JUDICIAL ROLE BEHAVIOUR:

A CRITIQUE AND REFORMULATION

BY

RICHARD ASSELIN

A Thesis
Submitted to the
Faculty of Graduate Studies
of the University of Manitoba

in partial fulfillment of
the requirements for the degree of

MASTER OF ARTS

Department of Political Studies

 June, 1985

ISBN Ø-315-33912-8

JUDICIAL ROLE BEHAVIOUR:

A CRITIQUE AND REFORMULATION

BY

RICHARD ASSELIN

A thesis submitted to the Faculty of Graduate Studies of
the University of Manitoba in partial fulfillment of the requirements
of the degree of

MASTER OF ARTS

Dedicated to Marek Debicki and
Ken McVicar, friends and teachers
both, for their clear-thinking
criticism, and to Colette my wife,
for her limitless patience. Errors
are solely the responsibility of the
author.

He who has not been in gaol
does not know what the state is.
Tolstoy

TABLE OF CONTENTS

List of Tables

List of Figures

ONE: LEGAL REASONING AND THE IMPORTANCE OF SENTENCING.

"(There is) a variation among the different magistrates."
Everson. (1919:93)

Introduction

THE CRITICAL STUDY of the forms of reasoning by which judges decide cases has been a principal concern of writers on jurisprudence in this century. (Hart, 1967:6-268.) Whether framed as the practical debate centering on sentencing disparities or its more abstract companion, the proper place of logic in the process of adjudication, the study of the judicial process is composed of issues which rest fundamentally on the nature of judicial reasoning and objectivity. Cast in perhaps its most basic form it becomes part of a broader question that is concerned with the maintenance of order in society and the ways in which that order depends upon the monopoly of the legitimate use of force by the state.

Law, with the systematic threat of the reserved monopoly of force as its essential characteristic, is the instrument the politically complex state employs as the authority to secure social order. (Chambliss and Seidman, 1971: 5-6; Redmount, 1964:29.) That is to say, as the political system orders the avenues and opportunities of the expression of will and interest, law orients social relationships such that a condition of certainty, a stable and predictable environment is

maintained. (Khan, 1972:136, 222.)

The problematic nature of change and stability in society is expressed in law through its emphasis on threat, sanction and coercion. Other disciplines, among them theories of power and politics, share this perspective. By light of metaphor Dowse cites France in description:

> "'Do you see, my son,' he exclaimed, 'that madman who with his teeth is biting the nose of the adversary he has overthrown and that other one who is pounding a woman's head with a huge stone?'
>
> 'I see them,' said Bulloch, 'they are creating law, they are founding property; they are establishing the principles of civilization, the basis of society and the foundation of the state.'"
>
> (Dowse, et. al., 1972:20)

The purpose of this thesis is to examine critically that which gives effect to law as a positive instrument of order--namely judicial determinations and the social purposes they serve--in the light of both normative legal theory and empirical social science. It will attempt to formulate and outline in some detail a model of the relationship of the judicial social environment to the judicial decision maker. The approach will be to synthesize, using a role theory perspective, a causal reformulation of the research tradition of sentencing behaviour. The aim is to produce an elaborate, yet reasonable, model of the antecedents to judicial decision making

that will permit a relatively large number of indicators while preserving the capacity to derive testable theorems about the relationships among those indicators.

The body of empirical research surrounding the central analytic concepts will be presented and examined within the second chapter. The relationship of this research tradition to the normative model of judicial decision making behaviour will be discussed. In particular, emphasis will be placed upon identifying the implications of the simplifying assumptions of both the 'mechanical model' of analytic jurisprudence and the 'realist jurisprudence' of interessen jurisprudence for the development of empirical research and theory. These conventional accounts provided an initial conceptual framework from which social science began an analysis. But, by accepting that framework, it also limited the analysis. These limits will be made explicit, as will theoretical inconsistences and methodological weaknesses within the literature. An explanatory taxonomy will be proposed, each taxon testing the dual criteria of parsimony and utility.

The third chapter will introduce role theory as a general approach to constructing a theoretically complex but logically formal and therefore comparatively parsimonious understanding of judicial sentencing behaviour. The discussion will turn first to the

contributions that role theory has made to the inquiry--among other things the powerfully adaptable and eclectic vocabulary of description it offers--and second to a critical treatment of role theory as an analytical tool. Central to this critique is the contrast between a stochastic, dynamic view of role behaviour and one which typifies role analysis as complex, authoritative constructions of normative expectations. These static and dynamic formulations of role theory represent not only different versions of the same analysis but engender as well specific substantive interpretations of social structures and their maintenance. Each draws the limits of theoretical closure differently, with significant implications for which concepts and indicators, and hence which explanations, are permissable. The discussion will identify what causal interpretations are theoretically legitimate to each and how they may contribute to a role based model of judicial behaviour.

In the fourth and final chapter the discussion will introduce a causally interpreted model of judicial behaviour. The outcome of this model is the sentencing decision, the formal structure is derived from the preceeding treatment of role theory, its endogenous variables from the empirical inventory.

Beginning with an examination of the notion of theory in the social sciences, the discussion will examine the characteristics of causality analysis and the relationship these bear to the development and testing of theory. Working critically from the earlier review of role theory and the principle conventional and interpretive models, a restructuring will be proposed which will attempt to integrate those models, with salutary effects for judicial role analysis in general and the proportions of explained variance in particular. A number of derived theorems will be presented along with certain predictions concerning their relationship.

Lastly, and in closing, the discussion will recaptulate briefly the proposed model adressing specifically the question of whether or not it moves toward a unification of earlier approaches. The problems of omitted variables and reciprocal effects will be noted with some suggestions for their resolution. Finally, the logical implications of a causal interpretation of judicial behaviour will be delineated, in particular whether the dimensions of judicial decision making behaviour can be adequately represented in this fashion.

The remainder of this chapter will compare the treatment of judicial reasoning and decision making behaviour in the main currents of modern jurisprudence, namely natural law and the jurisprudence of interests, and positive law and analytic jurisprudence. The normative models of judicial behaviour which arise from these conceptions will be described critically. The importance of sentencing in the judicial process will be outlined, as will the structure of the Canadian court system.

The Importance of Sentencing: Power and Policy

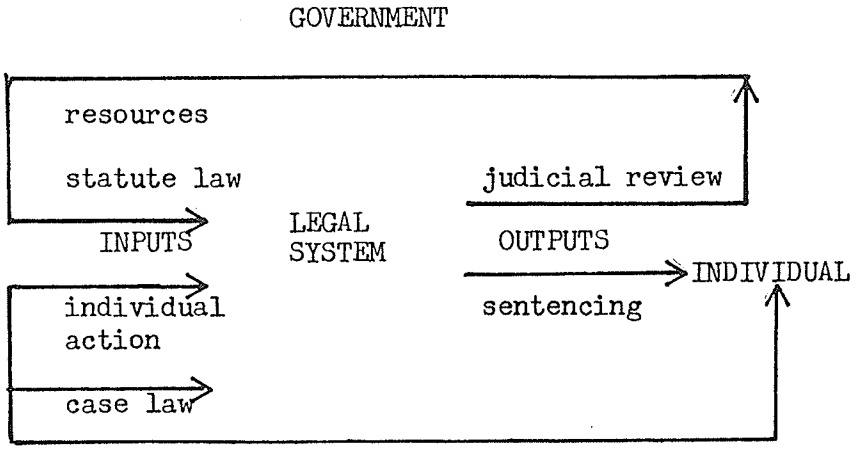
There exists in every society, to lesser and greater degrees of institutionalization, a social process or selection mechanism which is invested with capacity to assign individuals, with compulsory effect, to socializing institutions. For the individual this can be a more significant authority than policy decisions that more or less distantly redistribute resources as the legal authority can remove him entirely from everyday life. (Cook, 1979b: 224.) Nowhere is this seen with greater clarity and articulation than in the act of state sanctioned punishment. (Zimring and Hawkins, 1971.) Carrying with it as it does symbolic tokens of legitimacy, ideology, and security this act invokes and reifys for the individual the entire

immanent coercive power of the state.(Gibson, 1977:987.) Sentencing, in other words, is the specific mechanism which links individual behaviour to the authority of the abstract state.

There is a sense in which judicial determinations are the outcome of a matchkampf--the political struggle--between the individual and the state. In sentencing, a judge, through the determination of enforced and punitive resocialization, is able to reinforce the values of society and the distinction between the transgressor and the society which exercises the sentencing power. (Winick, et. al., 1964:123.) It is a process that clarifies which values are important or fundamental and thus deserving to be upheld and affirmed. (Law Reform Commission of Canada, 1974:10.) The courts in this view are political agents whose manifest function it is to change and enforce individual and group behaviour. (Zimring and Hawkins, 1971:34-35.) The efficacy of law and judicial determinations must thus be seen as having two aspects: the individual and the systemic. Subtending both, however, is the notion that judicial determination is not merely a process of legal reasoning, but more, a critical political act. (Rosen, 1972:9.) For the individual, it is an instrument of political learning based on the dissemination of authoritative commands in the form of verbal symbols. (Redmount, 1964:29.)

Systemically, the recognition that courts are political institutions is not a new one. Khan maintains that the process of deciding if an activity has violated the dictates of the political system is crucial since it reflects the authority of the system over society, demonstrating its power and reinforcing the culture. The legal system is therefore a subsystem of the larger political system 'whose overall role is to apply political decisions as expressed in law to specific instances of individual behaviour.' (Khan, 1972:221, 230.) Formalistically, this can be depicted as a structure in which the legal system intervenes between government and individual.

FIGURE 1.1 Legal System and Government



(Adapted from Kahn, 1972:230.)

In somewhat more concrete terms, at the level of policy, judges and courts have a function especially among those governments in which constitutional interpretation is supported by judicial review, that is by intervention and enforcement. Though he was speaking specifically of the United States, de Tocqueville's observation remains germane that 'scarcely any political question arises that is not resolved sooner or later into a judicial question'. (Peltason, 1955:1.) Though again in the U.S. context, Rosen argues that the shifting concerns of the upper courts have reflected fundamental political constructs and legislative issues including property rights, human rights and civil liberties and, most recently, the maintenance of economic and social order in the 'law and order' Burger court. (Rosen, 1972:7.)

However, considerable controversy and some obscurity surrounds this notion of judicial policy making. Ely notes, in quoting Madison:

> "Nothing can finally depreciate the central function that is assigned in democratic theory and process to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."
> (Ely, 1980:4.)

The issue stems from the observation that the central function of judicial review is at the same time its central problem. Namely, that in constitutional contexts, a body neither elected nor subject to direct political accountability has the capacity to not only declare invalid legislation enacted by an elected and representative legislature but to as well by its decisions make law. (1) (MacGuigan, 1965: 283.)

That the courts and judges do make laws -- whether interstitially within the gaps left by legislatures in the statutes they enact or in areas undeveloped by statutes -- seems clear. Indeed, the claim Ely makes is not that the judiciary has not participated in the making and revision of the laws they apply, or that this participation because of its scope and continuity may not properly be called a political function, but whether in a popular democracy policy determination by an unelected elite is legitimate.

However, in the context in which it is posed, the question is obscure: whether the judiciary <u>ought</u> to make law must be asked of democratic theory. The issue in the present instance would seem to be not the exclusivity of responsibility for policy decisions but rather the relative policy functions of legislature and judiciary. (Becker, 1964:8.) After all, as Ely writes, no answer is what the wrong question begets.

Several analysts have argued that the superior courts are political institutions, identifying in their activities stable areas of policy competence including civil liberties, labour relations and constitutional development. (Vines, 1970: 130, 133.) More recently though trial courts too have been recognized as fulfilling a policy function as they are engaged in the formulation and administration of public policies which demand that choices be made among competing values such as the definition and extension of human rights and civil liberties. (Cole, 1973: 1.) Similarly, it has been suggested that trial courts play a significant role as "residual" decision making institutions, either acting in policy areas in which other agencies cannot or will not act or in providing a forum for the review of decisions of other agencies. (Sarat, 1977: 371.) It is Greenawalt's interpretation that each, legislator and jurist, legislates within the limits of their competence. (1975: 359 and Becker, 1964:8, note 2.)

In another formulation, that of social welfare theory, the nature and extent of the relationship between the individual and the judicial system has been described as an important, although conceptually and methodologically nascent, complex of social and political indicators. In the absence of an overall quantifiable theory of the social system efforts to model the behaviour and performance of the system are typically based on the development and validation of

subsystem variable measures associated with 'direct normative conditions' of the subsystem. Social indicators are these direct measures of social welfare, or some aspect of it, and as such can hold considerable relevance for policy. (2) Henderson describes three analytical classes of subsystem homeostasis; maintenance and preservation indicators related to material well-being; achievement and excellance indicators related to socio-cultural well-being and indicators of equity, diffusion and distribution. (Henderson, 1974: 26, 28.) Within the class of socio-cultural indicators are included public order and safety, devolved from de facto and de juro equality under the law which in turn is devolved from legal rights and justice.

At the level of the individual, a social indicator that tests the relationship between the self and the legal system would focus upon the magnitude and stability of affective trust toward the system, fairness within objective equality of treatment and the social appropriateness of various aspects and stages of the legal process. Yet, as Harvey has noted, within a schedule of indicators those relating to the quantity and quality of interaction with the judicial system are the least developed. (3) This does not give full effect to the importance of issues that bear upon law and the administration of the criminal justice system, especially as these may have an impact

on public perceptions on the nature and extent of security and equality. (Harvey, et. al., 1980: 95.)

It seems clear that even by cursory examination judicial determinations, and by extension the antecedents to those determinations, are important mediators of both the formal relationship between the state and the self, and between the political culture as it is expressed in the judicial system and other aspects of the social system. Skeptics of a political interpretation of the work of the courts maintain that the law is an objective external phenomenon that controls the behaviour of judges, thus not admitting to the notion of judicial legislation. This classic view can no longer be said to adequately describe political reality.

In Canada, it has been "recognized that a special danger to the federation could arise if the judiciary was not equal to the task of interpreting the exercise of legislative powers..." (Carson, 1982: 2.) Recently, many political questions have come to the Canadian Supreme Court as legal questions: resource taxation in Saskatchewan, cable communications in Quebec and the 'patriation' of the British North America Act. Carson reiterates Greenawalt as he places the judiciary not in competition with legislatures but as fulfilling a complementary role, especially in situations which

require implementing new social purposes in law. (1982: 5, 7, 11.)

That trial courts too fulfill a political function is, while less clear, an important political idea. Judges in trial courts, unlike appellate and superior court judges, are the least studied and least well understood of all political actors. (Sarat, 1977: 368.) They are, however, responsible for decisions made at the most fundamental level of the judiciary. Trial courts are far more numerous than appellate courts and hence affect more individuals. And as was observed earlier, they are decisive in 'structuring and defining the issues that are appealed to the superior courts'. (Vines, 1970: 138.) Therefore, by describing the political role and behaviour of judges and the courts, a more complete analysis of the political process will result. (Peltason, 1955: 1, passim.)

The Importance of Sentencing: Crime and Justice

The immediate importance of sentencing stems from the central position that that act occupies in the administration of criminal justice. It is essential to note in this respect that, in Canada as in other western democracies, contact with the system of criminal justice occurs overwhelmingly at the level of the trial judge or

magistrate's court. In Canada it is the only court which may try and sentence under summary conviction and as such accounts for virtually all -- 98 or 99 per cent -- of all cases dealt with in the criminal courts. And though they do not hold exclusive jurisdiction over indictable offenses, 94 per cent of those cases are tried in magistrate's court either through application of its limited jurisdiction or by petition of the accused. (Khan, 1972: 238-39.) As Hogarth points out, this breadth of jurisdiction is greater than lower courts of criminal jurisdiction in Europe, the United States or the Commonwealth, countries with which Canada shares both legal history and culture. (Hogarth, 1971: 35.)

In making a sentencing determination the trial court judge instantiates the power of law which, irreducibly, must be the power of sanction: within the limits of penalty established for an offence a magistrate sitting alone may impose, depending on the offense: restitution; reparation; probation; fine; a suspended sentence; institutional incarceration or some combination of them. (Smith and Blumberg, 1967: 97.) Indeed, as Hogarth argues, a magistrate in Canada may impose any penalty. (4) No judge in a lower court sitting alone in any other country is given such scope of sentencing authority. (Hogarth, 1971: 36.) It is further the case that in most jurisdictions

a sentence determined by a trial judge cannot by adjusted by an appellate court if it is within statutory limits. An appellate review of an exceptionally unjust sentence would, even though the punitive determination itself might be modified, leave unaltered the sentencing discretion available to trial judges. (Felkenes, 1973:206.)

This aspect of a magistrate's function can be brought to full perspective when it is noted that the vast share of individuals charged with criminal offences plead guilty. (Frankel, 1973: VII.) In a study of two courts in the United States, Levine observed that, with only slight variations across regions, 90 per cent of cases coming to the lower trial courts were settled before trial by bargaining toward a guilty plea. (Levine, 1977: 2, 69.) In a highly similar finding Blumberg reported a guilty plea convictions rate of 70 to 85 per cent for felony cases and 95 per cent for all cases combined. (Blumberg, 1972: 215 and 1979: 168.) Within Canadian courts the rates of guilty plea convictions were also high, though with greater apparent variation. In an empirical application of a systems analytic model to Ontario trial courts Hann found that a case plea of guilty was entered in the court as plea in a little under half of the sample cases. (Hann, 1973: 315.) Working, however, with a sample of offenses from the same group of courts, Hogarth

reported that nearly 80 per cent of persons charged pleaded guilty. (5) (Hogarth, 1971: 270.)

These rates of guilty plea conviction take on special importance in that, in trying a plea of guilt, the determination of sentence is the only significant decision made by the court. And in cases tried on the merits, that is in cases of pleas of not guilty, the most visible and dramatic of all the activities of the trial judge remains sentencing. (Sarat, 1977: 239.) Thus, as Jones argues with compelling simplicity, by quantitative standard the exercise of sentencing authority far outweighs all other things a trial judge does as a participant in the legal system. (Jones, 1965: 139.)

It is therefore neither ambiguous nor unexpected that judicial reasoning in general and sentencing in particular are fundamental to the description and critique of the administration of criminal justice. Indeed, it has become fixed in the language of jurisprudists and reformers that the purposes of criminal law and sentencing are inextricably tied both in terms of the social values law protects and the prescriptive imperative that the community punish crimes against itself. (Law Reform Commission of Canada, 1973: 1.) And it is with the force of a popular truth that sentences that are inappropriately lenient are thought not to act as a deterrent to others and produce public reaction demanding harsher treatment. By

contrast, sentences that are inappropriately severe are thought to have little or no rehabilitative effect and impose an excessive burden on custodial correctional institutions. (Felkenes, 1973: 206.) Thus, apparently unaccountable disparities in the products of judicial decision making are seen as threats to the public support of courts. But more fundamentally, when the sentences that magistrates dictate are unalike for cases that seem not, then both judicial objectivity and the basis of justice may be questioned. (O'Donnell et. al., 1977:38.)

From this basis some, most notably Abraham, have maintained the primacy of judicial decision making beyond every other:

> "Respect for law is one of the select group of principles which we have come to regard as essential to the effective and equitable operation of popular government. If (citizens) have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will disappear with it to the great detriment of society." (Abraham, 1975: 3.)

Much the same argument was made by de Tocqueville when he observed that 'the power of the courts is enormous, but only as long as people respect the law; the courts would be impotent against popular neglect or contempt of the law.' (de Tocqueville, 1945: 151.)

In largest measure that respect depends upon the observed functioning of those individuals and institutions which administer

the law -- their "propriety, efficiency and humanity", in short, justice perceived. (Jones, 1965: 125.) The legal order and its apparent equity become personified in the individual engaged in bringing down the general principles of law to the concrete and timely. More than any other, that personification is within the trial court judge. (Felkenes, 1973: 206.) The judge is, as Stone describes, "the symbol of authentic rational authority." (1973: 1352.)

It is possible by this route to dissolve, almost without residue, the functioning of the criminal justice system into the legal logic of judicial decision making. Determinations by judges become more than a subsystem function: they are instead an evaluative barometer of the wider political system for if it is widely assumed that the law is unevenly enforced or that individuals or classes are treated with systemic unfairness then the community may lose its willingness to abide by the laws and the political system will lose its dominion over society. (Cole, 1972: 3.)

An empirical science of the judicial process would, as its basis, consist of factual generalizations about the decisions of courts. Too, it would attempt to evaluate critically the premises and beliefs of judges and the reasoning by which they justify their decisions. (Becker, 1964: 7-8.) These constitute, for the legal

profession, normative doctrines which themselves have a canonical character. (Becker, 1964: 13-26, 66.) Such conceptions exist in every social group, but few 'impose so strongly or exhaustively as the special sub-culture of the court of law'. Law, and its associated norms, demand that whatever private doubts a magistrate may have, decisions must appear to be the logical, rational, almost inevitable outcome of legal reasoning. (Hogarth, 1971: 300.) Indeed, it is a frequent argument in jurisprudence that legal norms are a species of social fact to be interpreted not as propositions of what ought to be but rather as propositions of what is in fact. (Ginsberg, 1965: 52.) In other words, the doctrines of legal reasoning and decision making are ascribed the status of empirical generalizations as well as normative propositions. It is to these doctrines that the discussion now turns.

Reason and Decision: Jurisprudence and Problems of Legal Reasoning

> "Any judge, one might suppose, would be able describe the (decision making) process which he had followed a thousand times and more. Nothing could be farther from the truth."
> Cardozo (1921: 9.)

The forms of legal reasoning are intimately tied, in theories of

the judicial process, to the nature of judgement and questions of equity. As Cardozo wrote, that process remains obscure and problematic even, and perhaps especially, among those who engage it in the act of judgement. The idea not only uncrates judicial reasoning from its formalist expression and offers it to the analytical perspective of empirical science, but more, it touches at the core of a debate which remains current in criminal justice and juridical research. In the terms of that research community this debate revolves around the continually abditive character of judicial objectivity.

As noted at the very outset, the critique of judicial reasoning has been a principal concern for jurisprudists in this century. Hart has characterized this concern as the search for the proper place of logic in the process of adjudication and the theories which have developed are, in general, skeptical in nature. They can be distinguished on the one hand as those that deny that reason and logic play a significant role in adjudication and on the other as those that adduce judicial decision making to be the ineluctable application of precedent to fact. Respectively, thses doctrines contrast experience and logic or 'intuitions of fitness' and deductivism: in the harsh light of extreme characterization these positions cast judicial

determinations as either arbitary or mechanistic. (Hart, 1967: 6-268.)

The latter account, or what has been termed the conventional doctrine of legal reasoning, begins with the proposition that a court's decision is the result of a syllogism in which the major premise is an invocation of the relevant law or rule and the minor premise is a collection of facts "discovered" in the case. The judicial decision therefore becomes an instance of deductive reasoning which, in its purest form, is a mechanical process cantenulating rule and fact. This is very much a "neutral principles" view of sentencing that portrays the magistrate-as-umpire, maintaining order and discipline, ruling on the admission of evidence and specific applications of law. It rests upon the belief that justice is best administered according to fixed rules applied by a structured logic in which values and ideologies are irrelevant. (Haines, 1964: 40-49.) Founded on the assumption that in order not to become arbitary a magistrate must not be affected by or involved with the circumstances or principals of the case before him, this image strikes closely to the notion of the trial court judge as revealed in the taught tradition of Western jurisprudence: apolitical, logic-oriented and law-discovering. (Shapiro, 1964: 17-33.)

This model of judicial reasoning is related to a body of judicial

theory termed analytical jurisprudence that has almost exclusively, but mistakenly, been identified with John Austin. (Hart, 1967: 4-419.) A comparative and analytic method, it views law as a complete and autonomous system of logically consistent principles, concepts and rules which can be studied apart from its causes, purposes, history or values. It states the application of law to be the inescapable unfolding of rules and recognizes judges as politically and socially neutral.

It is somewhat of an overstatement to set the nature of analytic jurisprudence as monolithic. Though popularly associated with Austin, the claims of the analytic movement are various and cannot be immured entirely within the views of Austin. Feinburg writes, however, that there is sufficient agreement to outline a number of defining tenets. Central and irreducible is the notion that the proper province of jurisprudence is positive law, that is, the 'set of rules established in a political community by political authority and enforced by the power of the state'. Analytical jurists are Austinian as well to the extent they share with Austin the conception of law as "established fact" subject to "scientific treatment". (Feinberg, 1967: 109.)

Analytic jurisprudence is, however, only broadly scientific -- in the sense of a rational mode or program of inquiry. And it is comparative only as it attempts to distill common concepts and principles from modern legal systems. It is here that the analysis is precisely contained for it aims to reduce legal concepts to a primitive few that are not themselves further reducible. The claim to neutrality is located here as well since analytic jurisprudence, in its emphasis upon a program of positive law, undertakes the study of what law <u>is</u> independently of what its content <u>ought</u> to be. (Feinberg, 1967: 109.)

Among the influences that may be traced through Austin are Jeremy Bentham and earlier, David Hume. It was Hume's thesis that moral distinctions are ultimately derived from passion or sentiment and not reason. Hence, to the extent that justice is grounded in reason, that is free from capricious passion, to the same extent law could be free from moral imperatives. Bentham's extension of this argument offered utility to replace morality as the anlage of justice. So conceived, the theory of law could be a theory of data and could be studied as a formal system or a class of formal systems.

It is this separation of law and morality that is the essential feature of legal positivism and, to a lesser extent, analytic jurisprudence. In the Province of Jurisprudence Determined, Austin wrote that 'law is one thing; its merit is another'. (Wollheim, 1967: 452.)

An elaboration of this argument which rests on the principle of utility, specifically that since the law brings 'the greatest happiness to the greatest number', states that there exists an unconditional obligation to obey the law however unjust it may be. Evident within the Austinian fractionation of law and morality, and bounded further by a foundation in utilitarianism, positivism can provide no justification to declare invalid an unjust law. (Hart, 1967: 4-419.)

As a theory of the judicial process legal positivism constructs the view that correct legal decisions are "uniquely determined by pre-existing legal rules and that the courts either do or should reach their decisions solely by logical deduction from a conjunction of a statement of the relevant legal rules and a statement of the facts of a case". (Hart, 1967: 4-419.) Judges are thus legal automata, and their decisions are 'mechanical' or 'automatic'.

