." (pp. 497-498)

Recent Canadian experience has shown how single instances of mandatory supervision/parole 'failures' (such as the Boden case) can generate a great deal of animosity towards the whole concept of offenders serving part of their sentences in the community.

Summary

Negative perceptions towards parole abound, and this has consequences for the broader issue of sentencing. The public appear to believe the parole board is responsible for releasing a larger number of offenders than is in fact the case. Public opinion about the parole system remains an important area for empirical research.

Perceptions of Offenders

While attitudes of offenders towards the police, lawyers and the justice system in general have been studied (e.g. Albert and Hicks, 1978), almost nothing is known about the opinions about sentencing held by the target of the entire process: the offender[28]. This is surprising, but Canada is not the only country that has paid scant attention to their views. Ashworth (1983) draws attention to the issue in the following way:

> There has been little systematic investigation of sentencers' beliefs about the ways in which offenders typically think and

> about the factors which might enter an offender's mind when he commits a crime, yet it seems likely that such beliefs have an effect on sentencing practice. (p. 50)

While we should not necessarily extrapolate directly from the Australian experience, the Law Reform Commission of that country reports some data derived from incarcerated offenders. When they encountered the following statement about disparity:

> Under the present system, offences which are pretty much the same and committed by pretty much the same sort of person (similar record, etc.) get much the same sentence.

77% of sampled offenders expressed disagreement.

Fully 93% of the sample agreed strongly, or simply agreed with the statement "some magistrates are generally much harder than others." Not unpredictably, 89% disagreed with the statement, "It doesn't matter which magistrate you appear before - they're all the same when it comes to sentencing." Their dissatisfaction with existing sentencing could also be inferred from the fact that 73% disagreed with the sentence "when it comes to sentencing, judges should have more power." It is interesting to note that the overwhelming majority of respondents endorsed the notion of sentencing panels: 76% agreed with the statement "I'd like to see sentencing done by a panel of experts and not by a judge." Thus, if the Australian experience is any guide, we can expect offenders in the Canadian system to have negative views of sentencing. Perhaps it is naive to expect otherwise. Beyond the simple question of the extent of disillusionment with the sentencing process shared by offenders, it is important to know whether this sentiment is affected by disposition (and other factors) and whether it is predictive of recidivism.

Offenders' Views and the Problem of Disparity

Offenders may be particularly sensitive to the issue of disparity, since they can compare their sentences to those being handed down to other offenders. They are also more likely than non-offenders to know about other sentences, especially if they happen to be recidivists. In short, offenders are likely to be very sensitive to the issue of sentencing disparity. Finally, it is also important to know if there is any relationship here in Canada between disparity (or perceptions of disparity) and particularly negative attitudes to prison[29]. Some writers have proposed a causal link between disparity and prison unrest.

> The most publicized arguments for reducing sentencing disparity rest on philosophical grounds...These philosophical principles, however, should not overshadow the more pragmatic reason for promoting uniformity in sentencing - to reduce prison unrest. (Forst, 1982, p. 21)

Summary

Not surprisingly perhaps, the perceptions held by offenders of the sentencing process are negative. Nevertheless, offenders' views are important, and worthy of research attention.

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ENDNOTES

1. In addition, as the authors of this report point out, such incapacitative sentencing strategies would be associated with staggering costs. Implementation of the five year policy, for example, would increase prison populations by approximately 600%. In Ohio (where this research was conducted) with would mean a rise in prison population from 13,000 to 65,000 inmates.

2. Although they are generally considered independently of one another, special deterrence and rehabilitation have a great deal in common. Indeed, van den Haag has proposed abandoning the distinction between the two since their aims and effects are indistinguishable (van den Haag, 1978).

3. There are few sound studies on this point, although letters to the editor usually associate disparity with undesirable variation as a function of offender characteristics. Thus, the sentence of Rock star Keith Richards following conviction on a charge of possession of heroin attracted considerable negative comment.

4. Analyses of public opinion data demonstrate that people typically equate 'paroled' with 'sentence served', and appear to have difficulty accepting the concept of a sentence continuing in the community. It is probably true - although we have no data directly addressing this point - that members of the public underestimate the rigour of conditions of parole, and fail to appreciate the consequences to the offender of violating those conditions. Parallels exist with the concept of suspended sentences: to the average layperson a suspended sentence is tantamount to an acquittal, or at least to a conviction without consequence. The perception that suspended sentences are frequently used, or are differentially associated with extra-legal factors, such as social status, will also contribute to a widespread belief that the courts are insufficiently harsh.

5. There are, of course, other purposes such as that derived from the 'Declaratory Theory' and known as denunciation. The criminal law expresses moral denunciation though the existence of criminal sanctions, and the degree of denunciation is supposed to vary directly with the magnitude of those sanctions. For a discussion of this point, and the research relating to it, see Nigel Walker (1980).

6. Although it is not necessarily the case that different sentencing aims will result in disparate sentences, this assumption is frequently made in research addressing the relation between sentencing severity and purpose underlying the sentence.

7. This study made newspaper headlines on at least two occasions. First, when some findings were publicly discussed, they drew a strong response from editorials (see Globe and Mail, August 25, 1982). Second, when it was alleged that this study had been suppressed on account of the conclusions drawn by one of the authors (see Globe and Mail, November 17, 1986, page 1).

8. That is, the extent to which one can attribute changes in the dependent variable exclusively to the independent variable. In the present context, a sentencing experiment permits us to attribute variation in sentence severity to factors associated with the judges rather than to case characteristics which in 'real life' remain uncontrolled.

9. See for example Orne, (1962); Rosenberg, (1969).

10. This is usually accomplished by post-experimental questionnaires or interviews, and the use of additional control groups.