These elements, the moral obligation to obey the law without

reference to extralegal standards, and the strictly formal deductivism of judicial decision making, comprise as well the main criticisms of positive law and analytic jurisprudence. (Feinberg, 1967:110.) Examining the latter objection first, legal logic is criticized as inadequate for achieving just and practicable decisions. (Goulding, 1967: 262.) This criticism contains a number of claims which do not completely rest on strict logical grounds. In perhaps its weakest form the argument specifies that legal reasoning, if it takes the form of argumentatively cantenulating legal rules to particular cases, cannot be a syllogism as these elements are neither true nor false and therefore cannot stand as either premise or conclusion. However, as Hart points out, this definition of deduction would not permit other sentential forms of reasoning to be regarded as deductive that are commonly employed as syllogistic constituents. (1967: 6-269.) Hence, this criticism is difficult to maintain as it can be shown to be inconsistently applied. A related point of some greater strength concerns the selection of the legal rule which forms the premise of the judicial argument. In every case except that in which there is but a single obvious legal rule, the selection of the rule must depend on some criterion which narrows the range of possible rules. As this criterion is, by nature, evaluative it cannot be specified by

logical operations alone. In other words, the rule for the rule must be substantive, subject thus to social, jurisprudential and political pressures.

In an alternate formulation, the criticism specifies that judicial reasoning is excessively logical. It is this formulation that casts legal reasoning as pejoratively 'mechanical' or 'automatic'. Its basis is found in the argument that:

> "...the legal system is more than a set of related norms to be treated as unassailable factual givens. Law is not a brute datum of social power but a mode of decision making guided by distinctive standards and ideals, capable of self-fulfillment or corruption."
> (Selznick, 1967: 479.)

This is a normative view of law that rests strongly on the contention that law is an instrument which can be informed by social needs and conflicts and can be allied with the natural law objection to the legal positivist claim that no positive law can be unjust.

Though it has been argued that natural law doctrines tend to confuse arguments about the criteria by which law and social institutions are to be evaluated with arguments constructed to inject a reference to morality into the definition of legal validity, these doctrines do serve to emphasize an important natural law criticism. Namely, that

evaluative criteria do not merely reflect preferences, tastes or conventions which vary from society to society or from time to time but rather are determined by features of the human and natural ecology which appear with such enduring stability and perspicuity that they are judged to be social or political constants.

Epistemology and metaphysical obscurities aside, this claim in its simplest form is identical to the notion that certain legal rules are basic in that in their absence or contempt other legal rules would be inefficient or, in the extreme, pointless. Analytical jurisprudence, as pure analysis, cannot recognize such a notion without revealing within itself damaging inconsistencies. Neither can it recognize that the maintenance of the legal system or even typical operations of the law such as legislation, adjudication and sentencing are purposive actions. Natural law thus argues that any study which "isolates law or legal phenomena... without considering their adequacy for human purposes makes a vicious abstraction which is bound to lead to misunderstanding." (Hart, 1967: 6-272, 273.)

It is important to distinguish the dissimiliar claims that law must be evaluated by permanent features of the human condition and the prescription that law and adjudication should yield to, or be informed by, social purpose. According to Wollheim there is at

minimum in theories of natural law the rejection of the positive law claim that no law received from a soveriegn political superior can be unjust. Any law that does not conform to canons of justice, though it was otherwise consistent with legislative and legal criteria of validity, cannot be argued to be a law at all. To this, however, can be added the proposition that the criterion of justice itself must possess characteristics of a legal code. Specifically, that it be complex; that it be consistent; that further it be capable of being formulated as evaluative rules and most fundamentally that it be grounded in principles more general and enduring than 'the mere practical affairs of men'. (Wollheim, 1967: 450-51.)

The transformations that theories of natural law have undergone have been in response to the changing interpretations placed on nature as the source or pattern from which law is directed. The orderly universe and the will of a supernatural creator were central to Greek and Thomist interpretations. It was when man acted in accordance with the laws of the universe, or according to the design of a willful and perfect creator that he acted in accordance with reason. The variation within nature however, and the difficulty of discerning perfection with an imperfect intellect revealed this conception of

natural law as simple and inadequate. (Wollheim, 1967: 451.)

Problematic was the necessity for discriminating those aspects of nature to which could be ascribed normative significance. This was approached through a further appeal to nature to identify an ideal nature within which each thing had its own characteristic end (telos). Excellance (arete) consisted in the achievement of this end. The essence of the ideal nature of men was their reason and excellance was to be found within reasonable actions. Hence natural law came to be that which was discernable by reason. (Wollheim, 1967: 452.)

These teleological and epistemological considerations, of necessity formal elements of natural law, are that which require the greatest defense against criticism. For one thing, natural law cannot admit without weakening its argument that justice may place different demands upon different individuals or societies, or within a society at different times. More serious is the implication that once a law is accepted as valid it is free from further assessment, precisely the criticism natural law makes of legal positivism.

The alternative criticism of analytical jurisprudence, namely

that law reflect the needs of the social and political community and that by design it 'effect practical solutions' to social problems finds its genesis in the work of the sociological jurisprudists, so-called, Roscoe Pound and Oliver Wendell Holmes among them. (Selznick, 1967: 478.) As an explanation of the nature of law it was in its earliest formulation empirical and can be traced backward to the interessenjurisprudenz--the jurisprudence of interests--which concentrated upon the conflict of interests that occurs outside as well as within a courtroom. Law represented the dominant interests in society, that is the state, and as such at any time was the outcome or the balance of social advantage. (Goulding, 1967: 261,262.) As a body of theory it treats skeptically the claim that judicial decision making is either logical or neutral, or that law can adequately be conceived as an autonomous system of isolated, canonical rules and principles. As the latter criticism it "obeys a practical impulse... (seeking) to infuse legal policy and decision making with the perspectives, insights and specific knowledge of the social disciplines". (Selznick, 1967: 478.) It attempts to draw attention to phases in judicial decision making that do not consist merely of logical operations and whose form and character have long been obscured by traditional legal philosophy. Pound argued that, beginning with the premise that law is an instrument of governance, it is necessary to understand the

nature of the interests law seeks to protect in order to understand law itself. (Rogat, 1967: 420.)

In Anglo-American jurisprudence this thinking has become associated with a group of 'legal realists' including, beside Roscoe Pound, Jerome Frank, Karl Lewellyn and others. It called for the act of judgement to focus on social facts instead of legal concepts and to recognize that a judge's concern should not be with logical consistency but rather with 'considerations of social policy and social advantage'. (Rogat, 1967: 421.)

This judicial realism saw the traditional juridical claim to objectivity at best as rationalization and at worst as self-deception. In this view of the judicial process judges are seekers after truth, bound to confront each case with waxing vision and acumen. Accordingly, decisions are not compelled by precedent but rather are free. This 'free decision' model of judicial decision making is nested in a society conceived as a system of power relationships with the courts acting as mediators. When acting to resolve a dispute a judge weighs the values each litigant represents and renders a decision upon that basis. Characteristically, this conception fosters an image as the magistrate as result oriented and law making; decisions are products of a unique and eclectic process of reason, insight and deliberation.

(Shapiro, 1964: 17-33.)

Realism is distinct in its rejection of law as either a set of neutral nomothetic primitives or as transcendent principles. However, it is the concern with the processes of judicial decision making that provides its clearest definition. This places in the centre of that process the individual judge; for the realists, a judgment was always somebody judging something. In terms of the work of the courts this directed attention to the slow accretion of law that develops from particular cases. This was not, however, to deny the analytic principle of stare decisis but rather to make visible and public the ways in which a judge decides which, of the universe of applicable past rules, are relevant in a current case. Here came together the dicta that law should serve as social policy and that legal rules are by nature indeterminate: the magistrate must employ the latter to promote the former.

This, as in other realist analyses of social process, is the essential feature of legal realism. "Reality" was taken precisely to mean moving "from theoretical formulas to what worked in practise, from books to life, from text to context, from passively and mechanically transmitting a received tradition to actively and flexibly responding to each...case". (6) (Rogat, 1967: 421.) In adjudication

and determination Cardozo expressed this perspective clearly:

> "If you ask how a judge is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it--from experience and study and reflection; in brief, from life itself." (1921: 113.)

Skeptics regard this notion with considerable distrust. If the law is what the courts do in practice, then the course of the law is unpredictable to the extent that the courts may actively employ legal indeterminacy to give effect to new social policy.

As a critical perspective realism has been argued to be inadequate. The judge is legal realism's most important element since he is the agent of policy change and implementation. As such, attempts to explain a change in the law relied, perforce, upon aspects of the individual judge as both the source of the explanation generally and the content of the explanation specifically. Thus, by pointing to a judge's psychological or attitudinal profile, usually as determined by an examination of that judge's written opinions or by an administered psychometric instrument, or to his social and political background, a realist critique would argue to demonstrate 'the irrelevance of his justifications and the speciousness of his claim to be applying rules'. (Rogat, 1967: 421.) As a class these arguments tend to be inadequate insofar as they merely remove the thing to be explained from beyond to within the individual and neglect or fail

to return to that which must ultimately be explained, the relationship between decision and 'policy'. (7)

If, however, legal realism can be criticized from an empirical perspective, analytical jurisprudence holds it not to be an explanation that can be properly applied to adjudication at all. The thing a magistrate must not do is stray from the tradition that teaches the judge to be an invisible and unfelt force in the process of adjudication. (Felkenes: 1973: 201.)

This, then, outlines what has come to be regarded as the central tenets of modern jurisprudence as it is concerned with judicial behaviour: analytical jurisprudence with its emphasis upon a formal and skillful judicial technology of duplicable and shared forms of logic, and realism with a vocabulary based on terms like policy and social purpose to describe judicial behaviour.

Note it is implicit in both that judicial reasoning is what is meant by judicial behaviour. More importantly though, it is neither difficult nor unorthodox to identify these descriptions, in addition to being theories of the nature of law and the judicial process, as prescriptive images or models of the legal profession's view of itself. Notwithstanding the appeal to experience in legal realism, both represent

normative constructions of judicial reasoning emphasizing how judges ought to reason as much as how judges do reason in fact. As Hart observes, descriptions of the methods actually used by judges are often confused with prescriptions of alternative methods of reasoning. It is important to distinguish theories regarding the usual processes or habits by which judges reach their decisions from recommendations concerning the processes that ought to be followed. In fact, Hart considers empirical versions to be of minor importance and instead ascribes significance to these arguments as standards by which decisions are justified. (Hart, 1967: 6 - 269, 270.)

In either case, normative imperative or descriptive theory, the burden of proof must be upon the analytical jurisprudists and realists. That each makes a case concerning the nature of law, in and of itself, is not the concern here. It is rather the differing conceptions of how judges reason and decide that are problematic. In a purely normative world noetically or introspectively derived descriptions would be sufficient empirically as well. In short, the behavioural would be completely identified with the normative.

When the jurist argues, however, that adequate precedents exist for all future decision making situations or that considerations of some prepotent social policy impell and attract reason toward evident

decisions then the jurist argues from authority. Arguments from authority simply do not count; they are, as formal proofs, specious and fallacious. The test, then, must be an empirical one: to what extent do the norms of judicial behaviour determine the process by which decisions are made, and the content of decisions themselves. A crucial test, therefore, would be the extent to which these normative models predict actual outcomes of decisions, that is sentences. If, however, sentences are found to vary with some other event or behaviour, then the normative argument is diminished.

Though the discussion reserves this question for the next chapter, it may be said here that critical social science has noted that sentencing criteria are 'unevenly and capriciously applied' and that there are dramatic differences in penalties for offenses that are, by the traditional legal standards, similar. Frankel contends that:

> "a defendent who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between". (1973:6.)

The Structure of the Canadian Courts

The structure of the Canadian court system is set in the British North America Act and federal statute, including the Criminal Code and the Canada Evidence Act. (Hann, 1973: 38.) Under Section 91(27) of the BNA Act the federal Parliament is assigned exclusive jurisdiction to make criminal law and law in reference to criminal procedure. The Act assigns to the legislatures of the provinces the exclusive jurisdiction to install and maintain provincial courts. Section 92 of the Act also gives to the provinces the authority to impose penalties for the contravention of provincial statutes. The result is that much criminal law is to be found within provincial statutes. Indeed, the overwhelming majority of criminal offenses are violations of provincial, rather than national, law. (Hogarth, 1971: 35-35.)

Canadian courts are hierarchical, reflecting the generalized structure of federalism. This is to say that provincial courts of original jurisdiction and provincial courts of appeal are organizationally subordinate to the federal courts. The latter exist as superior courts, their concern in the main being limited to apellate review but having too a narrow range of original jurisdiction. (Khan, 1972: 235.)

At the lowest level are the provincial courts, whose administration and staffing are the responsibility of the province. Here are found the justices', family and juvenile courts and criminal courts known variously in the provinces as Police Court, Magistrate's Court or Provincial Court. As noted earlier, in Canada a magistrate's court or its equivalent is the court of original jurisdiction for offenses under federal legislation. (Clarke, et. al., 1977: 16, passim.) It is as well the court of original jurisdiction for half of all indictable offenses dealt with by courts in Canada and may, by the consent of the accused, try most of the remaining indictable offenses. These courts thus try all of the summary offenses and ninety-four per cent of indictable offenses. (Hogarth, 1971: 35.)

In most provinces there is a second level of courts termed district or county courts. Judges sitting in a County Court are appointed by the Governor General in Council on the advice of the province as outlined in Section 96 or the BNA Act. Despite federal appointment these courts, like provincial judges' courts, are administered by the province. In general, county courts hear civil matters of certain magnitudes and serious crimes which have been committed for trial by a provincial court judge. In some provinces the county

courts may also hear appeals from provincial courts. (Van Loon, et. al., 1976: 164.)

At the highest level of the provincial court structure is the superior provincial court. Nomenclature varies here as well: The Court of Appeal, the Court of Common Pleas or the Court of Queen's Bench are all superior provincial courts. These courts typically have unlimited jurisdiction in civil matters, concurrent jurisdiction with lower courts for most indictable offenses and exclusive jurisdiction for the most serious indictable offenses. They too try appeals from lower courts. (Van Loon, et. al., 1976: 166.)

The national courts in Canada include the Territorial Court of the Northwest Territories, the Court Martial Appeal Court, and the Federal and Supreme Court. The former two are self-descriptive: the Territorial Court is the court of original jurisdiction in the Territories while the Court Martial Appeal Court hears appeals from military courts martial.

The Federal Court, which in 1970 replaced the Exchequer Court, consists of a trial court which is assigned original jurisdiction in matters of federal-provincial disputes, claims against the Crown and certain retained statutory jurisdiction, and an appeals division which may hear appeals from the trial division and from regulatory or

administrative agencies or in cases that by administrative law must be referred to judicial determination. (8)

At the apex of the court hierarchy in Canada is the Supreme Court, the final court of law and appeal. Though established in 1875 by the Supreme Court Act, it did not acquire authority as the final court of appeal until the abolition of appeals to the Judicial Committee of the Privy Council in 1949. Appeals come to the Supreme Court by way of right only from superior provincial courts in cases of civil dispute of certain magnitudes and in cases of constitutional reference where provincial law permits. Jurisdiction may be granted, however, in most civil matters and in cases of capital criminal offenses. (Van Loon, et. al., 1976: 168.)

The concern of much of the literature, juridical or behavioural, has been with the latter levels of courts and the Supreme Court in particular. Yet because of its specialized nature, that is, a collegiate court of narrow jurisdiction in civil matters and virtually a single issue jurisdiction in criminal matters, there is an inherent substantive difficulty in generalizing from studies of superior courts to the judiciary as a whole. That courts in Canada are, with reference to the law, hierarchically arranged is indisputable. But that this formal hierarchy translates simply into a hierarchy of

social importance is less easily justified. As Dolbeare and others have explicit, such models are based upon the 'myth of the upper court'. (Vines, 1970: 136.) For reasons stated earlier it is the lower courts, and in particular the provincial courts of original jurisdiction that are the focus of attention here. The importance of these arguments demand summary:

- in terms of criminal offenses fewer than one of every ten of summary and indictable offenses combined are heard in other courts;
- the overwhelming majority of criminal offenders -- more than ninety per cent -- appear before provincial court judges;
- of these offenders the majority plead guilty making the the determination of sentence the only significant decision made by the court;
- these courts define and structure, filter in a sense, the kinds of cases and hence the nature of the issues which are appealed to upper courts;
- as an instrument of maintaining systemic order, judicial determinations, sentencing in a word, is a direct and significant authority.

This then is the context within which judicial behaviour will be examined. Of particular interest is the empirical efficacy of the normative models of judicial decision making behaviour. This, as well as the main theoretical currents in the body of behaviourally oriented research, will be discussed in the next chapter.

Notes to Chapter One

1. The body of literature dealing with the problematic nature of judicial review is extensive. Besides Ely, who approaches the issue from the perspective of constitutional reform, see as well: G. Schubert Constitutional Politics; New York: Holt, Rhinehart and Winston, 1960 and R. Dahl "The Role of the Supreme Court as a National Policy Maker", Journal of Public Law, 6: 279-295, 1957.

2. A social indicator can be defined as a 'statistic of direct normative interest which facilitates concise, comprehensive and balanced judgements about the condition of major aspects of a society. It is in all cases a direct measure of welfare and is subject to the interpretation that if it changes in the normatively positive direction, other things being equal, it can meaningfully be said that things have gotten better or that people are "better off". In other words, a social indicator is an objective correlate of both objective and subjective measures of the quality of life.' See, in this regard: Henderson, D.W., Social Indicators: A Rationale and Research Framework; Ottawa: Economic Council of Canada, 1974.

3. The schedule of social indicators was drawn from the following policy areas: health, family, education, employment, economics, consumption, leisure, residential environment, mobility, politics and religion.

4. Magistrates, before the revision of the Criminal Code which eliminated it entirely as a criminal penalty, could not impose the death penalty.

5. The offenses from which cases were drawn were: breaking and entering; fraud; taking a motor vehicle without consent; robbery; assault occasioning bodily harm; indecent assault on a female and dangerous driving. See Hogarth, 1971: 25.

6. This notion is developed in greater detail in Chapter Three, particularly its relation to the conventional social science empirical literature.

7. See Chapter Three.

8. The jurisdiction retained from the Exchequer Court is vested in the Excise Act, Customs Act, Income Tax Act, Shipping Act, Patent Act and the National Defense Act.

TWO: EMPIRICAL STUDIES OF JUDICIAL BEHAVIOUR

"The survey suggests that sentence disparity does exist." (Clancy, et. al., 1981: 534.)

Political Science and Public Law

THE PERSPECTIVE from which social science approaches the problem of judicial behaviour is a comparatively recent one. As subject, however, judicial behaviour by another name and with another emphasis was one of the fields from which the study of politics found its genesis. When, nearly a century ago, political science emerged as a developing, distinct discipline its intellectual forebears had left to it a heritage that was heavily influenced by the study of constitutional law, constitutional history and political philosophy. (Schubert, 1963: 1.) At that time, for most professional practitioners, this emphasis was synonomous with public law as an object of inquiry. (Vines, 1970: 125.) Indeed, public law, which Schubert defines in traditional terms as a broad synthesis of history, law and philosophy, remained the core content of the discipline for decades despite the nascent but increasingly structured investigation of international relations, comparative government, individual and

mass behaviour and other subfields. (1963: 1.)

The study of judicial behaviour, as it was then conceived, was subsumed within these categories. That study, however, differs markedly from modern analyses. As Vines explains, public law scholars were as frequently as not "trained in the law, and it was customary to imitate legal case compendia in public-law textbooks, to structure courses along legalistic lines, and to place theoretical and research problems within a legal framework." (1970: 125.) The relationship between public law and political study was unique in its intimacy. Though this provided a measure of legitimacy by associating the new social science with a large body of accepted scholarship, it as well impeded its analytic development as the research and writing that emerged from that period were based upon a narrow professional legal perspective that is most accurately characterized as strict, historical legal descriptions of case decisions. (Becker, 1964: 7.) Taken as data were the opinions of judges, with the judicial process understood in catholic terms as the set of philosophical axioms and deductive premises as these were administered expertly by the courts--and as Vines adds, the higher the court, the more expert the administration. (1970: 125.) The main purpose of these inquiries had been:

> "... to make clear what meanings the judiciary has given to the provisions of the United States

> Constitution, to show what happened to legislation as a consequence of judicial determinations of constitutionality and to evaluate critically the premises and beliefs of judges and the reasoning by which they justify their decisions."
> (Hyneman in Becker, 1964: 7-8.)

This is not to say that this research was without merit for it produced detailed historical descriptions of the development of law and in some instances traced the genesis of incipient social policy. Biographical research, especially upon justices of the American Supreme Court, was an avenue that on occasion suggested an instrumental policy or behavioural bias that could be examined empirically. (1) Unfortunately, very little led to replicable empirical work. Nor did these early public law works forward theoretical explanations to account for reported observations or relationships.

It is Schubert's observation that this field in the study of politics changed little between the decades of 1880 and 1950. To that latter time and beyond much of the literature on administrative and constitutional law, and on the judicial process, treated as substantive content the opinions of upper court judges. The taught method of analysis was juridical analysis; the theory offered to account for opinions or decisions that departed from the 'ethical content of ideal norms' was the degree to which such deviate decisions

were the result of personal preferences (i.e., idiosyncratic variables at the level of the individual) or policy (i.e., empirical or instrumental variables). (Schubert, 1963: 1.)

In the middle decade of this century public law became increasingly marginal to both political science and the sociology of the law, the social science disciplines most concerned with a social analysis of judicial behaviour. (Schubert, 1959: 2.) Public law today continues to be, in the main, the legalistic analysis of appellate court decisions and to a lesser extent organizational or bureaucratic descriptions of the relationship between governments and the judiciary or among different levels of the judiciary. (Becker, 1970: 144.) Now, as then, very little is said about the political identity and significance of the judiciary as either agents of policy decisions or behaviourally, as politically motivated actors whose actions (decisions) have scope and effect beyond their immediate legal setting. It is evident in the literature that, for the greatest part, political science has shed its public law beginnings. Indeed, an assessment of its status places it in "the dustbin of the discipline". (Vines, 1970: 127.)

To argue that public law is no longer a member of the corpus of the discipline is not to argue that the judicial process is not a

relevant object of analysis. At about the time that the eclipse public law as a formal area of study began to become evident a new perspective was adopted that not only recognized openly the courts as political institutions but provided, unformed and developing, new lexical tools for their description. Peltason in his essay on courts and the political process employed Lasswell's thesis of politics as a conflict of interests to argue that judicial activity is, perforce, political activity. Whether a court defers to the legislature or declares ultra vires some legislation it modulates the mix of interests in society and is thus a participant in the process of 'who gets what, when, how'. (2) (1955: 1-3.)

Somewhat earlier, and conspicuous in its isolation from the main currents of jurisprudence, was C. Herman Prichett's study of the U.S. Supreme Court which emphasized the importance of the quantitative analysis of individual attitudinal data. (Schubert, 1963: 2.) By tabulating the patterns of majority and minority voting blocs in collegiate courts and correlating these -- in a substantive rather than statistical sense -- with attitude measures, Prichett argued that the political character of the Supreme Court could be exposed. Schubert identifies Prichett's work as seminal insofar as it treated the Supreme Court as a small decision making group, and for its use

of attitudinal measures as data. (1963:2.) More than this though, The Roosevelt Court anticipated what is arguable the principal tenet of judicial behaviourism, namely that judges are political actors whose attitudes toward substantive policy issues often influence their decisions. (Flango and Ducat, 1977: 41.)

In another early example of a political rather than juridical treatment Rosenblum developed a conception of law as public policy, a position which in contemporary terms has become in many respects the conventional account. (1955: 70, passim.)

In an extension of Prichett's treatment, Schubert refined the cluster bloc technique and developed a Guttman-class cumulative scale device termed scalogram analysis that is apparently capable of discerning relatively stable patterns of attitudinal influences in Supreme Court decisions. (Goldman, 1971: 148.) Examination revealed 'inconsistencies in the behaviour of the Supreme Court and what is regarded as the "rule of law"'. (Schubert, 1959: 378.) Textbook and normative folkmoot describe the court yielding to its own and to congressional procedural rules, a disinterested party in a sense. Schubert found, however, that the Court increasingly disregarded statutes that define its appellate jurisdiction, as well as its own regulation concerning the participation of amici curiae. As

a result, the court "has established classes of favoured and disfavoured litigants, although the status of the classes has, from time to time, varied with changes in the composite attitude of the court." (1959: 379, 384.) In Schubert's words realistic description calls for a focus on the behaviour of the courts rather than upon the law. (1959: 379.) This work brought together the conflicts of interests view of politics -- for by its discretion regarding amici curiae the court instrumentally or purposefully limited access to its forum, that is it filtered the influence of interest -- with a behavioural perspective that was distinctly empirical in method. This established a research avenue that, for more than a decade, shaped the landscape of research of judicial behaviour at the appellate level. (Goldman, 1971: 143, 148.)

Of that early period the work of Becker too is conspicuous. Becker, however, represents an alternative course more appropriate to lower-level and noncollegiate courts in which dissenting voting blocs are either rare or simply impossible. (see below.) As such it may hold greater promise for judicial theory -- that is, theory about courts in general.

Yet these early methodological and theoretical advances were isolated and lead neither to a program of systematic research nor

to fundamental advances in theory. Consequently it is hardly remarkable that the first reader in political behaviour in 1956 did not include the courts or the judiciary as an area of research in political science. (Schubert, 1963: 2.) By 1973, however, the Directory of the American Political Science Association listed public law, the courts and judicial behaviour as discreet entries in discipline subcategories. (Greenstein and Polsby, 1975.) Between those years and since has developed an extensive body of research expressing refinement in both theory and method. Both conventional and unique perspectives have contributed to an understanding of judicial behaviour in terms of political, sociological and psychological variables. It is to those efforts that this discussion now turns.

Empirical Studies of Judicial Behaviour

> "Justice is a very personal thing reflecting the temperament, the personality, the education, environment and personal traits of the magistrate." (Everson, 1919: 98.)

That courts often behave in an uncourt like manner has been observed by jurists and others for a number of decades. Apparently the earliest was Sir Francis Galton who in 1895 suggested that different courts might assign very different penalties for the same kinds of offender.

> "It would be expected that the various terms of imprisonment...should fall in a continuous series. Such, however, is not the case... The extreme irregularity of the frequency of the different terms of imprisonment forces itself on the attention... (and) it is impossible to believe that a judicial system is fair which allots only 20 sentences to 6 years, allots as many as 240 to 5 years, as few as 60 to 4 years and as many as 360 to 3 years." (Galton, cited in Gottfredson and Gottfredson, 1980: 180.)

Galton accounted for this variation with the observation that judges seemed to allow an arithmetic rythm to determine their sentencing choices. Certain lengths of institutional sentences 'commend themselves to judges because of their simplicity and by their disposition to favour a certain number and not another'. These trifles, Galton wrote, "determine the choice of such widely different sentences as imprisonment for 3 or 5 years, 5 or 7 and 7 or 10 years for crimes whose penal deserts would otherwise be rated as 4, 6 and 8 or 9 years respectively." (Galton, cited in Gottfredson and Gottfredson, 1980: 180.)

Similar results were found in the pattern of institutional sentences determined by an eastern U.S. court. For sentence lengths of greater than one year, lengths of five and ten years were chosen more than any other. Interestingly, sentences of four years and slightly lesser or greater than ten years were chosen only rarely or not at all. (Gottfredson and Gottfredson, 1980: 179.) It is quite plausible that this court in some fashion specialized in

particular offenses, say homicide, that have either determinate sentences or a very narrow range of statutory discretion. In the absence of such an argument, however, Galton's idea of "magic numbers" of sentencing is worth noting.

Following Galton, Everson early in this century studied 42 judges sitting in rotation on 28 Magistrates' Courts in New York City. That investigation found that "justice is far from the abstract thing of popular opinion. It is disconcertingly human, reflecting to an astonishing extent the personalities of the judges. (There) is bound to be almost as many kinds of justice as there are magistrates to administer it." (1919: 90, 91.) Variations were noted in both conviction rates for particular offences and sentences across approximately 155,000 cases. For example, magistrates varied considerably in their conviction of disorderly conduct, an offence which made up nearly 28 percent of all offences. The most severe magistrate convicted 82 per cent of those appearing before him while the most lenient convicted only a little more than half that number (42%). An even greater gap in conviction rates is evident for public intoxication which made up eleven per cent of all convictions. Depending upon the magistrate, individuals charged with this offence were convicted in between 21 and 99 per cent of the cases.

(Everson, 1919: 96.)

After conviction the type of sentence received depended to a great deal, in some cases it seems solely, on the magistrate. Again for public intoxication, one magistrate used suspension of sentence in three quarters of the cases while another used it in less than one per cent of cases. (Suspended sentences for this offence were employed by all judges on average in 48 per cent of the cases.) For disorderly conduct, the most frequent offence, suspended sentences varied widely as well: from 50 to 2 per cent of convictions. Some magistrates appeared to rely on particular types of sentences to the exclusion of others regardless of offense. In one instance a magistrate disposed of 85 per cent of convictions through fines and seven per cent through suspended sentence while another employed fines in only 34 percent of convictions but suspended sentence in 59 per cent of the cases. The rotational basis of the courts would seem to ensure that a mix of offences appeared before each magistrate closing the possibility that specialization of sentence was the result of specialization of offence.

Thus Everson concludes that "justice is a very personal thing" reflecting not material differences in the defendants or their crimes but rather the character and background of the magistrates. (1919: 97, 98.)

Recapitulating Everson, Gaudet and others reviewed sentences in more than 7,000 cases and concluded that the type of sentence may, unpredictably, be an indication of either the seriousness of the offense or the severity of the judge. An offender, for example, convicted of a certain offense, had about three chances out of ten of being sentenced to an institution if convicted and sentenced by either of two judges. But, if convicted and sentenced for the same offense by a third judge sitting in the same court in rotation, the offender had about six chances out of ten of receiving the institutional sentence. (Gaudet, et. al., 1933: 813 - 815.)

And more than sixty years after Everson, Clancy, in a study based on the first national survey of sentencing practices among American federal judges, concluded that sentencing disparities were widespread and anchored in patterned differences among judges in such areas as personal value orientations, sentencing goals and perceptions of the seriousness of the crime and its penalty. (Clancy, et. al., 1981: 533 - 534.) In attempting to partition the variance in sentencing, differences centered on the individual were found to account for the largest proportion. This was particularly true for the length of supervision (i.e., probation) and fines for which

differences among judges 'completely overwhelmed the variance explained by all of the other factors including characteristics of the offender and the offense'. Though less a factor in accounting for the length of incarceration, individual and idiosyncratic judicial variables still explained 21 per cent of the variation, compared to 45 per cent attributable to offender and offense characteristics. (1981: 535.) Clancy records:

> "...that (sentence) disparity is not simply random divergence of opinion about the sentence that should be imposed, but is a consequence of patterned differences of opinion about the influence that specific case attributes should have on the sentence." (1981: 537.)

It is, on the whole, a consistent finding: variations in sentencing are better described in terms of individual character and personal bias of judges rather than substantive differences among defendants or their offenses. (Gaudet, 1949: 449.) Frankel, for example, notes that sentencing has been critized for being individualized not so much in terms of the specific elements of cases but mainly in terms of the breadth of character, bias, neuroses and daily vagaries of trial judges. (1973: 21.)

Reinforcing this observation is Jones' account that the severity of punishment imposed depends in very large measure on the "personality and social attributes of the particular judge". Contemporary sentencing

statistics reveal clearly that there are dramatic differences among judges in the imposition of penalties in similar criminal cases. The most important single factor in the sentencing equation can be the social views of the particular judge. (Jones, 1965: 139 - 140.)

But more than sentencing disparities themselves, or the discretion that obtains from indeterminate statutory penalties, it is the social effects that are pernicious. Disparities are expressed in racial and economic terms to the disadvantage of marginal and minority social groups.

In a study of Canadian criminal courts Hagan found that offender ethnicity was consistently and significantly related to the sentence recommended in court ordered presentence reports, though in some urban courts the absolute magnitude of the effect was relatively moderate. However, the impact of ethnicity on the recommended sentence was increased when the effect of other important variables such as professional forensic evaluation (i.e., how likely the offender would be to repeat the offense) and the presence of a prior criminal record were taken into account. That is, membership in a visible ethnic minority augmented the relationship between forensic evaluation of recidivism and length of institutional sentence, and between prior criminal record and length of institutional sentence. (Hagan, 1976: 602.)

Similarly, a study of Chicago trial courts reported that judges and juries were found to define as more serious crimes by blacks and individuals from lower social economic groups. As a result, dispositions and the severity of sentences were racially and economically assigned. In particular, with other factors equal to those of white business property owners, nonwhites and labourers were twice as likely to remain in detention between arrest and final disposition. Further, for the same offense and offender characteristics, labourers and nonwhite offenders received longer sentences than offenders from high income and high occupational status groups. (Lizotte, 1977: 577.)

In short, neither purely legal nor social factors operate in such a manner so as to compel a magistrate to follow a clear course of case disposition. In some instances it is apparent that a magistrate may allow the character and severity of his determinations to be carried along by the rythm of the cluster of cases. The set of final dispositions that immediately precedes a case exerts an influence on the determination for the next similar case. (Mileski, 1970: 498 - 499.)

That a sentence may thus be a result of the social characteristics of the offender or magistrate as much as the specific offense is

the focus for the concern on disparities in sentencing. In themselves sentencing disparities contradict the normative ideals of criminal justice. They reveal as inadequate, and for some misleading, those jurisprudential accounts that describe sentencing as a taught technology of replicable reason. A process, whether of reason or not, that cannot be demonstrated to lead to the same or sensibly similar results is fortuitous and errant.

By their nature, sentencing disparities are argued to promote disrespect for law and its administration. (O'Donnell, et. al., 1977: 38.) This argument, made earlier, will not be reproduced here. (3) However, it is worthwhile to stress that the greatest share of criminal cases remain at the lower levels of the courts and that of these the vast majority plead guilty making the determination of sentence the only significant decision made by the court. (Mileski, 1970: 477, 493 and Jones, 1965: 139.) For these reasons it is the judge sitting in noncollegiate, criminal courts of first jurisdiction rather than collegiate appellate courts which will be the focus of discussion. This is not to say that those latter courts are unimportant either in terms of the decisions made there or in the scholarly advances made in their study: important results from those settings will also be reviewed. But by simple

proximity and frequency of interaction hierarchically subordinate criminal courts are emphatic in their status as indicators of the system of law.

A growing body of research literature has recognized the importance of sentencing in criminal courts of first jurisdiction and has begun to develop an array of research findings centering on what factors are determinative in the sentencing equation. In general, much of this research can be classified by the variables held to be antecedent. Representative of the largest share are studies which attempt to discover and analyze judicial attitudes or other stable aspects of individual psychological functioning. Closely associated with the approach yet sufficiently methodologically divergent as to be distinct are those analyses which examine the relationship of socio-economic, political and other social variables to the way sentencing decisions are made. A third approach relies heavily upon formal theories of social roles and political culture as a basis for explanation. Lastly there are analyses allied with none of these perspectives but instead concerned with the systemic ill effects of sentencing disparities or with transient or idiopathic factors. An apparent basic distinction is evident therefore between studies which contain hypotheses that locate the sources to sentence within

the decision maker himself, for example judicial attitudes, and those that cite sources to sentence beyond the sentencer, such as characteristics of the offender. An experimental study by Shoemaker of the effects of physiognomy upon judgements of guilt and innocence is an example of the latter. Stated simply, facial stereotypes were found to correlate highly with presumptive judgements of guilt for a number of serious criminal offenses. (4) The disturbing implication, of course, is that one need merely look guilty. (Shoemaker, et. al., 1973: 427 - 430.)

Lizotte's study of the racial characteristics of defendants and the effect this has on the outcome of sentencing, and Hagan's analysis of the relationship between ethnicity and forensic sentencing recommendations are also examples of approaches that attempt to locate the source of 'extralegal' variation in sentencing within the defendant.

Overall, much of the defendant-centered research is inconclusive. A number of studies reviewed by Gottfredson found that the best predictors of both the decision to incarcerate and the decision about the length of the sentence were 'legal' variables. For example, in an examination of sentencing practices in American federal district courts the severity of sentencing (ranging from a suspended sentence,

the least severe, to ten years imprisonment, the most severe) was related most strongly to the seriousness of the crime committed, and moderately to prior record and the type of conviction. Type of conviction and to a lesser extent prior conviction were most robust in their effects upon the least serious crimes. All in all, the racial origin of the defendant did not appear to be related to severity of disposition. (Tiffany, et. al., cited in Gottfredson, 1980: 181 - 182.)

In contradistinction however, Harries and Brunn report an examination of over three thousand sentencing dispositions which found that when nonracial factors were controlled, the degree of association between race and sentence length increased. It was concluded that:

> "Those who enforce the law conform to the norms of their local society concerning racial prejudice, thus denying equality before the law. That criminal statistics reflect social customs, values and prejudices appears to be further validated." (1978: 60.)

As confirmation, findings in another study suggested that there were racially relevent patterns of sentencing among a sample of superior court judges. Gibson reports that race as a factor in sentencing was strongly associated with individual racist attitudes, concern about crime and traditional cultural mores specific to the community. (Gibson, 1978b: 472 - 475.) And more so than judges

whose pattern of determinations revealed no evidence of race as a factor, judges who sentenced with race in mind also tended to employ considerations of the defendant's prior record and attitude toward the offense. This Gibson takes as evidence that discriminatory sentencing was related to both the attitudinal predispositions of the judge and the process employed in decision making. (Gibson, 1978b: 474, 475.)

However, in a study of over 1,000 cases of sentencing after trial, Tiffany and others reported that though the effects of extra-legal variables were evident, they were overshadowed by the effects of legalistic factors. The greatest differences in the severity of sentence were attributable, first, to the severity of the crime and second, to the presence of a prior criminal record. (Tiffany, et.al., 1975: 378.) Interestingly, the type of conviction was found to express an effect in that a jury trial resulted in a more severe penalty, especially for those with a prior criminal record. The type of conviction is, arguably, an extralegal variable; the race and age of the offender are clearly extralegal. The former was found to be associated with greater mean sentence lengths, but only in instances where there is no prior record. Age was not found

to be related in any manner to severity of sentence. (Tiffany, et.al., 1975: 380, 387 - 88.)

Age, in a federal study of defendant characteristics similarly did not in any significant manner relate to type of sentence, but was found to be associated with sentence length when the presence of a prior criminal record was controlled. (Harries and Brunn, 1978: 61.)

Gender of the defendant was in the same study related to the decision to incarcerate. Males were sent to prison about twice as often as females. On average, males were sentenced to longer prison terms, but not significantly so. (Harries and Brunn, 1978: 61.)

In an examination of the literature, Hagan evaluates the efficacy of a number of extralegal offender variables including socioeconomic status, race, age and sex to account for the severity and type of disposition. It was concluded that:

> "(r)eview of the data from twenty studies of judicial sentencing indicates that, while there may be evidence of differential sentencing, knowledge of extralegal offender characteristics contributes relatively little to our ability to predict judicial dispositions." (Hagan, 1974: 379.)

The critique points to the importance of controlling the influence

of legal variables, such as the seriousness of the crime, in analyses of sentencing disparities. This is a point made by Hogarth as well: namely that the absence of adequate statistical controls may exaggerate the degree of apparent disparity in sentences. (Hogarth, 1971: 7.)

In a different emphasis, a body of research has, in a sense, taken the impetus to sentence beyond the court qua court. For example, a multivariate analysis of court ordered desegregation plans for 151 southern U.S. school districts found considerable variation in the stringency with which the court interpreted and implemented statutory programs. Four items, in decreasing order of strength of association, were found to be significant predictors of variation: size of school district; the percentage of racial minority enrollment; court location and lastly judicial education. The influence of the judicial social background was minimal. The size of the school district variable, which accounted for the largest proportion of the variance, was structured in terms of the size of the total student population and hence the density of the urban population. That is to say, urbanization, with all its attendant social trends and processes was the best indicator of how judges implemented statutory provisions of desegration programs. (Giles and Walker, 1975: 936.)

In an extension of that notion Harries and Brunn examined in detail the evidence supporting an ecological interpretation of differences in sentencing patterns. (5) Rather more specifically, it can be argued that sentencing should exhibit relatively little geographic, or spatial, variation. If magistrates treated similar cases similarly, and if legally relevant factors such as the type of offense were randomly distributed, then the severity of judicial determinations should not exhibit systematic variation. That is, across regions, other things being equal sentence severity should be relatively constant.

To test this expectation, standardized sentence weights were compared across U.S. states for all federal criminal convictions in the United States in 1970. Sentence weights are nationally standardized indicators of severity that range from zero for suspended sentences and probation without supervision to fifty for institutional sentences of over 120 months. With this it was possible to compare actual mean sentence weights for a particular offense in a region with the expected mean sentence weight based on the national average for that offense.

Using this measure it was found that particular regions of the United States not only sentenced severely, but sentenced much more

severely than could be predicted on the basis of the offenses tried in that district. Specifically, the American states of Oklahoma, Alabama, Tennessee and Iowa were much more severe than expected. Conversely, less severe than expected were Alaska, Maine and Pennsylvania. Generally, the northern half of the U.S. with the exception of the west coast, and the south central area were less severe than expected; the central U.S. from the east coast including Florida to the entire west coast were more severe than expected. The differences discovered were substantial and significant, illustrating "the existence of undesirable geographic disparities in sentencing". (Harries and Brunn, 1978: 89 - 100.)

Using a random sample of sentencing districts a further test was applied to examine the effect of legally irrelevant factors upon actual average sentence weight. (6) It was found that various legally irrelevant factors accounted for significant proportions of the variation in sentence weights. Interestingly, and in distinction to much of the current empirical research concerning judicial behaviour, certain measured social characteristics of judges -- political affiliation, regional background, age and an index of 'southern conservatism' -- did not contribute appreciably to the proportion of interpreted variation. (Harries and Brunn, 1978: 104.)

Instead, the suggestion was made, based upon an elaboration of the approach within a single sentencing district, that cultural diversity could strongly influence sentencing behaviour and lead to significant regional disparities. The examined sentencing district was made up of two relatively homogeneous areas: the first was characterized by marginal agriculture, low income and ethnic diversity with anomalously high social pathologies such as homicide, high unemployment and low educational attainment. The second was on the other hand less ethnically diverse, had a highly skilled workforce and was socially stable. Attitudinally, residents of the former region tended to express with greater frequency preferences for harsh treatment and sentencing of offenders leading thus to the generalized expectation that magistrates, through an unspecified social process, would respond to local cultural folkmoot as embodied in public opinion and sentence relatively harshly.

The results of a comparison of sentence weights across the regions did reveal substantial and enduring geographic disparities. The pattern of the sentences, however, was not consistent. Sentences were harshest in the affluent districts for convictions based upon pleas of guilt, and inconclusive in jury trials which tended everywhere to result in harsh sentences in convictions. It might be noted that sentences for only one offense were reviewed and that the operational

analysis was potentially confounded as data became increasingly attenuated as smaller regional units were examined. In any case, persistent interregional disparities would seem to point to some relationship between regional cultural influences and sentencing behaviour. (Harries and Brunn, 1978: 114 - 116.)

An early Canadian study, conspicuous for its empirical approach, anticipated in part this approach: an offender convicted of a certain offense was, in comparison to the national average, virtually twice as likely to receive an institutional sentence in Quebec and nearly five times as likely in Manitoba, Saskatchewan and British Columbia. (Jaffary, 1963: 210 - 214.) If these sentencing tendencies could be shown to be consistent for other offenses, then the textbook view that Canadian courts are monolithic and hierarchical must be regarded as incomplete. Based on these findings, the distribution of sentencing practices of Canadian judges seem to be contiguous with political boundaries, an association unexplained by conventional jurisprudence.

One aspect of political culture that has explicitly been examined in relation to judicial sentencing behaviour is public opinion.

Within much of the literature, the correspondence between judicial sentencing practice and punitive demands of the community are taken as a rule to be coterminous, and stably so. Using Gallup survey data, Maleka reports a very high correlation ($r = .96$) between public and judicial choice of sentence, though there was a great deal more variance in the former than the latter. (1968: 60, 64.) Bertrand, too, in a review of recent Canadian data noted that public opinion polls frequently report that Canadians tend to worry about crime, believe it is increasing and would like the courts to be more severe with offenders. (1982: 13) Data collected in 1979 in fact found Canadians to be more punitive in what they believe to be the "right" sentences for certain offenses than judges were in their actual decisions. However, if it was not mentioned, concern for self from crime was only infrequently noted by respondents, much less often than such issues as unemployment or inflation. (7) Further, sophisticated survey data indicate that Canadians may be less punitive than at first suggested. For example, in a study of public attitudes toward capital punishment, it was found that while 70 percent believed that capital punishment should be the maximum penalty for capital homicide, only 36 per cent thought it should be the most frequently imposed sentence. And in a study that asked respondents to "sentence" an offender based on a legal description, institutional sentences were selected 40

per cent of the time, in very close agreement with actual sentencing by judges who sentenced 47 per cent of individuals charged with the same offenses to institutions. (Bertrand, 1982: 16.)

In a related treatment, Furstenberg notes that there is evidence to support the account that public fear of crime is exaggerated in inverse proportion to the amount of crime in a neighbourhood. That is, those least in danger of victimization were most afraid of victimization. (1972: 383 - 384.) This is an important observation since most research on crime and public opinion views changes in the latter as reaction to changes in the former.

However, the fear of victimization is not the same thing as the concern about crime. As Furstenberg demonstrates, the two can be unrelated. Concern about crime, it appears, may be closely related to discontent with changing social conditions and increased apprehension about social instability. (1972: 385 - 386.) Then, if harsh public opinion concerning sentencing is related to the dispositions that judges make, it might be that both are responding to a third factor, generalized social instability or perhaps classic anomie, rather than to each other.

At least two observations seem germane. First, it seems clear that conceptual difficulties can be associated with items concerning

crime and sentencing in public opinion data. Secondly, and more importantly, the relationship between culture and sentencing, to the extent that public opinion is representative of political culture, is indirect and probably more complex than suggested by some data.

Still, more research is based upon the utility of public opinion as a precursor of judicial sentencing behaviour. For one thing, it has been reasonably argued that some comparative disparity may be due to public reaction of outrage to a sensational crime. (Cook, 1979b: 248.)

More complex though is the claim that public opinion about a type of crime can be an important predictor of changes in sentencing. For example, Cook argues that changes in public opinion toward particular public policies can account for 60 to 85 per cent of federal judge sentencing behaviour, but only 50 per cent of U.S. Supreme Court and 25 per cent of trial judge decision making. (1973: 605.)

In a later elaboration, Cook defined the sentences of judges as public policy choices in that the pattern of sentences can indicate the degree of judicial support for the policy which defines a particular behaviour as a crime. (1977: 574.) Taking sentences in draft resistance cases during American involvement in the Vietnam

War as indicative of judicial support for regieme policies, Cook argues not unconvincingly that federal judges at least responded to public antipathy toward the Vietman War by sentencing less harshly "those undermining the war effort by draft resistance". For the period 1967 to 1975 the correlation between public opinion and sentences in conscription resistance cases was, lagged by one year, r=.995. Though rather lower when expressed as the relationship between sentencing in these cases and public opinion toward the Vietnam War when measured at the regional and state levels, the proportion of explained variance remained at approximately 48 per cent. (Cook, 1977: 579, 582.)

A replication of Cook's analysis, however, could not reproduce the finding that changes in the sentences given to draft resisters were a result of changes in public opinion, though sentencing did moderate in the direction of that opinion. (Kritzer, 1979a: 204.) Cook notes in rejoinder that a modification in the model which recasts public opinion as an endogenous or intervening variable instead of treating it as an exogenous or independent variable surmounts the problems uncovered by Kritzer. Though the proportion of explain variance remains high, two further points are worthy of note. First, sentences in conscription resistance cases must be

considered unique in the universe of judicial decisions. Widespread public disapproval of public policy leading to behaviour more closely resembling civil disobedience than criminal behaviour is an uncommon thing. And, at least by strict jurisprudential measures, it was comparatively short-lived. Secondly, at least part of the difficulty with the relationship between public opinion and sentencing is the structure of the association. It is not unreasonable to suggest that each may respond to a third, unmeasured factor. Hogarth argued, for example, that the influence of public opinion is mediated by the perception of its importance. Most judges who formed images of public opinion believed that the public was punitive and would prefer courts and judges to deal with offenders with greater severity. (Hogarth, 1971: 197.) This is not precisely an instance, however, of broadly disseminated public attitudes effecting a particular sentencing policy. Rather, it is an instance of judicial perceptions of public attitudes affecting sentencing behaviour. Still, Hogarth noted that the attitudes toward sentencing held by judges did reflect in some aspects the attitudes of the communities in which the courts were located: judicial attitudes were not isolated from the standards held in the community. But the relationship appears unidimensional. To the extent that public opinion played a role in sentencing it was likely to influence judicial behaviour toward greater sentencing severity. (Hogarth, 1971: 197, 220.)

That the community, or more generally and theoretically relevant, the attendant social system, has an impact upon the functioning of the court has been examined from other perspectives. Urban courts, especially in the larger centres, resemble high-turnover, clientel-based social service bureaucracies. (Mohr, 1975: 619, 637.) A Canadian observer, in observing that 74 criminal cases were dealt with in a single morning's session, characterized the handling of accused individuals as a mass procedure, despite the overlaid legal form. (Jaffary, 1963: 94.)

It is plausible then, from an organizational perspective, to view courts as elements in a bureaucratic structure. Tepperman has found that the scale and nature of court activities, particularly where sentencing is concerned, is qualititavely and not merely quantitatively different in the largest courts along a monotonic size continuum from small to large. That is, growth in the size and organizational complexity of a court impells that court to adopt bureaucratized methods of operation that are not predictable based on size alone. (Tepperman, 1973: 349.)

The primary characteristic of bureaucratized decision-making is, in Tepperman's argument, that it tends to become "standardized" or more consistent. Pressures to process offenders more quickly

leads certain courts and judges to communicate and coordinate their activities, such that they are more like one another than courts that do not communicate. This adds to the tendency to bureaucratization in decision making with the result that the court's responsiveness--the individualization of sentencing, so called--to differences among offenders decreases. Those who appear before the court tend to be judged more quickly, often with negative consequences for the offenders. (Tepperman, 1973: 346, 351.) In short, large courts, particularly in urban settings, acquire bureaucratic techniques in their sentencing determinations that tend to disregard the individuating characteristics of offenders and produce somewhat more severe sentences.

Organizational perspectives have also been applied to descriptions of institutional arrangements. For example, organizational theory has been used to describe the relationship among appellate and lower courts and other public regulatory agencies. An appellate court issuing a decision can be described as superordinate, while the lower courts and agency policy-makers respond to the decision as organizational subordinates. (Baum, 1976: 86-114.)

There are some problems with this perspective however. Courts

do not in Canada fit well the usual model of hierarchical organization because of jurisdictional exclusivity, which is to say that a formal bureaucratic hierarchy is tenuous. (Mohr, 1975: 619 - 642.) On the other hand, developments in organizational theory have moderated the importance of hierarchy and emphasized the goals and structure of an organization and its dependence upon technology and environment. (Burns and Stalker, 1961: see esp. chapter 6.) As organizations, courts have goals and structure, and though technology varies little across courts, there can be significant variation in environment: crime rate, degree of urbanization, jurisdiction, collegiality, selection, and so on. The utility of the organizational model lies in its emphasis on environment or context, that is, decision-behaviour must be linked to the context or environment of decision-making.

Ecological accounts such as these recall the arguments advanced by Harries and Brunn, among others, that regional disparities in sentencing patterns are a clue to the importance of cultural variables. While that evidence but weakly supported the general interpretation, regional disparities remain.

This general logic of exposition is recapitulated in a broad study of local political cultures in two U.S. cities and the significant differences in the sentencing decisions of judges in each. Levine

observed that, for nine offenses, white and black defendants received a greater proportion of probation and a shorter length of institutional sentence in Pittsburgh than in Minneapolis. (8) (Levine, 1972: 334.) The pattern, that is greater leniency in Pittsburgh, persisted when previous criminal record, plea and age of defendant were controlled.

Levine was able to describe general differences in the way judges from each group came to sentencing decisions:

> "The Minneapolis judges' behaviour approximates the judicial decision-making model. Most of them seemed to be quite distant from the defendants, for whom they had little attachment or empathy. They felt that both crimes against property and against person were serious threats to "society". Their universalistic, legalistic decision-making reinforced these attitudes, and they followed general standards with few exceptions.
>
> Most of the Pittsburgh judges' decision-making was nonlegalistic, particularistic, pragmatic, and focused on the defendant's personal characteristics. Judges usually did not base their decisions on general standards, nor were they constrained by "rule of law" considerations. Most of these judges preferred to base their decisions on policy considerations derived from criteria of "realism" and "practicality"." (Levine, 1977: 115 - 116, 135.)