11. For example, this is frequently found in psychological research involving perceptual judgments.

12. See, for a discussion of this point, Weiten and Diamond, (1979).

13. Lovegrove (1984), however, argues that the simulation studies are but a small distance from the procedure followed by a court of Appeal, which has to reach a decision (partially at least) on the basis of summaries of trial transcripts. This point addresses the issue of comparability of tasks, but the difference in consequences remains.

14. Conclusions drawn from this form of comparison are susceptible to the criticism that they involve 'between-group' comparisons, i.e., one must infer lack of insight, rather than demonstrate it for each individual subject. This is also the case for several experiments reported by Nisbett and Wilson (1977). The criticism is not fatal to the conclusion however; since substantial numbers of subjects are involved, i.e. it is unlikely that, as some critics assert, this result could have emerged even if all subjects (judges) displayed substantial accuracy about the

factors influencing their sentences.

15. For a discussion of the issue of exemplary sentences, see Ashworth (1983) pp. 343-346, 362-363, and Thomas (1979) pp. 35-37.

16. Doob and Roberts (1982) report that 80.7% of the respondents in a nation-wide poll over-estimated the proportion of prisoners released on parole before the expiry of their sentences (Table 10 of the original report).

17. Doob and Roberts (1982) found that 62% of polled respondents over-estimated the percentage of parolees who commit violent crimes within three years of their release (Table 4).

18. For example, fully three-quarters (75.3%) viewed the system as being more lenient than it is, i.e. they under-estimated the percentage of break and enter offenders who are incarcerated.

19. See, for example, Beinstein (1977), who showed that the mass media were more important than interpersonal sources of information. The President's Commission on Law Enforcement and the Administration of Justice (1967) noted that members of the public most frequently mentioned the news media as their information source. More recently, Smith (1984) reports that over half the respondents identified the mass media as their main source of information.

20. Graber (1980) (among others) has documented the manner in which the media present a distorted picture of crime, offenders and the criminal justice system.

21. The following examples - all headlines from recent Toronto newspapers - illustrate the point:

    "Woman who killed babies gets probation" - Toronto Star, 2/3/84.

    "Prison-release system assailed as merchant's killer sentenced" - Globe and Mail, 8/1/82.

    "Dad shocked as son's killer gets probation" - Toronto Star, 2/3/84.

    "No jail term for man in drug-trip slaying" - Globe and Mail, 6/4/83.

    "Probation after he slit throat of wife's lover" - Toronto Sun, 25/5/77.

22. A content analysis of the Metropolitan Toronto daily newspapers revealed that in 12% of stories devoted to criminal justice was a sentence reported. In addition, stories devoted exclusively to a sentencing hearing were extremely brief, and appeared in non-prominent pages of the newspapers. Thus, even if reported, a sentence is likely to escape the attention of most readers (Roberts, 1982).

23. The tendency to generalize to the population from a single case has been demonstrated by Hamill, Wilson and Nisbett (1980). In one experiment they demonstrated that encountering a single prison guard who acted in a humane fashion led subjects to regard all prison guards as being humane. Likewise, if the guard acted in an inhumane, cruel manner, people were likely to believe that prison guards in general were cruel and inhumane. For a review of the literature demonstrating the persistence of attitudes even when the absence of any foundation for them is made clear to subjects, see Nisbett and Ross (1980) and Anderson (1983). In a typical experiment subjects are led to believe that a relationship exists between two variables. Shortly thereafter the experimenter tells them that they have been, for the purposes of the experiment, misled. The data leading them to believe that the two variables were related had been made up by the experimenter. Despite this debriefing, testing at a later point revealed that subjects continued to believe that a relationship existed. Thus they persisted in believing something for which there was absolutely no supporting evidence.

24. Across a series of experiments, comparisons were made between the opinions of people who read media accounts of sentences and others who read summaries of court documents. In all cases, the 'media' condition subjects expressed significantly less satisfaction with the sentence assigned. (Summaries of actual cases were used - see Doob and Roberts, 1983-1984 - for a complete description of this research.) In fact the information available at trial which is not disseminated by the media can affect not just the public's perception of the appropriateness of the sentence, but of the nature of the "actus reus" itself. Wilkins (1984) provides an example of this:

> The Mayor of San Francisco and a supervisor were shot in their offices. Almost everybody would, without much further thought classify this act as 'murder'. However, the case went to trial and the verdict was manslaughter. That many of the public found this an unacceptable definition of the act was evidenced by demonstrations and violent protest (p. 36).

25. The G.R.A.C. data do not permit one to distinguish between general and special deterrence, although it seems likely on the basis of other research, that the public are more concerned with the latter than the former.

26. One deficiency of research upon public views of sentencing purposes concerns the methodology employed. Researchers have typically given respondents lists of purposes and asked them to rate each purpose in importance. Such procedures inevitably over-estimate the degree of support for all sentencing aims. More naturalistic techniques (perhaps involving open-ended questions) would tell us more about the sentencing aims people think about, rather than those they simply endorse when provided with a list on a questionnaire.

27. The misperception that the parole board is having a drastic effect upon sentencing is not only held by the average member of the public, as the following quote from Gordon Walker makes clear: "We're always hearing of cases where the sentence given out by judges have been undermined" (quoted in the Toronto Star, 26/&/84).

28. Beyond, of course, the predictable finding that offenders feel that judges are too harsh. Sebba and Nathan (1984), for example contrast the opinions of prisoners, 76.7% of whom stated courts were too harsh, with other groups such as students and probation officers (0% and 8.7% of whom endorsed this same opinion).

29. Judges appear to be aware of the importance of the offender's attitude. For example, Haines (1958) quotes one judge: "The offender's attitude towards the sentence is of prime importance in the subsequent treatment process" (p. 97).