These decision-making processes and sentencing behaviours closely approximate the two jurisprudential models of decision-making. The 'judicial model' of judges in Minneapolis follows a traditional view of judicial decision making that is evidential, objective,

adversarial, formal and legalistic. Within Pittsburgh, Levine found an 'administrative model', that is, reasonable and sufficient (as opposed to formal and exhaustive), subjective, pragmatic and individualistic. (Levine, 1972: 341.)

The divergence in the modes of decision-making was associated with systematic differences in the nature of the criteria used to determine a sentence. 'Universalistic' judges in Minneapolis tended to rely on professional doctrine as guide: sentencing criteria were the nature of the offense, penal deterrence and institutional rehabilitation. On the other hand, 'particularistic' judges in Pittsburgh relied with greater frequency and emphasis upon the character of the defendant and his circumstances, tempered with a skepticism of institutional rehabilitation and a regard for the offender's family. (Levine, 1972: 342 - 346.) The latter offender-regarding magistrates mediated the sentences they determined with extralegal criteria that moderated sentence severity. Offense-regarding judges like the former, bound as they were to the standardization imposed by law, sentenced with greater consistency and severity.

It is possible to locate the source of those differences in sentencing behaviour "as the indirect product of each city's political system. These systems shape judicial selection, leading to differing patterns of socialization and recruitment that in turn seem to

influence the judge's views and decision-making processes." (Levine, 1977: 136.) The predominate difference was the method of selection. In Minneapolis judges were elected on a nonpartisan basis, political parties playing virtually no role. Parties, however, dominate the selection of judges in Pittsburgh, recruiting from the politically competitive legislature and other elected offices. (Levine, 1977: 136, 142.)

Judges in Minneapolis, with its nonpartisan method of selection, were more likely to have been practicing jurists and were overwhelmingly middle class in origin. The competitively partisan Pittsburgh tended to install as judges individuals with considerable experience in party politics or political office. For the greater part they were from working class and ethnic minority backgrounds. Thus the political system in each city tends to move through it judges with identifiably different social and pre-judicial career backgrounds. It is arguable the combination of attitude and learned professional behaviour that impells judges in each city to regard different factors as legitimate considerations in determining sentences lead to interregional disparities.

Levine ascribes lesser importance to variables drawn from a magistrate's social background. The sentencing behaviour of judges

with cross-cutting configurations of characteristics--that is, professional, apolitical and working class or political, legislative and middle class--conforms to expectations generated by pre-judicial career and not social background variables. (Levine, 1972: 347 - 348.)

The model established is complex but theoretically incomplete. No theoretical argument is developed to account for the mechanism that translates the influence of pre-judicial career and social background into 'sentencing policies', that is, a more or less consistent pattern of sentencing criteria considered legitimate by the individual judge. Furthermore, despite some quantitative evidence concerning the relationship between judicial selection, career pattern variables and sentencing behaviour, the model is only weakly empirical. A good deal of the evidence is, at best, anecdotal.

Yet, with these weaknesses the model is important as it explicity cantenulates structural influence within the political system to judicial behaviour. It extends the genesis of judicial behaviour beyond the individual into systemic level variables. Intuitively alone this is interesting as it references the social order that relies upon judicial behaviour, inter alia, to support the maintenance of order. Theoretically, the approach is of significantly greater complexity as it admits a new class of variables and, as it does,

grounds judicial behaviour in a broader social matrix.

The model does find some support in other analyses. In a secondary factor analytic examination of four measures of political culture, Kritzer argues that political culture could be applied with success as an explanatory concept to the study of judicial behaviour. Kritzer found that a number of legal system and judicial behaviour indicators were significantly correlated with three political culture factors. The first factor was labeled 'role of government' indicating at its extremes an orientation toward an interventionist - welfare view of the role of government or, alternatively, a noninterventionist laissez-faire perspective. The second factor was aligned with the 'role of politics' and defined political participation as either motivated by self-interest or conservative ideology at its antipodes. Lastly, a factor termed the 'role of the legal system' accessed a legal sub-culture dimension at one extreme "indicating a strong reliance on the legal system as a distinct part of the larger political system and (at the other) indicating a lack of such a reliance on the legal system". (Kritzer, 1979b: 139 - 140.)

It was reported that the quantity of criminal statutes was significantly associated with the second factor. The number of statutes on the private ownership of firearms was associated with an orientation

of politics as self-interest; the absence of such statutes was conversely associated with an orientation of political activity as the expression of conservative ideologies. This was taken to fuel the observation that the legal environment, or at least that part of it that is composed of certain statutes, is "a product of the local political culture". (Kritzer, 1979b: 145.) Perhaps more to the point, an index of the degree of legal professionalism within the judicial structure including judicial selection, court organization, judicial administration, systems of judicial tenure, and judicial salaries and court financial resources was significantly related to each of the dimensions of political culture. The clearest relationship noted was to the third factor, role of the legal system: as the index of legal professionalism rose, reliance on the legal system increased. Less strong was an association between one aspect of the index, per capita expenditures on prosecution activities and the role of politics factor. Prosecutorial expenditures were directly related to the degree to which political activity was perceived as an expression of conservative ideologies. High per capita expenditures on the administration of criminal justice were also directly associated with an interventionist-welfare interpretation of the role of government. (Kritzer, 1979b: 145 - 149.) Indicators of judicial decision making behaviour, taken primarily as the severity of sentencing practices, were rather more ambiguous in

form and content. Most perspicuous was a relationship between sentencing U.S. selective service violators and the role of government, in particular with diffuse orientations toward interventionist-welfare conceptions of government activity. The more clear the interventionist orientation, the more likely was a draft offender to receive a less severe sentence of incarceration (though apparently the influence of political culture so-called was not strong enough to urge the sentencing practices of judges below the threshold of incarcerative dispositions to probated and other forms of non-institutional sentences). Reiterated too was the apparently consistent finding of no lasting relationship between sentencing behaviour and public opinion. (Kritzer, 1979b: 150, 152.)

Broadly, and in sum, it seems apparent that ecological models of judicial behaviour that incorporate such variables as public opinion, urbanization, political culture and local political systems are interesting and insightful, but undeveloped. Despite their successes, two minum difficulties are evident. First, with the exception of Hogarth, the mechanism by which systemic variables affect judicial sentencing behaviour is not made explicit. Secondly, and significantly more taxing in its recalcitrance, is the idea that cultural indicators such as public opinion and judicial selection are mediated variables,

inconstant in their relationship to other systemic constructs. This may be especially true in models of behaviour that attempt to examine and decompose relationships across the boundaries that demarcate the individual from the abstract social structure. The intrinsically elaborate and ambiguous architecture of cultural and other system-level processes cannot be succinctly or adequately mapped by covariation models.

Of longer history and greater development are models which take the individual magistrate--a micro unit of analysis--as the source of variation. At about much the same time that judicial behaviour first became an object of serious social science inquiry, Gaudet reported that of more than 7000 individuals sentenced, variations in the rate of institutional sentences ranged from 34 to 58 per cent of sentences determined by six judges, replicating the much earlier findings of Everson. (Gaudet, et. al., 1933: 814. See Everson above.)

In a later analysis Gaudet extended the evidence and the argument concluding that sentencing criteria are 'unevenly and capriciously applied' and that:

> "although experience on the bench might conceivably be considered training for sentencing, the influence of this experience as measured by changes in sentencing tendencies appears to be negligible. In other words, experience probably does not change the

> personality factors which determine whether a judge will be more lenient or more severe than his colleagues." (Gaudet, 1949: 461.)

Arguments based on factors intrinsic to the individual, rooted either in some deep aspect of personality or within functional cognitive processes have been the principal paradigm of the analysis of judicial decision making. Attitudes and attitudinal theory predominate in this research which rejects the notion that behaviour can be predicted solely on the basis of agents or variables external to the individual. (Gibson, 1978a: 912.)

It is indeed the case that attitudinal models of judicial behaviour can succeed where ecological models fail most visibly, namely when they are confronted with sentencing disparities among judges working within the same environment, culture, and legal and political structure. Ecological accounts typically specify that that which provides impetus to the variations in decision making which result in disparate sentences is to be found in influences external to the court, such as Levine's use of the expression of local political cultures through divergent systems of judicial selection. But it may be argued to good effect that ecological exposition can become atheoretical and fruitless in conditions where law and culture are undifferentiated, such as courts in the same community. To support an ecological

interpretation the model must be cast in broader terms, introducing variables that are conceptually and temporally more distant. The tenuous linkage between the individual and the environmental antecedents to his behaviour can be attenuated yet further.

Such a situation, that is one in which environmental variables appear undifferentiated, occurs in the case of collegial appellate courts where attitudinal models of judicial decision making have been employed most often. In fact, principal support for attitudinal accounts is from studies of the U.S. Supreme Court. (Gibson, 1978a: 912.)

Central to the attitudinal approach is the discovery and analysis of judicial attitudes. And though not methodologically monolithic, attitudinal analysis (and much of the intraindividual literature as a body) takes as dependent variable the decisions in opinions and measured attitudes of the decision makers as independent variables. (Ulmer, 1967: 82.) Judges are viewed as actors with personal, professional or political motives whose attitudes toward substantive policy issues predisposes their decisions in stable and discoverable directions. In illustration, power in a collegial court, essentially the formation and longevity of determinative majorities, has been understood primarily as the coincidence of values and attitudes held in common.

(Ulmer, 1965: 151-152.) Schubert stated this with economy when he noted that there is a "kind of stare decisis underlying (U.S.) Supreme Court decisions: but it is based on personal rather than institutional precedents." (1974: 20.)

Many attitudinal models typically began with an examination of the voting records of individual judges to uncover voting regularities which could be taken as evidence of attitudinal or value predispositions toward substantive policy issues. Goldman and Jahnige describe this as the "central hunch", namely that attitudes and values guide voting behaviour and that the votes are more revealing of a judge's attitudes than written opinion. (1976: 159.) Gibson describes the basic theoretical framework as one in which an attitude represents a "residue of previous experience with exercises a patterned tendency to respond in a certain way. Attitudes represent generalizations about phenomena based upon extrapolations from previous experience and usually take the form of cognitive generalization." (1978a: 912.)

Emphasis is placed upon nonunanimous decisions, that is collegiate court decisions in which there is a determining majority and a dissenting minority. If nonunanimity is the result of attitudinal divergence then there is no variation in unanimous decisions. (Flango and Ducat, 1977: 42.) Prichett's early work, recognized by Schubert and others as the first theoretical work on judicial behaviour, took

this form: counting the frequency of dissenting minorities on the U.S. Supreme Court. (Vines, 1970: 130.)

Much attitudinal research makes use of a procedure termed cluster bloc analysis, a technique that can be traced intellectually to Prichett's original analysis. It was his hypothesis that judges who held attitudes similar in content and saliency would tend to agree with each other in nonunanimous cases. Decision coalitions thus represented 'blocs' that indicate attitudinal convergence. (9) Prichett's agreement matrices revealed two main voting blocs, one which he termed 'liberal' and the other 'conservative'. (1948: 264-287.)

Schubert considerably extended this approach, in part by refining the procedure, but more by introducing Guttman scaling technology. It is the objective of Guttman scaling to produce an ordered array, or scalogram, which ranks in ordinal fashion the items of a test, questions of a psychometric instrument or, in this instance, the decisions of judges in cases. Guttman scale validation is founded more or less completely on a test of unidimensionality, the desirable property of scales to reference or measure a single characteristic or dimension. The nature of the characteristic, whether cognitive, attitudinal or political, is essentially irrelevant to the problem of scale analysis and validation. A second utile property of Guttman instruments is that unidimensionality is permissive of ordinality

and cumulativeness. That is to say, a Guttman scale arranges items in a pattern of sequential increase in intensity. In other words, items represent a continuum with those later in the scale expressing the measured dimension with greater saliency than earlier items. An individual, then, would continue to agree with scale items until he reached a point of saturation, or threshold of intensity, beyond which he would always disagree with the items. Guttman class instruments, in their ideal form, are robust and therefore desirable predictive instruments. Theoretically, such a scale permits perfect prediction of an individual's instrument behaviour once the last consistent positive response is known. (10)

Schubert's refinement in part was based upon regarding cases as stimuli and decisions as responses which provided explicit predictions concerning the causal ordering of judicial decision making. As well, Schubert introduced an Index of Interagreement which yielded a quantified estimate of the mean level of agreement among justices in a single bloc. (Schubert, 1959: chapter 3.)

A hypothetical scalogram display of decisions in civil liberties cases examplifies the unidimensional solution sought in such analyses. (See Figure 2.1) The positive symbols indicate agreement, the vote of a justice in support of an argument that a civil liberty had been

FIGURE 2.1 Hypothetical Scalogram Analysis

	Justices									
Cases	1	2	3	4	5	6	7	8	9	Votes
1	+	-	+	+	+	+	+	+	+	8 - 1
2	+	+	+	+	+	+	+	+	-	8 - 1
3	+	+	+	+	+	+	-	-	-	6 - 3
4	+	+	+	+	+	+	-	-	-	6 - 3
5	+	+	+	+	-	-	-	-	-	4 - 5
6	+	+	+	+	-	-	-	-	-	4 - 5
7	+	+	+	+	-	-	-	-	-	4 - 5
8	+	+	+	+	-	-	-	-	-	4 - 5
9	+	+	-	-	-	-	-	-	-	2 - 7
10	+	-	-	-	-	-	-	-	-	1 - 8

Adapted from Ulmer's data. (1960: 649.)

violated or denied, while negative symbols indicate disagreement, the vote of a justice against an argument that a civil liberty had been violated or denied. As may be seen, except for the scale error, so-called, in which Justice 2 voted against a claim of deprivation of liberty in Case 1 though agreeing with such claims in nearly all of the following cases, the scale is perfectly ordinal. The pattern of votes in these 10 cases outlines clearly a structure in the responses (i.e., decisions) to stimuli (i.e., cases). The display provides a cogent empirical argument that judicial decisions toward claims of deprivation of civil liberties approximate a Guttman scale with Justice 1 expressing the strongest support and Justice 9 the weakest.

The striking clarity that scalogram analysis offerred to researchers is evident in an analysis by Ulmer. Expressing a theoretical and methodological advance, Ulmer applied factor analysis to blocs of judicial votes allowing a "typal structure" to be defined in which every member of a bloc was more like other members of his own bloc than members of any other bloc. This permitted justices to be grouped and ordered such that apparent bloc leaders as well as members could be identified. Thus not only could divisions in collegial courts be noted, but some plausible description of the structure of influence in decision making was also obtained. (Ulmer, 1960: 633-636.)

At about the same time, other analyses tended to confirm the utility of scalogram solutions. Spaeth argued that not only could decision blocs and attitudinal alignments be discerned, but specific predicitions could be made concerning the relative extremity and intensity of attitudinal positions across pairs of judges. (Spaeth, 1961: 170, 173.)

In an application of the technique to the Canadian Supreme Court, Fouts recapitulated the basic argument of scalogram analysis. However, Fouts identified two scales, one termed economic liberalism and the other civil liberties, based upon configurations of votes. By setting the scales orthogonally, and from an interpretation of the positions taken in cases by the justices, Fouts was able to delineate four judicial types corresponding to the quadrants formed by the scale intersections. The first or northwest quadrant defined 'liberal' judges as they scored rather highly on both scales. The second or northeast quadrant defined 'authoritarian' judges scoring low on civil liberties but high on economic liberalism. The third or southwest quadrant was defined by the reverse of the second quadrant's scale positions and was labelled 'individualist'. Lastly were 'conservatives' who occupied the fourth quadrant and scored relatively low on both scales. (Fouts, 1967: 239.)

Perhaps the most robust and fecund contribution that can be identified is not the classification of judicial decisional types such as Fout's "authoritarians" or "liberals", but that by ranking judges' decisions it is possible to construct scales of behaviour that are unidimensional. The most widely investigated of these have been the B scale (business affairs), the C scale (civil liberties), the E scale (economic liberalism), the F scale (fiscal relations) and the W scale (labour relations). (Vines, 1970: 133.)

In a sophisticated elaboration, Schubert developed a psychometric model of judicial behaviour in which ordered dimensions of cases, determined through scalogram analysis, were used to explicate the ideological or attitudinal content of factor analytic solutions of voting behaviour.

The value of factor analysis rests essentially in its capacity to reduce large matrices of correlated variables to smaller sets of factors, each an orthogonal linear expression of some subset of the total number of correlated variables. (11) The extracted factors, whether considered analytical, theoretical or empirical constructs, can be understood as abstract variables which express some hypothetical but presumable causal relationship among the data.

In its most straightforward adaptation, factor analysis proceeds by correlating every variable with every other, producing

a correlation matrix. Unless the instrument is unidimensional, that is measures an attitude, trait or ability perfectly without measuring any other attitude, trait or ability, the matrix will reveal structured clusters of intercorrelated variables. It is these clusters that are the rudimentary foundations of factors. The cluster which in linear combination accounts for the largest proportion of variance among the intercorrelated data is extracted, or identified, as the first factor. The cluster which accounts for the next largest proportion of variance is extracted, also expressed as the linear combination of its constituent variables and so on. Since the second factor accounts for variance not accounted by the first, the second factor can be treated as orthogonal or independent of the first. The factors are then examined directly for interpretability, usually taken as commonality of meaning across the component variables.

Schubert's analyses consisted of factor extractions of matrices of judicial interagreement, that is correlations of the voting records of pairs of judges across cases. These extractions yielded relationships in decision behaviour which were treated as variables of coalition behaviour. Scalogram analysis was then employed to arrange the decisions from which the correlation matrices has been constructed into scales that ranked ordinally the votes of the judges. As in all conventional scalogram analysis, the substantive basis for the decisions

was "discovered" in the content of the cases and written opinions. The factor dimensions were rotated, that is linearly transformed, such that the factors moved through the decision matrix until they were in rough agreement with ordinal rankings of the votes. When the correlation coefficients between the decision scales and the factor structure were relatively robust Schubert concluded that coalition behaviour, operationalized as voting similarly in nonunanimous decisions, could be interpreted through individually held attitudes. (Schubert, 1974: 97-113.)

Theoretically, judicial decision making behaviour was described as the relationship between the objective case or legal problem (the j-point) and the ideal subjective attitude of the individual judge (the i-point) toward the legal problem. The decision is the outcome of that relationship such that the distance between the j-point and the i-point in n-dimensional space determines the decision. (Schubert employs factor analysis to locate the j-points and scalogram analysis to determine the i-points.)

The analysis described two attitudinal scales which together were reported to account for an average of 75 per cent of the variation in nonunanimous cases. The first, termed the C Scale, encompassed civil liberty issues and was constructed from cases which represented conflict between individual rights and liberties and state authority.

(Schubert, 1965: 99-127.) The second was the E scale, representing economic liberalism composed primarily of issues of conflict "between the economically affluent and the economically underpriviledged." (Schubert, 1965: 127-128.) Schubert defines as liberal those justices who score highly on both scales, and those scoring in the lower tertiles defined as conservative. Justices were politically liberal if they score highly on the C Scale but moderately on the E scale. Politically conservative justices were those who scored moderately on the E Scale but in the lower tertile of the C Scale. Similarly but obversely Schubert defines economic liberals and conservatives. (1974: 105.)

Perhaps most interestingly of all, Schubert has made specific predictions that were borne out concerning the behaviour of the U.S. Supreme Court in particular cases. (Schubert, 1964a: 548-587.) Schubert successfully predicted the Court would deny jurisdiction in an antireapportionment case, uphold defenses of lower court reapportionment decisions and that in these cases the Court majority would be composed of five particular Justices, with others joining in a predicted sequence. Unique in this success, the psychometric model seems invested with some measure of precision in forecasting decision-making behaviour in collegial appellate courts.

There are, however, significant criticisms of the method that constrain its utility, despite its methodological sophistication and natural world success. Flango and Ducat, in a review of Ulmer's work, observe that cluster bloc techniques and factor analytic elaborations delineate configurations of apparent coalition behaviour among collegial court judges. The technique retains as its basis the contention that decisions can be clustered in recognizable blocs given a threshold case stimulus. This tends to diminish the status of the individual in which the attitude finds expression to secondary importance. At times, this may reveal scalogram analysis as intuitively unsatisfying as it locates in the same bloc or attitudinal cluster justices that had not voted together, even when sitting before the same cases. (Flango and Ducat 1977: 43.) Hence justices could be found attitudinally identical (to the level of sensitivity of the test) without ever actually being in agreement. The result is that there is no necessary consistency in the composition of judicial blocs indicating, it is not unreasonable to suggest, that judges do not in their decisions respond to the same perceived stimulus in a case. All that can be said is that a bloc exists, and this but weakly.

In partial response, Ulmer has been successful in strengthening the technique by demonstrating that the composition of an attitudinal bloc remained stable over time. In a factor analytic solution of 47

identified U.S. Supreme Court blocs over a 15 year period, more than 35 of the blocs voted together more than half the time and a third of these voted together more than 75 per cent of the time. (Ulmer, 1965: 147.)

It is important to point out that Guttman scaling supports two quite distinct research enterprises: as a technique for questionnaire construction, or more accurately instrument validation, and secondly, as a method for roll-call analysis, so-called. In the former, items are drawn from a universe of items with the emphasis on selecting those which, according to substantive theoretical criteria, represent threshold increments in intensity of some characteristic. In the latter, the technique is, in a sense, held up to a mirror in that items, such as legislative bills on which legislators vote or cases in which judges have made decisions, are considered to constitute a scaled instrument. The task is to discover a subset that exhibits the property of ordinality and some degree of fit with theory. If the decisions in cases can be demonstrated to scale, indirect but strong evidence is obtained that a single, structured set of attitudes is shared by some members of the court. This, however, contains an assumption obscured in the construction of the scale. The obscurity is to be found in the assumption that there is a more-or-less complete

transfer of technology between research tasks: that is that the prior theoretical grounding of Guttman scaling employed as instrument validation is retained by Guttman scaling employed as roll-call analysis. This is not wholly the case. Specifically, it is not clear in theoretical terms that the cases are instances of the construct for which ordinality is claimed. Since scalogram analysis is founded precisely on this argument, that there is in fact as well as in appearance a substantive ordering, it is necessary both theoretically and empirically to demonstrate that the cases belong to the same taxanomic class. The issue can perhaps be stated in more familiar terms as the problem of construct validity: does an instrument measure what it purports to measure? If judicial decisions can be arranged empirically such that case A defines one end of a continuum because all of the judges voted against it (barring scale errors) and case Z the other extreme because all of the judges voted in favour of the issue (again barring scale errors) then there is prima facie evidence of a scale of cases, and by extension, of a coherent, unidimensional attitude. But the argument that the cases exhibit scalability <u>because</u> they are members of a subset of the same set of cases rests profoundly and therefore tenuously on the discovery of a subtending principle. For the researcher, the task of construct validation depends in large measure on the degree of interpretive sophistication brought to bear on the

content of the items. To illustrate, cluster bloc and later psychometric extensions interpret the substantive basis of the scaled decisions by direct examination of the content of cases. To construct an ordinal scale of economic liberalism the researcher must first exfiltrate cases that express or are an instance of economic conflict. Of necessity, this is an evaluative operation: scale criteria are therefore not independent of the subjective judgement of the researcher. (Flango and Ducat, 1977: 45.) For example, if a subset of cases ostensibly dealing with deprivations of civil rights is found to approximate a Guttman scale the argument is advanced that the cases constitute a measure of judicial attitudes toward civil rights issues. But it may be that, for the court at least, the issue may have been the infringement of the authority of one level of government by another. This point is made by Tannenhaus who notes that the scale position of a case can depend on other dimensions such as serious jurisdictional problems, federalism, overruling recent precedents, the exercise of executive power in a crisis, a competing civil liberty and the like. (1966: 1591.) As Flango and Ducat explain, there can be no defense against the criticism that the investigator may fail to classify cases as did the judges or even ignore cases that were attitudinally significant. (1977: 45.) At the very least, Blawie makes the point

in a germane observation that researchers may misread issues in cases as a result of a form of theoretical closure. (1965: 589.) The question becomes, then, which "scale" is valid? Certainly unidimensionality is threatened. In the extreme, the scale itself becomes a property of the selectivity of the researcher. Unfortunately, such selectivity is impervious to rejoinder.

A similar difficulty is that psychometric and Guttman based models do not take notice of marginal and nonmarginal incremental changes over time in decision making behaviour. Schubert's analysis relies heavily on the assumption judges behave consistently over time. Though justified on an aggregate level over short periods, there can be incremental but nevertheless non-trivial changes in judicial attitudes over longer periods. Scalogram techniques are either insensitive to such change as a result of the subjective classification of cases into substantive issues, or represent it as behaviour of another scale type, that is, classifies a decision in a case as a labour relations decision when instead the decision for the judge was the result of a genuine change in his attitudes toward civil rights issues. Alternatively, and perhaps more likely, an attitudinal change which led to an apparent reversal of opinion on a issue would be regarded as an error and therefore a deficiency in the scale rather than an instance of attitudinal adaptation. (Ulmer, 1974: 49-51.)

Psychometric models also do not respond well to instrumental behaviour, that is, in every Guttman scale a competing explanation is available, namely that judicial voting blocs may be instrumental and not value based. It is plausible that a bloc may be structured on a purposive judicial coalition intended to install or hinder a particular policy or outcome by bartering votes. As such, it is not clear that coalition or bloc members share similar affective attitudes toward the issue--indeed, in some instances an instrumental bloc could be a suspension of values, not an expression of them. (12) Unless a set of cases can be shown to express the construct on a separate measure there can be no reasonably convincing defense against alternative hypotheses. (13)

A further problem exists with shorn data, or data excluded from analysis by the architecture of the technique. Cases in which the court is unanimous, and in practice, cases in which there is but a single dissenting vote are excluded from the analysis. Typically, cases are included only if they attain a minimum threshold of 20% dissension, or just under two dissenting votes in a nine member court. Such cases, by the logic of the technique, add nothing to the analysis since they would do little more than anchor further the extremes of the continuum of cases. Their exclusion ostensibly as well decreases the likelihood of spuriously high coefficients of reproducibility.

But it also introduces an unknown degree of systematic selection into the data. At the very least it inflates the level of apparent disagreement, perhaps magnifying trace attributes to attitudinal status. In such circumstances generalizations can be made only under conditions of considerable caution as the sample differs systematically from the universe of cases. This leads inescapably to the suspicion that the model offerred by scalogram analysis is proficient for only an unspecified portion or subset of judicial behaviour.

Ulmer presents this view in an observation that characterizes the psychometric model as neither rigorous, systematic nor replicative. (1967: 84.) This is perhaps clearest in that the rules for constructing scales do not always lead to results that minimize the number of inconsistent votes. (Inconsistent votes are 'scale errors'.) It is possible to produce the same number of minimum errors with different arrays, changing the rank order of the distribution without increasing the number of scale inconsistencies. Because of this inherent plasticity the technique cannot yield unique solutions. Therefore, considerable doubt is cast upon the utility of the larger argument, namely that there exists shared attitudinal structures that, at least in part, determine behaviour. Moreover the rotation of factors to scale scores, that is setting of defined voting coalitions against the ordered set of cases selected to represent an attitudinal scale is also evaluative,

as Schubert admits. (1974: 41, 73.)

It is Gibson's argument that the "only way to construct a more comprehensive model of (judicial) decision behaviour is through independent empirical measures of all variables in the model". (1978a: 912.) Becker and Nagel have offerred similar suggestions: the former argues cogently that Guttman scale analysis and factor analysis, while demonstrably effective in the delineation of blocs of voting patterns, remain only a priori in their assumption that bloc behaviour is related to specifically relevant attitude positions. At best, Becker argues, such analyses describe in two ways the composition of voting blocs and not their subtending psychological antecedents. (1964: 12, 18.)

In a study of off-the-bench judicial attitudes Nagel measured independently attitudinal dispositions held by judges toward nonjudicial issues. Judges were found to be appreciably more conservative than legislators, administrators or the general community. (14)

These attitudes were as well positively associated with sentencing decisions: judges who scored low on the instrument, that is those who were comparatively more conservative in their off-the-bench attitudes, tended to decide in favour of the prosecution in criminal cases, for business interests in business regulation cases, for the defendent in civil suits arising from accident claims and for the employer in worker's compensation cases. (Nagel, 1963: 39-40.) And though no separate tests were reported, Nagel did argue that judicial conservatism

could largely be attributed to factors of class, family background, pre-judicial occupations, training, age and ethnic characteristics. (1963: 29,43.) But if the analysis did not demonstrate with empirical precision the degree of association between judicial decisions and judicial background characteristics it was important for at least two other reasons: firstly, for measuring attitudes and decision making behaviour independently rather than through the same medium or instrument, and secondly, for developing a specific, if unsophisticated, linkage to a new category of variables centering on the social background characteristics of judges and introducing them into the sentencing equation. This change effectively extended theoretically and empirically attitudinal and other cognitive and psychometric models by recognizing and measuring the impact of social attributes. This connects judicial decision making research to another body of literature concerned with sources of social-structural cleavage and support for law and order policies in the general population. (15) (eg., Bennet and Tuchfarber, 1975.) Like that literature, much judicial decision behaviour research tends to find enduring relationships between particular clusters of social-structural attributes and attitudinal dispositions. For example, Nagel established a relationship between judicial decisions in categories of substantive issues and political

party affiliations and ethnic origins. The latter, which included racial, religious and ancestral nationality affiliation variables, revealed that U.S. state Supreme Court judges with Anglo-Saxon Protestant backgrounds tended to be rather more conservative in their decisions than did judges with Roman Catholic backgrounds. In this case "conservatism" was determined to be the proportion of decisions made, in addition to those noted above, for the landlord in landlord and tenant disputes, for the vendor in sales of goods cases, and others. (Nagel, 1962: 93, 98, 99, 110.) Somewhat similarly, Nagel determined that, in every of 15 types of cases reviewed, U.S. state Supreme Court justices with Democratic party memberships or affiliations tended to be less conservative than state Supreme Court judges with Republican party memberships or affiliations. (Nagel, 1961a: 845.)

Convergent results were reported by Ulmer, who noted that periods of politicization of the Michigan Supreme Court corresponded both to changes in the pattern in which worker's compensation cases were brought before the court and decided, and to a dichotomy between judges with Republican and Democratic political allegiances: the former favoured such claims less than the latter to a significant degree. (Ulmer, 1962a: 358-359, 361-362.)

Much of the research that attempts to discover relationships between judicial sentencing decisions and social background characteristics can be classified generally into three categories. (Grossman, 1966: 1553.) The first is primarily descriptive and consists of data about age, ethnic and religious affiliation, career patterns, party affiliation, pre-judicial experience and other variables which illustrate the unrepresentative composition, at least in terms the offenders which appear before them if not the wider population as well, of courts. Such descriptions:

> "... provide the basis for plausible, though unsystematic, inferences about the sorts of values likely to dominate a court in a particular period." (Grossman, 1966: 1554.)

The second category is that into which the early works of Nagel and Ulmer may be classified. These efforts typically involve attempts to measure regularities between social characteristics and types of actual decisions. Though causality is rarely claimed, the logic of exposition requires that a stimulus-response model of judicial behaviour be assumed, not unlike mechanistic accounts of conventional jurisprudence. They too share the methodological weakness of eliminating unanimous decisions—in the case of collegial courts—from the analysis, introducing therefore an inestimable bias. (Grossman, 1966: 1554-1556.)

Illustrative of the third form is Ulmer's much later study of background characteristics. Simplifying the dependent variable to the rate of support for the state in criminal prosecution cases, twelve indicators were found to account for nearly 92 per cent of the variation: age at appointment; highest academic degree received; academic status of the school granting the law degree; size of community of birth; size of community of last law practice; state legislative experience; federal legislative experience; prior service on an appellate bench; federal administrative experience; religious affiliation; public office immediately prior to appointment and party affiliation. (Ulmer, 1973: 623-624.) Of these, three variables accounted for 70 per cent of the variation in the rate of support: 30 per cent of the variation was "explained" by age at appointment, 20 per cent by federal administrative experience and about 19 per cent by religious affiliation.

This explanatory power is, however, unique in approaches that centre on social background characteristics. For example, Bowen found in a replication of earlier research that a set of six characteristics including party affiliation, age, region, religious affiliation, judicial status and judicial tenure, taken together did not reach an explanatory level of 30 per cent: single variable explained variance only once exceeded ten per cent. (Bowen, 1965: 201, 205.)

Smidhauser (1962: 194-212.) and Adamany (1969: 57-73.) also report inconsistent results.

Inconsistent efficacy may in part be a result, in the vocabulary of the literature, of an omission of a measure of the stimuli. Many attempts to isolate subsets of social-structural variables ignore or relegate to obscurity important legal and institutional variables. The effect of the level of the court and the type of case are not always accounted within the model. (Grossman, 1966: 1563.)

A less frequent, but more recalcitrant, criticism of these analyses holds that they tend to be simplistic and atheoretical. Generally, social background variables are described as intervening. In conventional terms, this conception places the effects of individual social background between the stimulus, so-called, of the offense or legal claim and the response of the decision. As such, it is not altogether inaccurate to describe social background variables as 'filters' in the decision making process since they influence or 'filter' the direct effect of the stimulus. Presumably, the effect of the intervening variable may vary from zero, in which case the filter is wholly transparent to the stimulus, to complete, in which case the filter is wholly opaque to the stimulus. This much seems to fit relatively well with the overall pattern of findings. Unfortunately,

the greater part of the literature does not proceed beyond simple covariation models. The conditions which mediate the influence of the social background variables are unspecified, as are the form of the general functions or inequalities.

Analyses which rely on social-structural variables have tended to be atheoretical as well, despite Ulmer's assertions of a theoretical base. (1973: 627.) To the extent that the search for explanatory subsets of social background characteristics is guided by quantitative rather than theoretical considerations, the model is atheoretical. In other words, statistical efficacy supplants theoretical relevance as the criterion by which variables are selected for inclusion into an explanatory model. This can lead to a model in which covariates with no putative or apparent relation become central to high proportions of explained variance. Illustrative of this point is Ulmer's research: though methodologically successful inasmuch as Ulmer reports nearly a complete accounting of unexplained variance, no developed theoretical explanation is advanced for the relationship between religious affiliation and federal administrative experience, or between religious affiliation and age at appointment beyond an amorphous socialization process.

In interesting homology, a technically adept sub-body of research termed generally fact pattern analysis has also reported a large degree

of methodological success but without much theoretical development. Kort, a leading proponent of fact pattern analysis, notes that modern judicial behaviourism has been skeptical of conventional juridical claims of the exclusive effect of facts on judicial decision-making. (1966: 1595, 1597.) This fundamental criticism, which subtends implicitly if not explicitly the tenets of empirical judicial behaviourism since its theoretical divergence from classic political jurisprudence, has the status of a primitive principle in legal realism. And though Kort re-states this principle as the argument that the dependency of judicial decisions on the acceptance or rejection of facts is a relationship mediated by attitudes held toward those facts, the role of attitudinal dispositions is not crucial to fact pattern analysis. (1966: 1595, 1601.) Instead, the essential conception is one in which a decision can be represented by, or set equal to, the combination of facts that appear in a case. The task of fact pattern analysis is:

> "to develop a formula by which numerical values for these factors (i.e., facts) can be computed, to obtain composite numerical values for the combinations of them that appear in the cases, and to find a breaking point, or zone, which separates the composite values of the cases where convictions are sustained from those that are set aside." (Kort, 1957: 3.)

In an early effort based on appeals of convictions in involuntary confession cases Kort developed "pivotal factors", from the "Court's own appraisal of its position" which is to say from written majority opinions. In the method each pivotal factor is temporarily assigned an initial minimum value equal to the ratio of the number of positive votes in a case to the number of facts in the case. Intermediary values for each factor are then calculated indicating the effect of the fact in isolation while accounting for the composite effects of the other factors. (16) The final value or relative contribution of each factor to the decision is simply the mean of the intermediary values for the factor across all the cases in which it appears. The sum of these final values yield a range of composite scores that when ranked produce a scale-like measure such that cases with relatively low scores were decided against the individual (affirming a conviction) while cases with relatively high scores were decided for the individual (disallowing a conviction). As a test Kort was able to predict the outcomes of a subset of cases based on the composite scores computed from a superset of cases. (1957: 11.)

Despite a cumbrous and obscure algorithm Kort's early work, as Ulmer describes, claimed a 'science of politics'. It is here that Kort's and similar analyses recapitulate conventional jurisprudence

in the logic of their inquiry. Stated most directly, this relation is found in the assertion that a scientific jurisprudence would be composed primarily of "legislative or judicial rules of law that specify that certain individual variables or combinations of them will lead to certain judicial decisions". (Nagel, 1961b: 68.) Where these rules are ambiguous or absent scientific jurisprudence ought to specify quantitative rules to precisely the same end, namely that certain combinations of variables can be shown to lead to particular decisions. Following Kort, Nagel attempts a functionally specific algorithm that, when informed with the correct data, ought to predict judicial decisions. (1961b: 69-72.) Elsewhere, in a test of the technique, Nagel identifies four facts that predict the outcome of reapportionment cases: did the relevant constitution or organic act expressively require districts of equal population per representative; was a territorial, state or congressional apportionment attacked; could less 35 per cent of the population choose more than 50 per cent of the legislative membership, and did a federal court or state court decide the case? (Nagel, 1964: 1007.) Each variable was assigned a value based on its correlation with the outcome of the case. (17) As was the case in Kort's earlier analysis, when the sum of the variable values exceeded an empirically determined threshold the cases were decided consistently in one direction;

when the sum of the variable values was less than the threshold the cases were decided consistently in the other direction. (Nagel, 1964: 1012.)

In a similar effort Grunbaum and Newhouse extracted six decision variables from union regulation cases during the 1962 term of the U.S. Supreme Court. Four of the variables--the type of court of original jurisdiction from which an appeal was made; the outcome of union-management arbitration; whether the union regulation decision of the court of original jurisdiction is claimed to be in conflict with federal law, and whether the union claim holds that statute law had been violated or whether the union holds that an administrative action was ultra vires--were strongly associated with case outcomes. (Grunbaum and Newhouse, 1965: 210.) Individual votes of Justices were conceptualized as functions of the four predictor variables and were brought to solution through regression such that:

$$X_1 = B_2X_2 + B_3X_3 + B_4X_4 + B_5X_5 + A$$

where: X_1 = judicial vote

X_2 = predictor variable

⋮ ⋮

X_5 = predictor variable.

The analysis was able to predict 90 per cent of majority decisions

in twenty cases, as well as between 40 and 80 per cent of individual dissenting decisions in the same cases. (Grunbaum and Newhouse, 1965: 210-213.)

With differences only in emphasis, Ulmer examined claims of deprivation of civil liberties in nineteen search and seizure cases before the U.S. Supreme Court during the period 1942 to 1962. (1963: 173.) Premised on the notion that though cases decided for defendents may differ from cases decided against defendent on the grounds of procedural factors, rules and considerations of justice, they are as often differentiated in terms of the facts. Over time the facts will form recognizable configurations, and will be determinative in their effect. (Ulmer, 1963: 171.) Twenty facts relevant to the decisions were identified, with four selected for analysis:

1. the search was made of living quarters;
2. the search was made in the absence of an arrest warrant;
3. the search involved participation of state officers, and
4. the search occurred after forcible entry or trespass. (Ulmer, 1963: 174.) The relationship between the facts and the outcome in a case was expressed as the discriminate function:

$$D = A_1 x_1 + A_2 x_2 + A_3 x_3 + A_4 x_4 + \ldots + A_m x_m$$

where: x_1

$\vdots$

X_m = variable values, and

A_1

$\vdots$

A_m = coefficients. (18)

The importance of Ulmer's work lies in the introduction of simultaneous inequalities to determine the values of coefficients:

$$N_z d_1 = A_1 x_1^2 + A_2 x_1 x_2 + A_3 x_1 x_3 + A_4 x_1 x_4 + \ldots$$

$$N_z d_2 = A_1 x_1 x_2 + A_2 x_2^2 + A_3 x_2 x_3 + A_4 x_2 x_4 + \ldots.$$

$$N_z d_3 = A_1 x_1 x_3 + A_2 x_2 x_3 + A_3 x_3^2 + A_4 x_3 x_4 + \ldots$$

$$N_z d_4 = A_1 x_1 x_4 + A_2 {}^2x_4 + A_3 x_3 x_4 + A_4 x^2{}_4 + \ldots$$

Where: N = total number of cases;

z = value of the ordinate at the discrimination threshold, and

d = differences in the means of the predictor variables across the classes. (Ulmer, 1963: 173.)

Unlike Kort and Grunbaum et. al., Ulmer assigns as values to the four decisional variables the value of their correlation to a decision in favour of the defendent. (19) Solving for the coefficient values and testing the discriminant function against the actual decisions, Ulmer was able to successfully predict 18 of the 19 cases. (1963: 174.)

In a refinement of the pivotal factors method, Kort following Ulmer adopts the argument that a set of decisions in cases can be represented as a set of simultaneous equations in which the facts of the case are the independent variables in the equation and the decision is the dependent variable. For example, it may be supposed that facts f_1, f_2 and f_3 have been reported by the courts in a series of related decisions as consistent, complete and determinative. Each decision is represented by an equation such that it is a function of the combination of the facts where the weights or the relative contributions of the facts are unknown. The system of inequalities for these facts and three decisions would be represented as:

$$D_1 = f_{11} X_1 + f_{12} X_2 + f_{13} X_3$$

$$D_2 = f_{21} X_1 + f_{22} X_2 + f_{23} X_3$$

$$D_3 = f_{31} X_1 + f_{32} X_2 + f_{33} X_3$$

where: D = number of favourable judicial votes in a collegial court;

fij = the jth fact in the ith case

x = weight or coefficient. (Kort, 1963a: 143 - 144.)

The variable values in this case are not the values of the correlation coefficients between the fact-variable and the decision but instead are the absolute frequencies of the fact-variable in the decision. The simplest, and most prevalent, value is one. Therefore, the system

of equations becomes:

$$D_1 = X_1 + X_2 + X_3$$

$$D_2 = X_1 + X_2 + X_3$$

$$D_3 = X_1 + X_2 + X_3$$

Note that this presumes that each of the three fact-variables, f_1, f_2 and f_3 appears in every decision. However, Kort properly points out that some of the values may be zero (if the variable does not appear) causing that term to drop from the equation. (1963a: 145.) Once solved, that is once a weight is found for each controlling fact and as these weights are substituted in equations which represent new cases for which decisions have not been made it becomes possible to predict the number of favourable votes and hence judicial decision-making behaviour. (Kort, 1963a, 144.) In instances where the equations do not contain sufficient information — such as is the case when the same facts appear to yield different decisions — or when there are fewer equations than coefficients, the number of facts can be reduced by restating them through factor analysis. (20) (Kort, 1963a: 146 - 149.)

In a later empirical application Kort applies factor analysis to 22 fact-variables in 26 appeals based on involuntary confession; 23 fact-variables in 35 appeals based on denial of right to counsel

and 19 fact-variables in 76 appeals based on worker's compensation claims from Connecticut. (1963b: 145 - 148.) Once having identified the fact-variables from the majority written opinions, the:

> "cases are...represented by simultaneous equations. The decisions of the cases are regarded as a function of the combinations of the circumstances in the cases. Accordingly, the circumstances of the cases are the independent variables in the equations, and the decisions are the dependent variables. It is possible, however, to restate the circumstances of the cases in terms of psychometric constructs called <u>factors</u>. (Emphasis in original.) On the basis of this restatement, the factors become the independent variables in the equations, and the decisions then are a function of the combinations of factors in the cases." (Kort, 1963b: 135.)

The substitute factor estimates are introduced into the equations such that:

$$D_N = F_{n1} X_1 + F_{N2} X_2 + \ldots + F_{Nj} X_j + \ldots + F_{Nm} X_m$$

where: F_{ij} = the factor estimate of the jth factor in the ith case. (Kort, 1963a: 149.)

Regression analysis is then employed to develop weighting coefficients for the factor estimates such that each weighted equation yields a Case Weight (CW). The CW is the expected value of the linear (additive) combination of the products of weighting coefficients and the factor estimates. The correlation of the CW and the observed value of the case, D_N the number of favourable judicial votes in the

case, is the measure of congruity between the expected and observed values. If this test, "the (final) correlation (r_{DCW}) between the 'observed values' and the 'estimated values' (is) significant, it can be concluded the decision of a case, which is represented by the Case Weight is, - at a specifiable degree probability - a function of the combination factors..." (Kort, 1963b: 163-164.)

Unfortunately, only one set of cases, the appeals based on worker's compensation claims from Connecticut, were unequivocally predicted from the expected Case Weight values. (21) The sets of cases are divided chronologically into two halves: each half is tested first for the degree of correlative significance between expected and observed value; secondly, each half set is tested "forward" and "backward" by attempting to predict the outcomes in the second half from the CW in the first half and obversely the outcomes in the first half from the CW in the second half, respectively. (See Table 2.1) It is Kort's conclusion that the general weakness in the estimates derives primarily from the conditionality of the method. That is to say, the quantitative formulations of the rules of law are based on the "assumption that the combinations of circumstances which will be accepted by the Court is known". (Kort, 1963a: 179 - 180.) In the sets of cases in which (CW $\not\propto$ D), circumstances which the Court accepted as determinative

changed over time, that is later cases were decided on but slightly different fact-variables from earlier cases with the result that the behaviour of the Court departed significantly from expected patterns. (Kort, 1963a: 170 - 177, 180.) Indeed, it is a general failure of fact pattern analysis to account for developmental behaviour. (Kort, 1966: 1602.) While this surely limits the explicature power of fact pattern analysis as an analytical method, it does not affect the technique as a classificatory scheme. (Kort, 1972.)

In a later argument, Kort develops the hypothesis that judicial behaviour in culturally distinct legal systems are isomorphic to linear and nonlinear quantitative functions. Adjudication in a common law system may be represented by a linear function, the basic formulation being:

$$a + b_1X_1 + b_2x_2 + \ldots + b_nx_n.$$

Alternatively, adjudication in a civil law system may be represented by a nonlinear function, a common formulation being:

$$(b_1X_1)\ (b_2X_2)\ \ldots\ (b_nX_n).$$

The systemic distinction is founded on the requirement of the latter legal system that certain conditions are indispensible, that is legally and therefore logically necessary, to a favourable decision. Any

TABLE 2.1 Results for "Forward" and "Backward" Prediction (Kort, 1963a: 177.)

Sets of Cases	p	Significant
first half of involuntary confession cases	p 0.01	yes
second half of involuntary confession cases	p 0.05	no
second half predicted from first half	p 0.05	no
first half predicted from second half	p 0.05	no
first half of right to counsel cases	p 0.05	yes
second half of right to counsel cases	p 0.05	no
second half predicted from first half	p 0.05	no
first half predicted from second half	p 0.05	no
first half of compensation cases	p 0.001	yes
second half of compensation cases	p 0.001	yes
second half predicted from first half	p 0.001	yes
first half predicted from second half	p 0.001	yes

single condition may be represented as

$$\left\{(b_1X_1)\ (b_2X_2)\ (b_3X_3)\ldots\ (b_nX_n)\right\}\ b_mX_m$$

where the absence of (b_mX_m) will set the term to zero hence nullifying the entire function. (Kort, 1972: 18.)

The scheme is developed fully in an essay which outlines a "special and a general theory" of judicial decisions. (Kort, 1977.) The "special theory" is represented by a linear function where no variable multiplicatively increases the effect of another variable; no variable by its absence nullifies the effect of another, or is raised to a power other than one:

$$Y = b_1X_1 + b_2X_2 + b_3X_3 + \ldots + b_jX_j + \ldots + b_nX_n.$$

The linear case may also be expressed as a regression equation with the addition of a constant (b_0) and an error term (e_i). Further, if Y is a dichotonious variable which cannot be measured on an ordinal or interval scale, the equation becomes a discriminant function:

$$Y_i = V_1X_{i1} + V_2X_{i2} + \ldots + V_jX_{ij} + \ldots + V_nX_{in}$$

where yi is an index which determines the category of the predicted Y_i^*. If Y has several categories a system of inequalities is required to represent the behaviour of the independent variables. As in dichotomous discriminant analysis the object is to maximize the separation of the groups of observations and to obtain values for the

coefficients. (Kort, 1977: 8-10.)

The "general theory" is represented by a nonlinear function where variables increase multiplicatively the effect of other variables; nullify the effect of other variables by their absence, or are raised to a power other than one.

$$Y = ((a+b_1X_1^{C1} + b_2X_2^{C2} + \ldots + b_{k1}X_{k1}^{Ck})(a + b_{k1} + {}_1X_{k1}^{ck1} + 1)$$
$$(a + b_nX_n^{Cn}) + b_n + 1^{X_{n+1}^{Cn+1}} + b_n + {}_zX_n^{Cn+}{}^{+2^2} + \ldots + b_pX_p^{Cp}))$$
$$(a + (b_p + 1X_p^{Cp}{}_{+}{}^{+}{}_1{}^1))(a + (b_p + 2X_p^{Cp}{}_{+}{}^{+}{}_2{}^2))\ldots(a + (b_qX_q^{Cq})).$$

Kort argues that additive functions, multiplicative functions with terms that do not nullify the equation by their absence, multiplicative functions with terms that do nullify the equation by their absence and exponential functions can be derived from this 'primitive'-- in the sense of being a progenitor -- expression. For example:

(1) if the constants (a) and the exponents (c) equal one, and the final terms $(a + (b_p + 2X_p^{Cp}{}_{+}{}^{+}{}_2{}^2))\ldots(a + (b_qX_q^{Cc}q))$ equal zero, then the expression is reduced to a simple nonlinear multiplicative expression;

(2) if the constants (a) equal one and the exponents (c) equal zero, then the expression is reduced to a complex nonlinear multiplicative expression in which the nested terms become indispensible conditions such that by their absence Y = 0;

(3) if the constants (a) equal one and the coefficients in the multiplicative terms equal zero, then the expression is reduced to an exponential expression, and

(4) if the constants (a) and the exponents (c) equal one, and the coefficients in the multiplicative terms equal zero, then the expression is reduced to a simple linear expression. (Kort, 1977: 115.)

The symbolic descriptive utility of Kort's latter work, however, cannot ameliorate weaknesses apparently intrinsic to fact pattern analysis. For example, Berns, in an early attempt, was unable to replicate the calculation of pivotal factors based on Kort's initial technique. (1963: 197.) And though Berns' critique was of a general nature, it identifies both technical and theoretical problems.

The identification of variables is intimately related to the public aspects of the processes of judicial reasoning. (Berns, 1963: 196.) In practical terms, this means that fact pattern analysis is dedicated to the "discovery" of facts from the written records of the Court. (Kort, 1957: 3 and Grunbaum et. al.: 1965: 201.) Since the opinions are intended, inter alia, to give juridical justification as well as direction to lower courts and not necessarily lists of controlling facts, the analysis must contend with the fundamental problem of 'obtaining precise and exhaustive distinctions' of facts. (22) (Kort, 1963a: 143.) Nagel notes in this regard that fact-dependent quantitative analysis of judicial decisions must assume that courts are first consistent in their interpretation of facts and second

that these facts may indeed be determined. (1961b; 69.) In a later work Nagel re-iterates this observation, that is that variables must have the quality of visibility. (1964: 1008.) Interestingly, Nagel proposes a full correlation study of the complete text of a judicial opinion, with those phrases, terms and synonyms correlating most highly with the decision chosen as fact-variables. (1964: 1009.) Unfortunately, not only does this approach suffers from a plethora of fact-variables but it as well is confounded by the very large proportion of the total number of available correlates that both favourable and unfavourable decisions to a defendent must share. In short, word by word correlation matrices would generate many meaningless correlations.

Ulmer has discussed these difficulties, which can be formalized as:

> (1) of all facts which may possibly be identified in a case or series of cases, what is the rule of specification to determine which facts will be identified as relevent;
>
> (2) of all relevant facts which may possibly be identified in a case or series of cases, what rule of number may be stated to determine how many (i.e., what subset) is sufficient, and
>
> (3) of the total number of relevant facts which may possibly be identified in a case or series of cases, what rule of inclusion may be stated to select a sufficient subset? (1963: 172.)

The absence of such rules has led to an obscurity within fact pattern

analysis made manifest in irreplicable results. (Ulmer, 1963: 172.) Kort has suggested, in reference to the first difficulty, restricting the analysis to cases in which the fact-variables may be identified clearly. (1968: 552.) Whether this will introduce replicability into the analysis is moot; it will, however, confine the analysis to those subsets of cases which are, from a social policy perspective, possibly the least interesting. These cases are those in which the role of the judicial decision maker has been minimized. Perforce this excludes cases in which decision making, and hence developmental elements, are predominate.

The number of variables selected from the pool of all relevant variables depends on unspecified criteria. Kort has performed analyses based on 19, 22 and 23 fact-variables (see above); Ulmer (1963: 173.), Nagel (1964: 1007) and Grunbaum et. al. (1965: 201.), on the other hand, discovered a much smaller number of variables, four in each of search and seizure, reapportionment and union regulation cases. This ambiguity in the rule of number remains; the determination of variables is at least partly intuitive.

Perhaps more perspicuous is the determination of the rule of inclusion which may be defined in methodological terms as the relative contribution of each fact-variable to the proportion of explained

variance. Indeed, this is precisely the procedure in those fact pattern analyses which rely on factor analysis. (Grunbaum and Newhouse, 1965; Kort, 1963b.) Ulmer, however, noted that for many of the early efforts, fact pattern analysis relied solely on trial and error to determine the most robust subset of facts. (1963: 172.)

A secondary problem concerns the assignation of values to the fact-variables. Grunbaum et. al. (1965) assigned values intuitively; Nagel (1964)and Ulmer (1963) assigned values based on the coefficient of correlation with the decision; Kort at first (1957) equated the value of a variable with number of positive judicial votes, and later (1963b) with the simple frequency of the variable in the written opinion.

Beyond these methodological difficulties there are further problems with the nature of the fact-variables themselves and the theoretical basis of the analysis. It is important to reiterate that fact pattern analysis takes as its analytical substance "the factual elements which have been emphasized by the justices". (Kort, 1957: 1.) Elsewhere, Kort emphasizes that only those facts which the court in its opinion "states and accepts" are identified as variables. (1963b: 135; 1977: 19.) Investigations which employ factor analysis to reduce the fact-variables are to the same extent founded on this notion of variables

with objective characters (i.e., facts). (23) But the variables are not, properly speaking, identified from the facts of the case; they are instead discovered variables of instances of verbal behaviour of the individual judge assigned the task of composing the majority opinion of the court. When re-framed in this manner the analytical task is no longer one of discovering patterns of objective facts; it is discovering patterns of judicial verbal behaviour.

Relevant to this notion is Berns' argument that judicial language cannot meaningfully be separated from judicial reasoning. (1963: 196.) Those aspects of a case cited in a written opinion are not developed in a random or neutral fashion--opinions, like direct speech acts, are verbal behaviour, constructed of social motive and judicial intent. Thus understood, the object of fact pattern analysis is not to weight the contribution of fact-variables to the decision of the court, but rather to weight the effect of categories of verbal judicial behaviour. It is perhaps paradoxical that an analysis premised on a rejection of the subjective and intersubjective may be transformed into an analysis of that which it rejects.

More generally, fact pattern analysis, in the observation of its leading proponent, has been described as a "quantitative theory" with "general and special multivariate" components. (Kort, 1977: 36-37.)

To the extent that this fulfills the criterion of theory as conceptual schemes of interrelated canonical propositions, this is surely the case. (Blalock, 1969: 2.) For example, the systems of equations representing the effects of facts in consistent ways arguably approximate 'interrelated canonical propositions'. However, empirical research, with lesser or greater intent, may abandon theoretical perspectives in favour of approaches which rely on regression techniques to sort large sets of related variables into more efficient subsets. (24) (Blalock, 1969: 2.) In this light fact pattern analysis seems to be, at best, but vaguely theoretical since the method relies to a large degree on this sort of variance-regarding prediction. But more serious and to the point, 'simple prediction' may displace theoretical discourse. As Blalock argues, a good indicator or predictor of variable in many instances is the same variable at a point earlier in time. Indeed, simple prediction was the basis of much of earlier social science. However, Blalock continues:

> "...if any of the major parameters are varied, a theoretical explanation will be needed ...(I)t will be necessary to locate, measure, and fit together the basic causal factors that affect the dependent variable. This process of finding explanatory variables is a much more difficult one since, in effect, only a small fraction of the predictor variables will turn out to be

> directly related causally to the variable to be explained. Furthermore, there may be complex reciprocal relationships among all of the variables that cannot be disentangled through prediction equations alone. There must be a theory in terms of which these interrelationships can be explained." (1969: 3.)

This criticism is insurmountable within fact pattern analysis. The method firstly requires a large group of related cases prior to identification of the fact variables. (Kort, 1957: 12.) The reason for this is clear: the variables are discovered in the written opinions of the court and are not derived or devolved from theory. While this does not of itself differentiate fact pattern analysis from other, more theoretically grounded work, it does lead to two limitations, one assumptive and the other empirical. The first limitation consists of the assumption that the pattern of facts or circumstances antecedent to judicial decisions is both known and stable. More precisely, the analysis is predicated on the condition that the fact-variables which a court will accept as determinative are evident to independent observers. Kort terms this the assumption of conditionality. (1963a: 160 - 161.) Notwithstanding for the moment the problematic nature of the independent variables themselves (whether they can be defined as objective, concrete facts or whether they are categories of verbal behaviour), the corrollary of the assumption of conditionality

is that fact pattern analysis cannot predict the outcome of a case, or more accurately the weighting of the variables, in a case in which an unknown variable (fact or verbal act) appears. (Kort, 1963b: 180.) This is very much the situation Blalock described. In practical terms, this restricts the efficacy of the analysis to cases that have already been decided. (Kort, 1966: 1602 and 1968: 552.) At best fact pattern analysis is transformed into a cheme of classification or taxonomy of types of decisions; at worst, it is reduced to triviality.

The empirical implication associated with the criticism of theory in fact pattern analysis was identified by Fisher who argued that the fundamental task in the analysis, namely the identification of variables or factors which are indicative of decisions, can be restated as the task of identifying F factors consequential for a favourable decision. Obversely, there must never be observed an unfavourable decision with only the same F factors present. As Fisher states with economy, 'transparently clear precedents must not be violated'. (1958: 325.) Further, Fisher argues that this condition is the only condition required by fact pattern analysis to render it internally consistent and complete. That this is the case is evident as every other sufficient condition for the partitioning of cases is a corollary of the first condition:

1. if a favourable decision is observed with F factors, then no unfavourable decision ought to be possible with the same F factors present;

2. if an unfavourable decision is observed with G factors present, then no favourable decision ought to be possible with the same G factors present, and

3. if an unfavourable decision is observed with H factors absent, then no favourable decision ought to be possible with the same H factors absent. (Fisher, 1958: 325-326.)

The conditions are equivalent in that each implies the others.

Logically, the first condition imposes only weak assumptions about the decision making behaviour of judges in the test of prediction. In particular, the discovery of a perfect predictor implies no more than the first condition. Furthermore, and central to Fisher's argument, any algorithm that satisfies the condition is acceptable - indeed, it is also perfect. This leads Fisher to the conclusion that:

> " The first condition alone is a necessary and sufficient condition for the existence of an infinite number of solutions to the prediction problem posed and the fact that a perfect predictor has been found implies no more than the first condition ." (1958: 326.)

In short, fact pattern analysis can permit any number of predicting formulas to be constructed each of which could describe, with perfect

accuracy, the distribution of fact variables and decisions. Note, however, that even though a perfectly predicting algorithm is discovered, it may or may not describe the actual behaviour of the Court (that is, predicting the outcome of a case does not guarentee that the calculated fact variable weights approximate the actual fact variable weights). To illustrate this problem, consider in formal terms the basic argument of fact pattern analysis:

$$A_1X_1 + A_2X_2 + A_3X_3 + \ldots + A_nX_n$$

where $A_1, A_2, \ldots, A_n$ are the weights assigned to fact variables $X_1, X_2, \ldots, X_n$. (25) When solved the equation or equations differentiate cases which were decided favourable from those which were decided unfavourably based on the weighted effect of the extant fact variables. Fisher cogently argues that if this is the case, then there must clearly exist some value, K, such that all cases are distributed on either side of the value and where the decision (d) is unfavourable if $(d < k)$ and where the decision is favourable if $(d > k)$. Indeed, this recapitulates Kort's original purpose to "find a breaking point, or zone, which separates the composite values of the cases where convictions are sustained from those that are set aside." (1957: 3.)

This may be represented as:

$$A_1X_1 + A_2X_2 + \ldots + A_nX_n > K > A_1 + kX_1 + k + A_{2+k}X_{2+k} + \ldots A_{n+k}X_{n+k}$$

If the entire expression is then divided by the same value k, the

equation becomes:

$a_1x_1 + a_2x_2 + \ldots + a_nx_n \rangle 1 \rangle a_{1+k}\, x_{1+k} + a_{2+k}\, x_{2+k} + \ldots + a_{n+k}\, x_{n+k}$

This being the case, the objective is recast as the task of locating the values of the equation whose solution is one.

To explain more fully, if the decisions in a set of cases were determined by a single fact variable, then they could be arrayed along an unidimensional continuum separated by the point P which dichotomizes the cases into favourable and unfavourable decisions. The logical task (as distinct from the experimental or methodological task) is the specification of the value P such that (P = 1). Further, where two fact variables are consequential for the outcome of a case, decisions are distributed in a bidimensional scatterplot. (26) In the two (fact) variable case, the logical task becomes the specification of the line

$$a_1x_1 + a_2x_2 = 1$$

that divides the arrayed groups of cases in favourable and unfavourable decisions. Similarly for three or more fact variables the problem is transformed, respectively, into finding the equation for a plane or hyperplane equal to one. (Fisher, 1958: 323-324.)

With this in mind, Fisher's dominant criticism is revealed since any point or line or plane or hyperplane with a solution of one which

divides the decisions into homogeneous groups with respect to those decisions provides a perfect solution to the prediction problem. Unfortunately, unlike other algorithms which by their architecture permit but a single best solution, (27) there can be no guarentee in fact pattern analysis that there does not exist an infinite universe of points or lines or planes or hyperplanes that with equal efficiency separate judicial decisions into subsets unfavourable and favourable to the defendent. Therefore, fact pattern analysis cannot be said to yield a description or model of the actual behaviour of the court. Instead, it provides an evident or satisfactory solution which cannot coincide unambiguously with micro judicial behaviours.

Consider, too, an instance in which a prepotent variable X is necessary for a case to be accepted for consideration by the court. Every case decided will therefore contain variable X, while every case not decided will not contain variable X. (28) This results in the paradox is which variable X is both indispensible and useless: the former because any case decided, whether favourably or unfavourably, must contain the variable and the latter because it is effectively indistinguishable from a variable not considered at all. In consequence the variable must be assigned a zero weight. (Fisher, 1958: 330.)

Unfortunately, it is very difficult to repair these weaknesses in fact pattern analysis as they appear to be fundamental. Unlike earlier research which emphasized the importance of factors intrinsic to the individual (education) or social structural variables (political culture and public opinion) at the expense of traditional jurisprudential accounts of the meaning of sentencing behaviour, Kort describes as isomorphic the relationship between fact pattern analysis and mechanical jurisprudence. (1966, 601.) That is to say, the former reproduces the view of the latter of the judicial decision maker as a passive computing legal machine, registering information, comparing it to standard rules and producing a decision. It is, from the perspective of an observer of judicial behaviour, an aperceptive model of behaviour. The technique, like the view of jurisprudence with which it shares its logic of exposition, considers the decision maker transparent to the influence of variables not strictly legal in nature. The decision maker contributes nothing to the decision making process.

Precisely the reverse is true, however, for a body of literature which places the decision maker at the center of the judicial process by emphasizing the notion of judicial policy. Though variously defined in the literature, certain features are ubiquitous. Firstly, policy or policy-making is treated as a cognitive variable, usually interpreted as a result of the actions of purposive decision makers who

act, to greater or lesser degrees, with direct intention. Secondly, this intention is both systematic (in the sense of proceeding from plan to goal) and value-based. Lastly, acts and decisions based on explicit policies are designed to have effects beyond the immediate act itself. However, outside of these few elements, judicial policy is a plastic explanatory concept.

Comparatively, fact pattern analysis and the view of judge as policy maker locate the source of variation in widely disparate sources and provide radically different paradigms of the nature and character of judicial decision making. On the one hand, fact pattern analysis recapitulates mechanical jurisprudence and constructs a version of the judicial decision maker as a kind of New World technician applying learned reproducible technologies to problems with objective characters. As policy-minded decision makers, on the other hand, the view of judges becomes much more tentative and approximate. The emphasis instead is upon a mediating process (decision making) that tests cases against dimensions with unknown values (policies).

The notion of policy is defined variously when applied to judicial behaviour. In perhaps its most conventional jurisprudential treatment, judicial policy has been developed as an espect of the court's own functioning. Tannenhaus and others examined the statutory writ of

certiorari in relation to the US Supreme Court. Certiorari, that is the leave granted by the Court which permits a case to be transferred for consideration from an inferior court, was made discretionary in 1916 and then extended in 1925. Since that time, grants of certiorari by the Court have produced the largest share of its activity. (Tannenhaus, et. al., 1963: 111-113.) As certiorari is discretionary, the rules the Court devises to regulate access to its decisions have a determining effect on the classes of issues and litigants which argue before it. Relatively narrow rules of certiorari carefully cull appeals, limiting the types of issues for which the Court is an agency of remendy as well as restraining the influence of the Court at an institutional level. Alternatively, broad or permissive rules of access allow a greater range of litigious issues, creating for the Court perhaps a larger role among the agencies of governance. (29) Manifestly, therefore, certiorari controls the number, and more importantly, the type of issues that are raised to the Court, investing it with the capacity to regulate its workload. The latent effect of certiorari rules is found within the opportunities it regulates and provides to the Court to rule on what otherwise might be inaccessible questions.

Tannenhaus concluded that the rules of certiorari do not, for the US Supreme Court, constitute a sufficient account of the classes of

issues granted jurisdiction. (1963: 114.) In other words the policy of the court with regards to certiorari is found to a large extent in sources other than its rules. These sources were argued to consist in cues present in a petition which signal the decision maker that jurisdiction ought to be granted. In particular, Tannenhaus found that cases in which the federal government appeared as appellant, cases in which civil liberties issues were primary and to a lesser extent cases in which lower court dissension was evident were approved. (1963: 122-128.) Moreover, there was evidence that such cues were additive, which is to say that the likelihood that a petitioner would be granted jurisdiction rose if more than one cue were present. The analysis, however, did not proceed beyond observed coincidence of case characteristics. It did not pose nor answer, for example, questions concerning the relationship of the cues to the policy preferences of the individual judges themselves. Still, Tannenhaus' analysis was theoretically important if exploratory. It points to the observation that the antecedents to judicial decisions can be understood as the products of a concious, purposive agent, rather than as just the output of a mechanical process or unconcious psychological traits and social attributes. However, the question yet goes begging as to what are the forms and sources of policy which supplant the

rules of certiorari. Even more fundamental, the general characteristics of judicial policy qua policy were yet to be identified.

In a refinement and test, Baum argued that discretionary jurisdiction decisions are good indicators of judicial policy preferences and specified the assumptions of a model of decision making:

(1) judicial decision makers behave independently;

(2) judges are rational decision makers;

(3) discretionary jurisdiction decisions are based on the goals of limiting the workload of the court and achieving or furthering policy perferences;

(4) policies are unidimensional, with each judge holding an ideal point of greatest preference (this ideal point is also described as unimodal, monotonic and symmetrical);

(5) each judge in a collegial court places an inferior court decision at the same point on the relevant policy dimensions, and

(6) the decision to grant jurisdiction is a function of the distance of the inferior court decision to the ideal policy preference on a dimension and the salience of that dimension. (1977: 16.)

The model furthers requires that decisions be limited to cases that are unidimensional, though extensions to multidimensional decisions are not necessarily excluded. The view this prescribes of judicial decision making is one that is internally competitive, that is the utility of granting jurisdiction for a policy preference must exceed the

utility of denying jurisdiction to limit the workload of the court. In other words, a rational judicial decision maker will not grant jurisdiction if an inferior court decision is perceived to be near the ideal policy preference. In this case, the goal of limiting the court's workload has greater immediate utility. If, however, the inferior court decision is perceived to be distant from the ideal policy preference, then jurisdiction will be granted. In this case the policy utility of overturning that decision exceeds the workload utility of denying jurisdiction. The greater the perceived distance between ideal preference and policy position of the inferior court decision, the greater the likelihood of granting jurisdiction. Baum terms this an error-correcting strategy. (1977: 14, 18-20.)

The analysis proceeds from a modified Guttman analysis, termed a proximity model. (30) The scale resulting from the application of the proximity model is interpreted in the same manner as a Guttman scale with an important exception. In a perfect Guttman scale, scores tend to cluster in two regions, separated by a major diagonal in a matrix, such that "positive" scored group above the diagonal and "negative" scores below. In a perfect proximity scale, scores cluster in three regions, demarcated by two parrallel diagonals in the matrix:

above and below the diagonals are "positive" scores while between them are "negative" scores. (31) The direct test of the model was based on two sets of evidence: first, whether a block of cases approximated a unidimensional ideological scale, and second, whether decisions to grant jurisdiction were associated with the court's final decision on the merits of the cases. (32) (Baum, 1977: 22)

In general, the model was supported in both tests: the cases for both years selected were arrayed strongly in Guttman patterns, and, more importantly, decisions to grant jurisdiction were distributed bimodally along the Guttman scale and were highly associated ($r = .81$ to .90) with the eventual decisions in those cases. (Baum, 1977: 28-29.) In short, the decision to grant jurisdiction appeared to be related to the Justice's efforts to achieve a policy outcome on an ideological dimension. These results, however, are tempered by two difficulties. Firstly, while the cases selected for analysis were found to approximate closely a Guttman scale, it was not established cogently that this scale, and consequently the proximity model, were ideological in nature. No separate measure was applied that might demonstrate the ideological content of the scaled cases except for the assertion that inferior court decisions in favour of a defendent were liberal while those against were conservative. Secondly, the applied

tests, the scalability of the cases and the degree of association between the jurisdictional and substantive decisions, are not direct tests of the model at all. Indeed, as Baum notes, the hypothetical quantity of utility would in most instances be overwhelmingly difficult to measure. And for this investigation, utility is by definition unmeasurable as the cases were drawn from historical data. (33) (Baum, 1977: 20.)

This difficulty with the notion of judicial policy is at least in part the result of ambiguous definitions. Baum and Tannenhaus begin with a view of policy that is not distant from a more or less administrative conception. However, both transform this narrow construction to a much broader one that approaches in many ways a political definition of policy in which decisions affect the distribution of some scarce public good. (34)

Dahl takes precisely this perspective, examining the problem of policy in judicial contexts from an overtly political tradition and, consequently, was able to bring to bear a more substantive definition. Specifically, a policy decision is defined as "an effective choice among alternatives about which there is, at least initially, some uncertainty." (Dahl, 1957: 279.) The choice is uncertain because knowledge concerning alternatives and consequences is imperfect. And

it is effective in that it is enforceable.

Dahl identifies for the court a policy making role which is more direct than certiorari policy. This role is manifest in the extent to which a court, and in particular the US Supreme Court, delivers decisions which cannot be derived from the strictly legal criteria of precedent, statute or constitution and which invalidate provisions of federal law. (Dahl, 1957: 281, 282.) Such decisions are in opposition to the national lawmaking majority for the reason that laws must first have legislative majority assent before they may be invalidated by judicial review. These serve, in Dahl's argument, as an indirect test of the Court as a policy making institution with membership in a class of policy making institutions concerned with governance.

In examining 86 instances of federal American law invalidated by the Supreme Court, Dahl concluded that the decisions were with but few exceptions unimportant in the sense that they were either concerned with minor legislation, restricted by a later Court or reversed in a short time by the legislative bodies. (35) (1957: 286-290.) In other words, the Court is installed with the clear capacity to make a choice in policy disputes, but those choices were only wanely effective or infrequently made.

Policy decisions from the Supreme Court occur, generally speaking,

in those instances in which plausible, legitimate policy alternatives compete in the public domain. As Dahl notes:

> "(e)xcept for short-lived transitional periods when the old political alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance." (1957: 293.)

But when a period a political transition occurs, the Court may exercise policy--and hence political--leadership in the form of judicial review. Note, though, that this role remains an interstitial or residual one as the court cannot act proactively in legislative matters but must, through the confluence of circumstance, depend upon litigious challenges.

Cook developed a convergent argument based on the severity of sentences as an apparent behavioural indicator of judicial support for government policy. (See also public opinion, above.) Guided by the hypothesis that the severity of sentences applied in conscription resistance cases could serve as an indicator of judicial support for US Selective Service Act during the Vietnam War, Cook studied the penalties determined by 304 federal judges in 1,852 draft offender cases during 1972. In particular, a severe sentence in draft resistance

case was interpreted as supportive of the policy while a moderate or lenient sentence was interpreted as unsupportive. (Cook, 1973: 597.)

This argument is not identical to that developed by Dahl in its concern about the relationship between judicial behaviour and public policy. Dahl and others concentrate upon appellate court behaviour which is intuitively as well as empirically more overtly "political". That is to say, it is the appellate and Supreme Courts which may direct their attention purposively to certain social, economic or civil issues through certiorari decisions, and by explicit judicial review declare public policy unconstitutional and hence invalid. Within the lower civil and criminal courts however, the issue is rather more obscure. Important here is the judicial tenet that the administration of justice would be brought into disrepute if criminal courts were critical of the statutes and precedents they are required to enforce. But as Walker discovered, lower courts can influence policy by acting as unstructured regulatory agencies in civil cases in which individuals claim compensatory, punitive or other damages from a business for an injury, and in cases in which governments or public agencies regulate economic and commercial behaviour through claims of statute or regulatory violation. (1973: 13-16.) Similarly, Cook's analysis of draft offender cases treats sentences explicitly as policy decisions. Given that

sentence selection can uphold or impede legislative or administrative policy, this is a useful interpretation. It does rely, though, on certain assumptions: firstly, that law and precedent offer but general sentencing parameters, and second, that the purpose of the sentence, at least in the draft offender analysis, is "to symbolize national defense requirements rather than rehabilitate individual offenders". (Cook, 1973: 599.) Also not unimportant is the extension in this argument that Cook develops, namely that if precedent and law mediate judicial policy choices weakly or not at all, then the principle antecedents must be located within personal history and the social and political environments. (1973: 597.) This is a considerable elaboration of Dahl and Walker who adduce that judges and courts make policy choices, but who do not develop explanatory models for those choices.

Cook examines the influence of five major classes of variables found in the literature to be important predictors of judicial behaviour: precedent; case attributes; environmental or ecological factors; legal structure or system variables and certain sociological characteristics of the individual judicial decision maker.

Case attributes are ascriptive variables and include the socio-economic class, sex, nationality and race of the offender. Some of

the research on these variables in draft offenders cases indicates that case attribute variables are of limited utility in predicting sentence outcome with the single exception of race. But that too, however, was only weakly associated. (Cook, 1973: 606-607.) Unfortunately, Cook does not test the effect of case attributes. The only case attributes examined were type of plea and type of counsel. Consistent with other criminal court research, guilty pleas and not guilty pleas convicted before a judge tended to receive less severe sentences. Unexpectedly, however, the type of counsel made no difference to sentence severity. (36) (Cook, 1973: 608-609.)

Ecological or environmental variables consisted of socioeconomic, demographic and political factors. The first were operationalized as wealth, that is the percentage of families in the judicial district with greater than a specified income threshold, and the official reported crime rate. Again these factors contributed little to the variation in sentence severity: the combined effect of the two variables contributed only one percent of the variation. The demographic variables were defined conventionally as the size of the population and the size of the black population. The results for both variables were atypical relative to the literature in that sentence severity and size

of the black population did not correlate at all with severity. (Cook, 1973: 611-613.)

Party dominance and pressure group strength were also classified as ecological variables. The former was defined as the congruence between the political party affiliation of the judge and the party affiliation of the succesful senatorial candidate. Judges could therefore sentence in "congruent" or "incongruent" political cultures. Interestingly, sentences were found to vary to some extent in relation to political dominance: judges with Democratic party affiliations in Republican environments tended to sentence with relative greater severity than other Democratic judges. The obverse, however, was not observed in that judges with Republican party affiliations sentenced comparably across both "congruent" and "incongruent" environments. The political pressure group variable, operationalized as the presence of a national veterans organization with intense public commitment to US national policy, was essentially unrelated to sentence severity. (Cook, 1973: 613-615.)

Similarly, judicial seniority, the circuit organization of the court and the uneven distribution of draft resistance cases were defined as structural or systemic variables and were found, with the last as a weak exception, to be ineffective predictors.

The effects of judicial characteristics were tested through four measures: age and military service; membership in a political party, civic service group or specialized pressure group which had attempted to influence conscription policy, and lastly a family composition variable. Weak to moderate associations were noted between sentence severity and family composition, military service, and memberships in voluntary organizations, especially policy specific civil liberties groups. (Cook, 1973: 620-628.)

A regression analysis determined that, taken together, environmental, structural and sociological variables were able to explain but five percent of the total sentencing variation, arguably the lowest appreciable limit of effect. Unaccountably, the effects of precedent, case attributes and three other variable complexes noted by Cook as important--public opinion, judicial attitudes and judicial roles--were untested. These results tend to cast doubt on the general merit of large, mixed models, at least in judicial behaviour, to demonstrate any enduring utility. Two points are perhaps relevant: first, that the inclusion of variables in the model was not directed by a consistent theoretical perspective, and second, that it was likely that the effects of the unmeasured variables was crucial.

In a later analysis Cook narrowed the argument to center on the

relationship between judicial support for public policy and popular sentiment, in this case public opinion. (See also above.) The argument was guided by an explicit reliance on traditional political concepts drawn from democratic theory, namely representation. In particular, Cook argued that the political recruitment of judges was a "noncoercive linkage between judges and their constituencies". (Cook, 1977: 567.) However, unlike Dahl who argued that courts would "never be out of line for very long with the policy views dominant among the law-making majorities" (1957: 285) Cook instead considers the pivotal relationship between judicial behaviour and public policy to be expressed as the relationship between choice of sentence and public evaluation of a policy embedded in criminal law. Judicial decisions, that is sentences, are public policy choices: the choice of sentence over time is indicative of the 'degree of support for the policy implicit in the definition of the crime'. (1977: 574.) When decisions tended to approximate the distribution of public opinion with greater conformity than legislative statute or regreme policy, Cook concluded that explanatory models drawn from constructs of political representation were more efficacious than those based on legal or bureaucratic models.

Conceptually, the role of public opinion in decision making behaviour is legitimized through judicial socialization. Indeed, Cook

argued that it can be raised to the status of a sentencing principle:

> "the force of public opinion should not be allowed unduly to control the judgement of the court, yet the sensibility of the community to the nature or magnitude of the crime should be considered in determining whether probation or commitment is advisable as well as determining the severity of the sentence." (Van Dusen, in Cook, 1977: 569.)

Furthermore, this instrumental relationship is reinforced by an effective congruence between judicial decision maker and public constituency resulting from the recruitment of judges from the particular communities or districts in which they served.

The representative model, so-called, was tested against three alternative explanations: a legal model; a bureaucratic model, and a sociopsychological model. The measure of judicial decision making behaviour, perforce the dependent variable, was the probation index, the ratio of lenient (i.e., probation) sentences given in draft resistance cases to lenient sentences given in all cases. Public opinion was operationalized as mean responses to items in Gallup polls. (Cook, 1977: 574, 576.)

Interestingly, Cook also examines the effect of elite opinion, taken alternatively as Congressional policy and Department of Justice

policy. The former was operationalized as the mean percentage of votes in bills and resolutions against US participation in the Vietnam War, while the latter was operationalized as the number of draft resistance cases filed for prosecution. (Cook, 1977: 577.)

The working hypothesis stated that as American public opinion became increasingly antithetical to the Vietnam War, judges would make 'representative' policy choices by sentencing "less harshly those undermining the war effort by draft resistance". (1977: 579.) The hypothesis was strongly supported by the results: incorporating a one year lag, the correlation between national public opinion and sentences in draft resistance cases was $r=.995$. However, correlations between sentences and public opinion measured at regional and judicial district levels was appreciably less: $r=.894$ for aggregate regional opinion with a two year lag and $r=.697$ for aggregate judicial district opinion with a two year lag. (Cook, 1977: 580.)

The first alternative hypothesis, derived from a bureaucratic model, is based upon the assumption that sentence patterns would moderate in the direction of, or in response to, changing behaviour of role-alters in the subculture of the court system. This was tested by examining the relationship between probationary sentences and the dismissal rate of prosecutors (effectively, the frequency with which

state prosecutors chose not to proceed against individuals charged with illegally resisting Selective Service) and the choice of plea and type of trial by defendants. Neither relationship was found to be robust. The path coefficient for defendant plea and trial selection and sentence was p=.185; the coefficient for dismissal and sentence was p=.181 when the third variable of public opinion was held constant. (Cook, 1977: 588.)

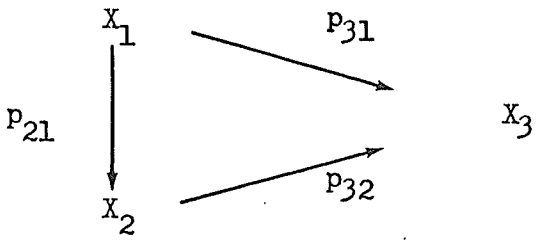
The other alternative explanations, a more purely legal model based on defendant type and criminal record, and a socipsychological model, which assumes that judges bring to their decisions complete and mature ideologies such that the appointment of new judges to trial benches brings new—and presumably more lenient—evaluations of draft resistance, were tested. In neither case were strong or stable coefficients observed. (Cook, 1977: 589-592.)

Unfortunately, Cook does not specify the precise form of the model. The argument does seem to offer a reasonable and persuasive basis for distinguishing certiorary policy from sentencing policy as generally, though perhaps not exclusively, separate forms of judicial decision making behaviour. As noted earlier, Cook describes the conception of decision making which admits mediating social variables as non-coercive, that is an "an affective response based on common

socialization and... as a cognitive reaction to influences defined as legitimate by their role conceptions". (1977: 568.) However, Cook does not complete the argument and instead argues that "a high correlation between public opinion and judicial decisions flows naturally from this noncoercive linkage without any special mechanisms for communication..." (1977: 569.) Later, Cook more clearly specifies the endogenous behaviour of the model, linking the variables in causal representation. (See Figure 2.2.) But, as Bennet and Tuchfarber note in a discussion of the sources of opinion on law and order policy, a subclass of which must be opinion toward offenses against the Selective Service Act, social and social psychological cleavages translate only imperfectly into elite policy behaviour. Moreover, that discussion is particularly germane since it focuses on partisan electoral alignments and the mechanisms by which popular sentiment is translated into electoral issues. If a policy model of sentencing behaviour is to be functional with respect to public opinion,then it must share concepts with other models of political representation, including the mediating linkages between judge and constituency.

In investigating the effect of law and order opinions upon electoral partisanship, Bennet and Tuchfarber found that extreme opinions on the issues of urban unrest and rioting, campus disorders and the rights

FIGURE 2.2: Path analysis of Draft Resistance Sentences (Cook, 1979a: 212.)



X_1 = battledeaths

X_2 = public opinion

X_3 = probation

p_{21} = -.194

p_{31} = -.264

p_{32} = +.906

of accused criminals were more likely to be found among the elderly, rural residents, Republicans, individuals with "limited educational backgrounds", fundamentalist Protestants and whites living in the southern states. (1975: 424.) (Interestingly, the putative observation that blue collar workers are more punitive that other occupational groups was not borne out.) But the most basic sociocultural cleavage along which law and order opinions were distributed was race. (Bennet and Tuchfarber, 1975: 423, 426.) The implication this has for a policy model of sentencing behaviour with roots in representation theory is that opinion qua opinion is not an adequate explanation. The question must rather be phrased as whose opinion, and when. It seems clear that there must be a form of opinion-sampling or opinion-testing which selects, on the basis of certain criteria, a relevant subset of opinion. Thus, a model which achieves better results with the largest units of aggregate opinion must be an atypical, if not unique, case. (37) More to the point, Bennet and Tuchfarber found that multiple discriminant analysis revealed law and order issues to be of relative unimportance in the 1970 and 1972 elections. (38) Instead, party identification, employment security and inflation were more important predictors of voting behaviour. In short, law and order issues 'were not the electoral fulcrum' they were thought to be during

those electoral contests. (Bennet and Tuchfarber, 1975: 432-434.) That is, even within the domain of events for which representation theory most concretely and adequately operate, there are process anomalies which are more complex than simple bivariate models might at first suggest. Since those electoral contests coincide with the end of the period during which Cook collected judicial sentencing and mass opinion data, it would appear even more convincing that a model with no special mechanism to connect the former with the latter is incomplete.

Indeed, but for the substantive nature of the covariates, the gulf in the logic of exposition which separates the interaction between judicial sentencing behaviour and public policy from the interaction of facts in fact pattern analysis is a narrow one. The difficulty, as in fact pattern analysis, lies in a misconception of policy and sentencing as formal and nomothetic. To explain: as a construct or element in an explication of a set of behaviours, policy was above described as conspicuous in the status it gives to purposive intention on the part of acting alone and with others. This emphasis was unique for conventional accounts of judicial decision making as it did not consider the relationship between sentencing and its antecedents as bivariate or even direct. In variance terms, the relationship between

sentencing and policy evaluative variables such as public opinion would be mediated by some variable located within the intentions or goals of the individual, if not in fact rendered spurious. In short, a policy account of judicial behaviour which is based on the simple, albeit lagged, correlation of public opinion and sentencing outputs is more nearly like an ecological account than the promise of policy.

This point is made in a slightly different manner in an experimental analysis which notes that "to explain human performance in most cognitive tasks it is necessary to introduce subject strategies as intervening variables that are likely to produce or to account for individual differences of large magnitude". (Simon in McFatter, 1978: 1500.) The analysis examined sentencing decisions made by naive judges (i.e., the subjects were neither actual judges sitting in courts nor members of collateral legal professions) under conditions of differing crimes, type of defendant and sentencing strategy. Three sentencing strategies were employed:

> "(1.) Punishment/retribution: The attempt to impose a just punishment on the offender, in the sense of being in proportion to the severity of the crime and his culpability, whether or not such a penalty is likely to prevent further crime in his (sic) or others.

(2.) Reformation/rehabilitation: The attempt to change the offender through treatment or corrective measures, so that when given the chance he will refrain from committing crime.

(3.) General deterrence/deterrence: The attempt to impose a penalty on the offender before the court sufficiently severe that potential offenders among the general public will refrain from committing further crime through fear of punishment." (McFatter, 1978: 1491.)

The experiment required individuals to assign sentences, measured in years of incarceration at an adult correctional institution, to hypothetical defendants convicted of one of ten crimes. (39) Sentencers were randomly assigned to one of the three sentencing strategy groups, with a fourth group receiving no sentencing strategy instruction as a control. Crimes and defendants were randomly paired independent of the random assignment of sentencers to strategy groups. (40) After transforming the data to reduce heterogeniety in the group variances and derive a sentence severity scale, McFatter reported that sentences imposed by sentencers working under or constrained by the general deterrence strategy were the most severe for all the crimes and defendants. Sentencers constrained by the rehabilitation strategy imposed the least severe penalties while sentencers constrained by the retribution strategy and sentencers in the control group imposed penalties between those extremes. (McFatter, 1978: 1494.) When the distribution of type of crime and scaled severity of sentence was

summarized by ordinary least squares, it was found that the mean slope of the retribution and control groups was significantly steeper than the mean slope for the rehabilitation and deterrence groups, indicating that, for the former groups, severity of sentence increased at a faster rate. Analysis of variance revealed statistically significant effects for strategy ($p < .001$), the type of crime ($p < .001$) and the interaction between strategy and type of crime ($p < .025$). McFatter thus concluded that adopting a particular sentencing strategy--or in the language developed here adopting a judicial policy which embodies a mature ideology of values and cognitively consistent purposes --did indeed affect the severity of the sentence, and that that effect differed for different offenses. (1978: 1494-1495, 1499.)

At the very least this suggests that another variable would add to the cogency of models of sentencing decisions; more problematically, it may also suggest that the lexicon developed around judicial behaviour is incomplete and, in a sense, disabled. (41)

In a more recent investigation, Clancy and others examined the effect of judicial attributes, judicial environment and case characteristics on the extent and nature of disparities in US federal court judge sentencing. The central question posed concerned the extent to which dissensus among judges, operationalized as disparities

in assigned sentences, could be partitioned into that which could be attributed directly to the objective characteristics of the offender and the offense, and that which could be attributed to the judge and his or her environment. (Clancy, et. al., 1981: 527.)

The investigation required judges to sentence, with any combination of incarceration, probation and fine, 16 offense/offender scenarios constructed according to an 'incomplete orthogonal' design. (42) As well, each judge rated the severity of nine model composite sentences, the perceived severity of intermediate and extreme offender and offense characteristics. Lastly, this information was compared to sentencing policies, attitudes toward the importance of sentencing policies, and judicial background characteristics. By sentencing policy is meant the classic purposes, so-called, of sentencing: general deterrence, that is to prevent others from committing crimes by punishing a particular offender; special or specific deterrence, that is to prevent the particular offender from committing further offenses through the imposition of a penalty such that he or she will be deterred from committing further offenses; incapacitation, that is removing the offender to a secure institution, thereby preventing further offenses during the term of incarceration; retribution, that is, imposing a

penalty in accordance with the severity of the offense and lastly, rehabilitation, that is, the attempt to change the offender through imposition of treatment or corrective measures, such that given the opportunity to commit an offense, the offender will not do so.

The variation in the composition (i.e., incarceration, probation and fine) and severity of sentences was partitioned through analysis of variance into three sources: main effects from the characteristics of the offense and offender; main effects from the characteristics of the judge and judicial environment, and interaction effects from both the combined effect of offender and offense characteristics, and from the combined effect of judicial characteristics with offense and offender characteristics.

The partitioned variance revealed that, for the decision to incarcerate, 37% could be attributed to the offender/offense, 10% to judicial variables and the remainder to interactions of these main effects. But interestingly, once the decision whether or not to incarcerate had been made, the main and interactive effects decomposed into different patterns for each type of penalty. For the length of incarceration, offender/offense and judicial main effects accounted for 45% and 21% of the variance, respectively, with the remaining variation attributable to the interactive effects. However, and

unexpectedly, offender/offense main effects only accounted for four per cent of the variation in the amount of fines, and only one per cent of the variation in the length of probation. Judicial main effects were much more robust for those latter two penalties: 55% of the variation in probation and 38% of the variation in fines. Lastly, the interaction of judicial and offender/offense main effects were found to account for 44% and 58%, respectively, of the variation in probation and fines. (Clancy, et. al., 1981: 534-536.)

These results contribute to the argument that processes, events, attributes or states specific to the individual judicial decision maker are unique and important. To extend the argument, Clancy examined the relationship between sentences assigned in the 16 offender/offense scenarios and the policy purposes of those sentences. This illuminates the principle hypothesis of policy accounts of sentencing, namely that policy goals intervene between characteristics of the offender and offense and sentences. In other words, sentencing policies "constitute (a) cognitive and social filter through which data about the case must flow before a sentence decision is reached." (Clancy, et. al., 1981: 545.)

Of the five sentencing policies described, general and specific deterrence were cited most frequently. More interestingly though,

the type of offense was related to the stated sentencing policy such that general deterrence, incapacitation and retribution were more likely to be identified as policies guiding sentencing in robbery offenses, while specific deterrence and rehabilitation were more likely to be identified in fraud cases. Furthermore, sentencing policies strongly influenced the severity of the assigned penalties. For example, a policy founded on the logic of incapacitation tended to lead judges to assign significantly ($p = .05$) longer terms of incarceration than did judges with other policies. Deterrence and retribution, as sentencing policies, led to larger financial penalties ($p=.05$) while rehabilitation was associated with lengthier periods of probation ($p=.05$). (Clancy, et. al., 1981: 543-546.)

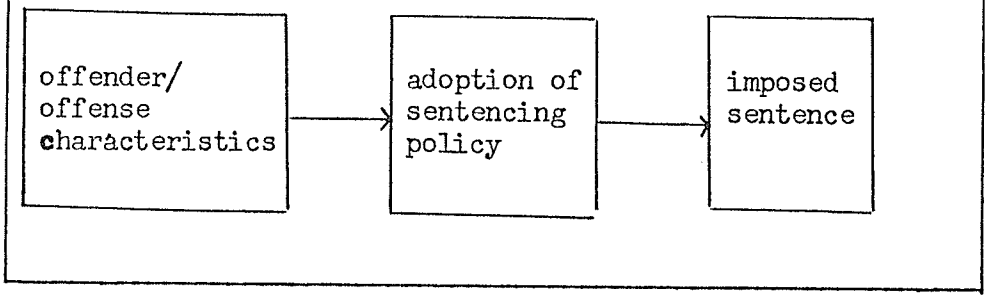
Thus, a policy account of sentencing is also a cognitive account in the particular sense that conciously held - indeed, consciously sought and adopted policies selected in part according to the nature of the offense before the magistrate or judge--evaluations lead the individual judge to different sentencing choices given the same individual offender and offense. It would seem, therefore, that information Ding an sich, in and of itself, is not sufficient to impell judicial decision making. Graphically, Clancy constructs the model of sentencing with judicial policy as intervening: (see

Figure 2.3)

This identifies sentencing as a social act and is, as such, consequential for the framework within which judicial decision making and possibly other forms of elite behaviour are understood. Perhaps the least that may be said is that policy accounts contribute further to the arguments that fact pattern analysis and other treatments founded on interpretations of mechanical jurisprudence are likely inadequate.

Hogarth, in a seminal Canadian work on the sentencing practices of 71 active trial court magistrates in Ontario identifies and defines judicial policy from the same perspective, namely that policy decisions that judges employ in sentence determination derive from penal philosophies. In nonrigorous terms, the central thesis of Hogarth's treatment is that disparities and other concrete problems in the practice of sentencing arise primarily from patterned differences in the antecedents to sentencing behaviour. These differences are to be found particularly in interjudicial dissensus concerning the social purposes (i.e., policy) that sentencing ought to serve, the sources of perceived constraints magistrates believe are placed on their sentencing practices and individual magistrate's capacity to deal intellectually with complex information. Note that these constructs--policy, perceived constraints and cognitive complexity--focus attention at that point in the act of

FIGURE 2.3: Policy Model of Sentencing (Clancy, et. al., 1981: 541.)



sentencing which articulates and mediates the interaction between the individual magistrate and the social environment. Hogarth argues that the conception engenders a rational model of man. As its central characteristic, such a model assumes mind, that is the individual as an inquiring and discriminative agent, capable of critical evaluation and reflexive self-appraisal. This stands in stark contradistinction to other views of the sentencing judge: for example, the syllogistic and mechanistic model of traditional jurisprudence and fact pattern analysis; monistic social characteristic views which conceive of judges as functions of their political, social or economic attributes, and darkling psychological hypothesis of judges as fundamentally incapable of behaviour not in concordance with basic personality traits set in infantile past. (43) (Hogarth, 1971: chapter 2, passim.)

In congruence with this cognitive emphasis, Hogarth reported that the majority (91.5%) of magistrates believed that it was "their role to prevent crime through sentencing." (1971: 70.) Of the five conventional policies or purposes of sentencing--reformation or rehabilitation, general deterrence, individual deterrence, incapacitation and punishment or retribution--rehabilitation was identified as the most important and retribution as the least important sentencing policies.

Interestingly, when correlated with each other, the sentencing policies of retribution and incapacitation, and individual deterrence and incapacitation, were mostly highly correlated (r=.437 and r=.352, respectively). Perhaps not unexpectedly, rehabilitation was negatively correlated with every other sentencing policy. (Hogarth, 1971: 72.)

Similar to the findings of McFatter and Clancy (see above), Hogarth reported that different sentencing policies were viewed as appropriate for different types of offense and were associated with different perceptions of the efficacy of penal measures. For example, rehabilitation as a sentencing policy was associated with incarceration for cases in which the offense was considered serious or if the offender was recidivist. Similarly, a policy of retribution also led to incarceration, but in cases of violent or sexual offenses. For less serious offenses, or offenses committed by elderly offenders, a retributive policy of sentencing tended to be associated with fines. (See Table 2.2) Not surprisingly, magistrates tended to be more convinced of the effectiveness of incarcerative sentences as the severity of those sentences increased. (Hogarth, 1971: 75, 81.)

In making these decisions concerning sentencing policy and sentence outcome, judges apply evaluative categories that both defines the behavioural limits of sentencing and judicial decision making and

TABLE 2.2: Sentencing Policies, Offense Characteristics and Sentences. (Hogarth, 1971: 81, Chapter 5 passim.)

policy	offense characteristics	sentence
.rehabilitation	.recidivists	.incarceration
	.offenders who can benefit	.probation
.general deterrence	.sex offenses	.incarceration
	.abuse of trust	.incarceration
	.all serious offenses	.incarceration
	.first offenders	.probation
.individual deterrence	.less serious offenses	.fines
.retribution	.violent offenses	.incarceration
	.sex offenses	.incarceration
	.less serious offenses	.fine
	.elder offenders	.fine
	.young first offenders	.probation
.incapacitation	.young first offenders	.probation

integrates those limits with the purposes they are to serve. Hogarth argues that the principle concept in this is judicial attitude, defined as:

> "a set of evaluative categories relevant to the judicial role which the individual magistrate has adopted (or learned) during his past experience... These evaluations consist both of beliefs about and feelings toward the object of the attitude..." (1971: 24, 100-101.)

As exploratory but complex measurement instrument was constructed from a phenomenological survey, so-called, which collected items from written opinions in cases, jurisprudential scholarship, appeal court decisions and other sources. Iterative pilot tests and interitem correlation matrices were employed to cull items exhibiting high response variation and low item-scale correlation. Factor analysis of the resulting scale extracted five factors which were reported to account for 59% of the observed variation:

1. Justice Factor: interpretable as just deserts or that crime be punished in proportion to its severity;

2. Punishment Corrects Factor: interpretable as the belief that offenders need and deserve punishment to prevent them from committing further crime;

3. Intolerance Factor: interpretable as moral aversion to the social deviance of offenders and criminal behaviour;

4. Social Defense Factor: interpretable as the belief that crime is a threat to the social order and that potential

offenders must be intimidated from committing offenses by the threat of punishment, and

5. Modernism Factor: interpretable as concern for individual welfare as it relates to the reformation of individuals. (Hogarth, 1971: 110-136.)

The attitude factors were examined in relation to policy purposes of sentencing reported by judges and to actual sentences determined by the 71 magistrates in seven indictable offenses. (44) However, Hogarth was able to significantly extend the discussion by including in the 'sentencing equation' variables which were argued to measure directly cognitive complexity. From 25 ranked items of information about the nature of the offense and the offender it was found that judges that sentenced with ostensible consistency tended to focus upon one type of information to greater degrees. Moreover, this tendency was associated in characteristic fashion with attitude factors and sentencing policies. To illustrate, general deterrence as a policy of sentencing was associated with low values on both the Justice Factor and offense characteristics related to the treatment of the offender. This is understandable in the strict terms of the purpose of a general deterrent: judges at times sentence beyond the measure of culpability of an offense or what might be necessary to change an offender's behaviour in order to achieve a general deterrent effect. On the other hand, policies of individual deterrence and reformation were positively associated with

offense characteristics related to the likelihood that sentencing would change the behaviour of an offender. Both these policies are 'offender-regarding', that is centered on "factors concerned with treatment of offenders." Retributive sentencing policies were associated with high values on the Punishment Corrects Factor and on offense characteristics related to the criminality (eg., criminal record and type of offense) of the offense. That is, a strict punishment perspective was related to a narrow emphasis on direct culpability. (Hogarth, 1971: 280-285.)

These observations are revealing: specifically that there was a fairly patterned relationship among the characteristics of the offense considered important, sentencing policy and the substantive content of judicial attitudes toward judges' role and purpose. When the type of offense was rated as a highly important aspect of the case, magistrates tended also to rate highly individual and general deterrence and score highly on the Justice Factor. When instead the criminal record was considered the most important information in a case, general deterrence was most often selected as a policy of sentencing, and the Social Defense Factor was prepotent. Rehabilitation as policy was associated with emphasis on the background of the offender and relatively low scores on the Justice and Social Defense Factors.

(Hogarth, 1971: 235-236.) Correlation coefficients among sentencing policy, judges' perceptions of the offense and the offender, and factors considered important describe a complex relationship in which "there is an association between the purposes (policies) magistrates tend to emphasize in sentencing and those factors which they isolate, ascribe importance to, and use as the basis for determining the appropriate sentence to impose." (Hogarth, 1971: 298.) In other words, Hogarth discovered that sentencing policies differentiated judges on the type (and number) of items of information employed in sentencing. Hogarth considers this evidence of levels of cognitive ability, or more accurately, cognitive complexity among magistrates.

A concept closely linked to general intelligence, cognitive complexity is developed as the capacity to structure or perceive objects and events in a complex or differentiated manner. With respect to individual functioning, cognitive complexity may be considered to vary from the simple or concrete to the complex or abstract. Hogarth argues, on the basis of experimental evidence, that individuals with relative cognitively complex approaches to problem solving tend to perceive a greater number dimensions and elements in tasks while cognitively simpler perspectives view problems in monolithic terms. Elaborating this further, cognitive 'simplicity' is characterized by

less differentiation and integration of information; tendency toward extreme and polarized evaluations; less tolerance of ambiguity in social relations; tendency to form generatlizations from incomplete information; greater tendency to stereotype; lower sensitivity to subtle or minimal cues and a greater tendency to authoritarian styles of behaviour.

As a measure of cognitive complexity among magistrates, Hogarth employed factor analysis to reduce 17 variables from "sentencing study sheets". (45) Three factors were extracted which accounted for over 44 per cent of the variance: discrimination, size of information space and effort in problem solving. The first factor, Discrimination, represents the degree to which judges were able to make complex discriminations in information about cases. The second factor, Size of Information Space, describes the amount of information a magistrate habitually, or was capable of bringing to bear upon a problem. Hogarth described judges with low Size of Information Space scores as tending to report that purposes and case features considered important were the same across cases despite categorical differences in the type of offense or offender. These judges also tend to prefer simple to complex information and sentencing with less flexibility. The final factor, Effort in Problem Solving, was strongly loaded on items related

to sentencing effort: time taken in decision making, the number of information sources about an offense identified, the number of perceptual dimensions identified, and the capacity to shift policies and information requirements across cases. (Hogarth, 1971: 314-317.)

These cognitive complexity factor scores were correlated with sentencing policy and judicial attitude factors. Most significantly, there were reliable patterns in the correlations among the three measures which seem to elucidate coherent models of sentencing behaviour.

As a sentencing policy, rehabilitation was associated with high scores on the cognitive factors of Discrimination and Effort in Problem Solving, indicating that judges who sentence with this purpose or policy in mind tend to make more discriminations in information about offenders and offenses, and expend greater cognitive effort in decision making. Through these factors rehabilitation was negatively associated with the attitudinal Justice and Social Defense Factors. Taken obversely, cognitive complexity was associated with low retribution policy and Punishment Corrects attitude scores, and with sentences which were atypical or anomalous.

The sentencing policies of retribution and incapacitation, on the

other hand, were found to be associated with low scores on the Size of Information Space cognitive factor and Justice attitude factor. Total cognitive factor scores which indicated relative simplicity in an individual judge's decision making were more likely to be associated with high Social Defense attitude scores and with punitive sentencing practices, particularly the frequent use of institutional--and especially penitentiary--incarceration. (Hogarth, 1971: 318-319, 339.)

It is from this empirical basis that Hogarth constructs a generalized model of sentencing, incorporating the cognitive, attitudinal and behavioural variables. Punitiveness, whether measured as concretely as sentence severity or abstractly as an attitude toward offenders and offenses, was associated with cognitive simplicity. Indeed, judges who sentenced with either incapacitation or retribution employed relatively less information and expended relatively less effort in their decision making. Hence, punitive judges "appear to be characterized by stereotyped or compartmentalized thinking. "(I)nformation (is) organized in a relatively fixed way with little or no integration. In contrast, non-punitive magistrates appear to use information in a more complex and subtle way... and then capacity for abstract thought or conceptualization is enhanced." (Hogarth, 1971: 320.)

It is this conclusion which is the central finding of the study. Stated with economy, it remains innovative and durable: greater individual capacity for complex cognition is associated with greater complexity in decision making behaviour, and finally, with greater leniency in sentencing. However, there is a sense in which Hogarth's contribution is incomplete, logically as well as empirically. To begin, while the antecedents to sentencing were described in the relationship of policy to attitude, and the manner in which this relationship is mediated by individual cognitive ability, the perhaps more fundamental question of the nature of the causal relations among these antecedents is answered but equivocally. Consider the exposition by which the essential argument is constructed: a social behaviour (sentencing) is rooted, other things being equal, in certain deep structures which, while accessible to instrumentation and measurement, are psychological in nature. There is no clear causal ordering within the antecedent model, nor is there a set of propositions which relate the psychological structures to still further antecedent social, economic or psychological variables. Thus, though elaborate and robust, the analysis remains similar to earlier bivariate personality conceptions in which certain micro behaviours were causally juxtaposed

to attitudinal elements. In point of fact, Hogarth notes this difficulty, but in a slightly different manner. The data do not specify "whether the attitudes and philosophies of magistrates cause them to deal with information in the way they do, or whether they tend to develop attitudes and beliefs which are consistent with their capacity for abstract thought." (Hogarth, 1971: 320.) Some evidence supports the former view, that is that decision making behaviour is, at least in part, a function of attitude and policy and that further, these are a function of certain variables related to objective characteristics of the social structure of the court. (46) The support, however, is weak and desultory.

In general, two unrelated points ought to be established: firstly, that sentencing behaviour and sentencing policies and attitudes are related through a fundamental dimensional of psychological functioning and from there perhaps to social structural variables, and secondly, that policy accounts of judicial behaviour share an argumentative design with earlier personality accounts.

Note too, that policy accounts of themselves are not of a type. Hogarth developed a notion of policy derived from the classical purposes, so-called, of sentencing. This might be therefore classical judicial

policy. In apparent contrast, however, are Cook, Dahl and Bennet and Tuchfarber who develop a view of policy more politically substantive in that it attempts to relate judicial decisions to the decisions of political bodies. This second type might be termed political judicial policy. Lastly, this discussion of policy in relation to judicial behaviour began with treatments developed by Baum and Tanenhaus in which policy was defined by administrative rules of certiorari. As such, this latter type might be termed as judicial administrative policy.

These three subtypes of judicial policy -- classical, political and administrative -- can also be considered as one category of a larger classification of research which can be overlain upon investigations of judicial behaviour. It is to this larger classification that this discussion now turns.

A Research Taxonomy

IT would be an error of observation to characterize the tradition of inquiry into judicial decision making behaviour as an organized program of research. There is within the tradition breadth of scope,

purpose and method. Below, Table 2.3 presents in review a schematic summary of that part of the research tradition here reviewed.

But even within this eclectic history of hypotheses and results, some order may be seen. In particular, two basic types, or 'genera' of research are evident. The first consists of those efforts that place the locus of explanation outside the individual, while the second consists in an intraindividual perspective which emphasizes variables measured at the level of the sentencing magistrate. These two research genera are classed, respectively, exoteric and esoteric in nature.

A research genus is exoteric if hypotheses are developed which employ variables that locate the account of sentencing behaviour external to the judicial decision maker. In one sense, this describes models of behaviour which incorporate constructs that are 'public' in nature. This is not to say, however, that such models are observable in the same manner that a behavioural event is observable. Political culture, for example, is exoteric in the special sense developed here of being an antecedent of judicial behaviour external to the individual, but political culture Ding an sich is obscure and incorporeal. Other exoteric factors, of lesser or greater concreteness, are geography, public opinion and characteristics of the offense and offender.

TABLE 2.3: Nominal Summary of Explanatory Concepts and Variables in Judicial Sentencing Behaviour Research

author/year	concept/variables
Baum, 1976	subordinate - superordinate structure of hierarchical courts
Baum, 1977	judicial policy preferences
Bennet and Tuchfarber 1975	public opinion about sentencing
Bertrand, 1982	public opinion about crime
Bowen, 1965	social background characteristics of judges
Clancy, et. al., 1981	judicial value orientations, sentencing goals and perceptions of the seriousness of the crime and its penalty
Cook, 1973	judicial policy preferences
Cook, 1977	judicial policy preferences
Cook, 1979a	judicial policy preferences
Cook, 1979b	public opinion about crime

TABLE 2.3: continued

author/year	concept/variables
Dahl, 1957	judicial policy preferences
Everson, 1919	social and personality characteristics of the judge
Flango and Ducat, 1977	public policy variables
Fouts, 1967	judicial attitudes
Frankel, 1973	neuroses and personality characteristics of judges
Furstenberg, 1972	generalized public apprehension about social instability
Galton in Gottfredson and Gottfredson, 1980	arithmetic pattern of the length of sentences
Gaudet, et. al., 1933	judicial predisposition to sentence severly
Gaudet, 1949	judicial personality characteristics
Gibson, 1978a	judicial attitudes
Gibson, 1978b	race of the offender

TABLE 2.3: continued

author/year	concept/variables
Giles and Walker, 1975	urbanization of the court district
Goldman and Jahnige, 1976	judicial attitudes
Grossman, 1966	social background characteristics of judges
Grunbaum and Newhouse, 1965	pattern of facts in a case
Hagan, 1976	race of offender
Harries and Brunn, 1978	sex of the offender
Harries and Brunn, 1978	age of the offender
Harries and Brunn, 1978	microcultural variables
Harries and Brunn, 1978	race of the offender
Hogarth, 1971	judicial perception of public opinion
Hogarth, 1971	cognitive complexity of judicial decision making processes

TABLE 2.3: continued

author/year	concept/variables
Hogarth, 1971	judicial sentencing policy
Hogarth, 1971	judicial attitudes
Jaffary, 1963	microcultures contiguous with Canadian provincial borders
Jones, 1965	judicial personality and social attributes
Kort, 1957	pattern of facts in a case
Kort, 1963a	pattern of facts in a case
Kort, 1963b	pattern of facts in a case
Kort, 1966	pattern of facts in a case
Kort, 1968	pattern of facts in a case
Kort, 1972	pattern of facts in a case

TABLE 2.3: continued

author/year	concept/variables
Kort, 1977	patterns of facts in a case
Kirtzer, 1979b	local political culture
Levine, 1972	local political cultures
Lizotte, 1977	race of offender
Maleka, 1968	public opinion about crime
McFatter, 1978	judicial sentencing policy
Mileski, 1970	sentence given in the immediately preceding case
Mohr, 1975	bureaucratization of the courts
Nagel, 1961a	political party affiliation of judges
Nagel, 1961b	pattern of facts in a case
Nagel, 1962	social background characteristics of judges
Nagel, 1963	attitudes of judges toward non-justice issues

TABLE 2.3: continued

author/year	concept/variables
Nagel, 1964	pattern of facts in a case
Prichett, 1948	judicial attitudes
Schubert, 1959	attitudinal convergence in collegial courts
Schubert, 1964a	judicial attitudes
Schubert, 1965	judicial attitudes
Schubert, 1974	psychometric structure of judicial attitudes
Shoemaker, et. al., 1973	offender physiognomy
Spaeth, 1961	judicial attitudes and decision blocs in collegial courts
Tannenhaus, 1963	certiorari policy
Tepperman, 1973	bureaucratization of the courts
Tiffany, et. al., 1975	seriousness of the offense

TABLE 2.3: continued

author/year	concept/variables
Ulmer, 1960	attitudinal influence structures in collegial courts
Ulmer, 1962a	political party affiliation of judges
Ulmer, 1963	pattern of facts in a case
Ulmer, 1965	judicial attitudes
Ulmer, 1967	judicial attitudes
Ulmer, 1973	social background characteristics of judges
Vines, 1970	judicial attitudes

The second genus of research is esoteric in that it can be said to be comprised of constructs that are, in some sense, possessions of the individual judicial decision maker. These include constructs and models founded, on the one hand, upon psychological approaches which attempt to account for divergent sentencing behaviour in personality, attitudinal or cognitive terms, and on the other hand, upon sociological perspectives that estimate the effect of political, educational or socioeconomic variables. This classification is presented in Table 2.4 with an example author drawn from Table 2.3, above.

To develop further this scheme of classification, consider as genus the relationship of the explanatory antecedent to judicial behaviour: if endogenous to the judicial decision maker, the model can be said to esoteric; if exogenous the model can be termed exoteric. Separating these further into extracourt and extra-individual beneath exoteric, and psychological and sociological beneath esoteric, is possible. Note, too, that by moving from east to west across Table 2.4 the scope of agency becomes broader. That is, the personality of a judge is of greater specificity to the decision maker than sociological characteristics than offender characteristics than public opinion.

TABLE 2.4: Classification of Judicial Sentencing Behaviour Research

exoteric		esoteric	
extra-court	extra-individual	sociological	psychological
geography (eg. Harries and Brunn, 1978.) public opinion (eg., Cook, 1979b.) political culture (eg., Levine, 1972.) bureaucratic organization (eg., Mohr, 1975.)	offender characteristics (eg., Hagan, 1976.) offense characteristics (eg., Kort, 1966.)	socioeconomic characteristics (eg., Nagel, 1962.) political party affiliation (eg., Nagel, 1961a)	personality factors (eg., Jones, 1965.) attitudes (eg., Schubert 1965.) cognitive integration (eg., Hogarth 1971.)

Obversely, moving from west to east across Table 2.4 the constructs of research retreat from measurement. Geography is more accessible to measurement than an offense characteristic such as seriousness than the socioeconomic class membership of a judge than the cognitive intergration of a judge's knowledge about crime and criminal behaviour. Thus, there seems to be a form of the attenuation paradox present by which measurement becomes more difficult and less precise as the prima facie relevance of the explanatory construct becomes more clear. Unfortunately, no simple remedy seems to suggest itself. It is perspicuous, though, that both theoretical and methodological elements are required to address the problem.

Note that it is possible to extend the taxonomic specification of the classification by setting the endogenous variables -- that is, geography, offender characteristics, socioeconomic characteristics and personality factors -- orthogonal to the exoteric/esoteric dimension. This yields a four-fold classification whose dimensions are:

1. exoteric/esoteric, that is, a dimension which expresses the relationship of the composed model to the individual judicial decision maker such that esoteric models are those comprised of behavioural antecedents which are inherent to the individual and exoteric models are those comprised of behavioural antecedents which are external to the judicial decision maker;

2. systemic/individualistic, that is, a dimension which expresses the level of analysis of the variables operationalized within the model such that systemic variables are those measured at a social economic or social structural level, and individualistic variables are measured at the level of the unique social actor. (See Figure 2.4.)

Thus represented, the research tradition of judicial sentencing behaviour does seem to approximate certain characteristics desirable to a program of research. First, results are cumulative, which is to say that later work builds on the foundation of earlier findings. Second, the efforts are comprehensive, that is, they represent a range of method, insight and theory. Lastly, it is developing, incorporating into the literature techniques and perspectives drawn from the larger social science community.

In conclusion, this chapter has reviewed representative work from the major currents of judicial behaviour research. This included accounts based upon judicial attitude, personality and social background characteristics; the structure of collegial courts and the relationship of subordinate to superordinate courts from bureaucratic perspectives; facts and characteristics of the offense; characteristics of the offender; influences of urbanization, political culture and

FIGURE 2.4: A Research Taxonomy of Extra Legal Variation of Sentencing

	esoteric	exoteric
systemic	social characteristics economic variables political/policy variables	political culture bureaucratization
individualistic	personality factors attitudes cognitive functioning	offender characteristics

political policy; public opinion about crime and about public policy, and the purposes to be achieved in sentencing.

The major findings and weaknesses of each research avenue were discussed. It was shown, lastly, that these broad traditions could be arrayed as taxons in a classification of research in which two major dimensions were discernable: the level of analysis at which variables were operationalized (individualistic versus systemic) and whether the model of sentencing developed was internal or external (esoteric versus exoteric) to the individual judicial decision maker.

The next part of the discussion develops a general critique of the inquiry into judicial behaviour and purposes a unifying solution.

Notes to Chapter Two

1. The biographical literature has become extensive over the years, for example: Swisher, C.B. Roger B. Tanney; Hamden: Archon Books, 1935; Fairman, C. Mr. Justice Miller and the Supreme Court 1862-1890; New York: Russell and Russell, 1939.; Bickel, A.M. Politics and the Warren Court; New York: Harper and Row, 1965.; Schick, M. Learned Hand's Court; Baltimore: Johns Hopkins Press, 1970, and Carter, J.D. The Warren Court and the Constitution; Grenta: Pelican, 1973. And more recently in the popular press: Woodward, B. and Armstrong, S. The Brethren: Inside the Supreme Court; New York: Avon, 1979.

2. The phrase, of course, is from Lasswell. Becker argues convincingly (1970: 125-126.) that it was Lasswell's thesis that politics could be decomposed to a competitive process that orders the distribution of will and interest which provided the necessary intellectual grounding for the growth of judicial behaviourism. See: Lasswell, H.D. Politics: Who Gets What, When, How?; New York: McGraw-Hill, 1936. and Lasswell, H.D. and Kaplan, A. Power and Society: A Framework for Political Inquiry; New Haven: Yale University Press, 1950.

3. See Chapter 1: The Importance of Sentencing.

4. The offenses for which judgements were made were robbery, murder, homosexuality and treason. See: Shoemaker, et. al., 1973: 427-430.

5. Ecological in this context refers to the judicial environment in which sentencing occurs exclusive of the set of strict legal variables. These environment variables have been taken to include aspects of political culture, local folkmoot, public opinion and other system level variables.

6. The legally irrelevant factors were: 1) whether a jury was present in the trial; 2) exceeding the median length of time between arrest and disposition, and 3) whether a defense lawyer had been assigned.

7. In a 1976 survey conducted by Centre de recherche sur l'opinion

publique only 1% of respondents spontaneously mentioned crime as an issue while 24% and 18% respectively mentioned unemployment and inflation. (Bertrand, 1982: 14.)

8. The nine offenses for which data were gathered were burglary, grand larceny, aggravated assault, aggravated robbery, simple robbery, indecent assault, aggravated forgery, non-sufficient funds and possession of narcotics. For the nine offenses, defendants were sentenced to probation in average of 54% of the cases in Pittsburgh while in Minneapolis probation was selected as sentence only half as often. And six times as often in the former as in the latter institutional sentences were shorter in length. (Levine, 1972: 334, 336.)

9. Unfortunately, this argument contains a logical error which renders it fallacious. This is discussed in the text, below.

10. At least as far as all true Guttman scales are concerned, all responses are consistent, only that some are positive, and some are negative. The positive and negative responses will, however, be grouped together such that there will not be a single negative response among the positive ones, nor will there be a single positive response among the negative ones.

11. Strictly speaking, this is known as principal component factor analysis.

12. Ulmer's findings that significant portions of blocs remained relatively invariant over time and across issues may be evidence more convincing of affective rather than instrumental behaviour on the assumption that coalitions of the latter type tend to decompose more quickly than the former. (Ulmer, 1965.) The question remains an empirical one.

13. This problem is discussed at greater length in Chapter 3, below.

14. The instrument Nagel used was the Eysenck Liberalism Inventory

15. Social structural variables are here taken as those constructs and measures which express some relationship between social

institutions through an individual rather than between individuals or groups. For example, party affiliation is considered a social structural variable because the behaviour which it references connects, in this instance, two social institutions: political parties and courts. Similarly, for religiosity. On the other hand, age and ethnic background are social attribute variables since they describe some aspect of an individual or of an individual's relationship to other individuals. This definition is intentionally fluid, but is sufficiently precise for the purposes here.

16. Kort states that in general this can be accomplished by subtracting from the preliminary value the sum of the preliminary values of the other facts and multiplying the result by the number of positive judicial votes. It is often necessary, however, to correct for negative and geometric artifacts by inflating the preliminary value of the fact being estimated and deflating the effect of the interaction of the other preliminary values. The correction procedure begins with finding the square root of the prelimary value of the factor and multiplying it by ten; squaring the sum of the collateral pivotal values and dividing it by ten; adding a constant equal to five to the preliminary value result from the first step. (Kort, 1957: 6-8.)

17. Phi correlation coefficient.

18. Discriminant analysis, so-named, assigns weights (coefficients) to attributes with the result that the linear function (equation) discriminates maximally between the classes or sets of which the attributes are members. See in this regard: Klecka, W.R. Discriminant Analysis; Beverly Hills: Sage Publication, 1980.

19. One of the principle criticisms of fact pattern analysis had centered on the arbitary manner in which initial values are assigned to fact-variables. See text, following.

20. See text, above for a discussion of factor analysis in relation to the psychometric model of judicial behaviour.

21. Prediction is here used in a narrow, restricted sense to mean degree of correlation between the number of positive judicial

votes and the sum of the weighted factor estimates. Strictly speaking, this is not prediction at all, since it does not specify the outcome of an event prior to the occurence of that event.

22. It is the case that written opinions may serve to disseminate a legal rule, for example the consequences of the denial of counsel, rather that list facts in either the criminal or civil law sense that determined a decision.

23. For the moment this does not consider the problems noted in connection with the rule of specification.

24. Efficiency is used here in the sense of producing a subset of variables which accounts for the largest proportion of variance.

25. Recall that the values of the fact variables are determined by the frequency of the facts in the written judicial opinion. A fact variable is assigned a zero value if it is not present in the written judicial opinion in which case the local term becomes zero. Alternatively, the values of the variables may be determined through factor analysis. For convenience of argument, both facts cited in an opinion and factors derived from factor analysis will be termed fact variables.

26. The discovered fact variables are assumed to be independent. If each is represented as a segment of a continuum, then the continua may be placed orthogonally and transformed such that their intersection is defined as a point of zero origin. Decisions could then be plotted against both continua as data points against axes. Therefore, in the two fact variable case, decisions are distributed in a bidimensional scatterplot.

27. For example, the best least unbiased estimator solution provided by ordinary least squares.

28. Fact pattern analysis is exclusively applied to courts of appellate jurisdiction, the US Supreme Court in particular. For cases to be considered, they must be granted jurisdiction, that is the court must determine if cases contain those characteristics which are necessary or sufficient to permit the appeal to be heard by the court. Thus, cases with the hypothetical variable X

are always granted jurisdiction, while cases without the variable are never granted jurisdiction. See also the discussion of judicial policy-making, in the text, below.

29. Indicative of extremes in this regard is the expansive US Supreme Court under Chief Justice Earl Warren and the Canadian Supreme Court, at least prior to the patriation, so-called, of the Canadian Constitution.

30. Guttman scaling and its attendant analytical outcomes were discussed above.

31. That this is intuitively the case can be confirmed by recalling that Justices will deny jurisdiction (a negative score) if the policy position of a case is perceived as approximating their ideal policy, but will grant jurisdiction (a positive score) if the policy position is perceived as distant. There must be two regions of positive scores because the distribution of possibly policy positions is symmetrical, that is, they are distributed in both directions along the dimension from the ideal policy preference.

32. The cases were drawn from the record of the California Supreme Court for 1972 and 1974.

33. In practice, the quantity of utility of granting jurisdiction would ideally be measured at the moment of the decision. Operationally, this is an impossible task.

34. Baum does not develop the notion of policy to this extent.

35. The decisions involved competition policy, price control policy, worker's compensation law, child labour legislation and income tax legislation.

36. Sentence severity was measured along a 99 point scale based on an index developed by the Administrative Office of the United States Courts. Several penalties in a single sentence were considered additive. (Cook, 1973: 602.)

37. Recall that Cook found the correlations between sentencing and public opinion more robust as larger units of opinion were considered. See text, above.

38. Multiple discriminant analysis maximizes the differences in categories of a dependent variable by testing linear combinations of the independent variables. When the dependent variable has only two categories, the techniques is in practice indistinguishable from multiple regression with a dichotomous dependent variable. (Bennet and Tuchfarber, 1975: 429-430.)

39. The ten crimes for which sentences were determined were: shoplifting; assault; car theft; swindle; forgery; burglarly; robbery; manslaughter; rape; and murder.

40. Subjects in the experiment were given photographs of hypothetical defendents.

41. For ecological models and accounts based on defendent characteristics, (see text, above), the introduction of a cognitive policy variable would add an intervening endogenous element. For explanations founded upon the social or personality characteristics of judges a cognitive policy variable may align models such that previous relationships are revealed to be spurious.

42. That is, the 16 offender/offense scenarios were not completely independent. The mix of characteristics was such that the scenarios represented a plausible range of circumstances. (see: Clancy, et. al., 1981: 531.)

43. In point of fact, Hogarth does not strictly resign to complete desuetude the utility of unconscious psychological factors. But Hogarth does state that these will be important only insofar as they "find expression in consciously held definitions, perceptions, attitudes and beliefs." (Hogarth, 1971: 23.)

44. The seven offenses were: breaking and entering; fraud; taking a motor vehicle without consent; robbery; assault occasioning bodily harm; indecent assault on a female, and dangerous driving. (See: Hogarth, 1971: 25, 147-148.)

45. Magistrates completed sentencing study sheets for seven indictable offenses (cf. note 44) for eighteen months. The questionnaire was completed "at the time of the determination of sentence" and asked judges to rate the seriousness of the offense, describe

their perceptions of the offender, identify and rank items of information about cases considered essential for decision making and lastly, provide reasons for the selected sentence. (Hogarth, 1971: 19.)

46. These variables were urban density and growth rate. Unfortunately, hypotheses are not tested which might explain the relationship.

THREE: JUDICIAL ROLE AND THE CRITIQUE OF JUDICIAL BEHAVIOURISM

The Specific Critique of Judicial Behaviourism

THE LITERATURE of judicial behaviourism, as discussed in the previous chapter, ranges wide from normative expositions to formulist scientific and quasi-scientific accounts. In each perspective and avenue of inquiry developed there has been analytical and synthetic argumentative gain.

However, if it is possible to characterize the larger body of research with a general observation it might be that judicial behaviourism has tended to focus upon concepts and variables internal to the individual judicial decision maker -- esoteric in the language of the preceding chapter. Indeed, with the ascendency of psychology as a mode of discourse in the social sciences:

> "there is little question that the predominant paradigm of judicial decision making places judges' attitudes at the centre of the process. Indeed, it is not an overstatement to assert that attitudinal approaches have become the traditional nontraditional mode of judicial analysis." (Gibson, 1978a: 912.)

Methodologically, this perspective broached the problem of judicial behaviour by positing a psychogenic agency. The general inference is that judicial decisions are understandable in terms of

attitudes, and that these attitudes can be determined from an examination of a judge's past behaviour.

An illustrative example is Schubert's Quantitative Analysis of Judicial Behaviour (1959). Based upon a comparative analysis of judicial decisions over a specified period of time, a sentencing policy, that is a set of attitudes, was described. A punitive attitude or policy was inferred from what were, comparatively speaking, highly punitive or severe sentences. Similarly, judges were described as liberal or conservative or dogmatic or open-minded because of certain taxonomic decisions made regarding the classification of sentences. (Hogarth, 1971: 10.)

Of the criticisms which can be made of attitudinal models (indeed of all esoteric accounts) the most general consists in a telos of method, namely:

> "the questionable procedure (of) the recruitment of data to be processed. What has been done is that a "category" of cases constructed on one factor common to all cases in that category also determines the responses of the Justices to the extent that it "limits" their choices "requiring" a Justice to cast his vote either for or against that factor. This factor... is the category which encompasses certain species of cases. They may not be the same categories into which the Justices themselves divide the cases... (Grossman, 1962: 293.)

As Grossman concludes, it is possible that the 'variables' to which the judges were responding in their decisions were not the same variables that were determined by the classification of cases. In other words, there is a fundamental and apparently unresolved problem of construct validity.

It is also the case that there is no empirical test, beyond the test of consistency, of the relationship between attitudes and behaviour. (Gibson, 1978a: 912.) If, in cases that have been classified as similar, a magistrate continues to decide in a similar fashion then this consistency has been taken as evidence that attitudes are determinative. This unfortunately overlays a basic circularity: attitudes were inferred from consistencies in judicial decisions which were then forwarded as explanations of those and future decisions. (Hogarth, 1971: 10.)

Becker has noted that this may amount to the precise description of the same thing in two ways. (1964: 18.) The association of complex scaling solutions of judicial votes with factor analytical reductions of the written opinions is equivalent to verbal reconstructions of past behaviour. This is not to gainsay necessarily research based upon informants or other respondents. It is notewrothy though, that judicial opinions are an instrumental use of language, which is to say its purpose lies in its capacity to rationalize.

This is prosaic enough -- however, a logical problem also ensues. The implicit ordering of the propositions of which the hypothesis is a syllogistic outcome demands that the decisional behaviour is the result of judicial attitudes toward the case. This is to say nothing more than that attitudes are formally and hence logically prior to the decision making behaviour. Given that this is so, the structure of most attitudinal accounts -- using a later behavioural event (a judicial determination) to establish the existence of an earlier psychological event (judicial attitudes) which then founds the explanation of the later behavioural event -- are vulnerable to a commonplace logical fallacy termed affirmation of the consequent.

In a simple syllogism a propositional statement may establish, through deductive reasoning, a causal relation. For example:

1. If it rains, the streets are wet.
2. It is raining.
3. Therefore the streets are wet.

However, in an instance of affirmation of the consequent the conclusion is improperly regarded as evidence:

1. If it rains, the streets are wet.
2. The streets are wet.
3. Therefore it is raining.

The streets, of course, may be wet for any number of reasons, including

just having been washed.

Consider now the generalized psychometric model of judicial behaviour:

1. If the attitude is conservative, the sentence is punitive.
2. The sentence is punitive.
3. Therefore the attitude is conservative. (1)

As in the example above, the conclusion, here appearing as statement number two, is improperly regarded as confirmatory evidence of the antecedent condition. The proper form, which would require an independent measure of attitudes, would be:

1. If the attitude is conservative, the sentence is punitive.
2. The attitude is conservative.
3. Therefore the sentence is punitive.

In operational terms, this tends at minimum to blur the distinction between the psychological state and its behavioural consequences. (Campbell, cited in Becker, 1964: 13-14.) At worst it subtends the argument that if attitudes and sentences are the same thing then there is nothing more to understand. On the one hand, the individual is completely reduced to a specialized set of attitudes, a one dimensional view. On the other hand, questions such as the manner in which specifically judicial attitudes are related to more generally political and social attitudes may no longer be important.

Perhaps the most critical stance which may be taken is one that views psychometric and psychometric-like analyses as an attempt to petition purpose from outcome. This is an obscurity which leads to the affirmation of the consequent, a state neither methodology nor theory can ameliorate. The central point to be made is that psychometric accounts share this shortcoming with other models of judicial behaviour. For example, correlative or association techniques similarly obtain from arguments based on consequents affirmed. Illustrative is Nagel's research on the social background characteristics of judges and the relationship these bear to sentencing. (1962.) The origins of this argumentative structure are substantive as well as methodological. The latter is the specific critique; the former derives the general critique of judicial behaviourism.

The General Critique of Judicial Behaviourism

Legal realism, as a philosophy of judicial decision making and as an exposition of those decisions, gained momentum in the early decades of the twentieth century in the writings of K.N. Llewellyn, Jerome Frank, Underhill Moore and others. (Rogat, 1967: 420.) Realism was culturally a search for concreteness, and in this way, realism in law

and judgement was part of a much broader social idea that extended to art, literature and social criticism. Rogat describes the tenets of realism as the conscious shift from what worked in theory to what worked in practice, from "passively and mechanically transmitting a received tradition to actively and flexibly responding to each...case." (1967: 421.) For the realists in law, the attainment of certainty in a changing society was specious.

Legal realism was closely allied in its doctrine with sociological jurisprudence, primarily in the rejection of the formal and conservative tradition of analytical jurisprudence. Fundamental to both is the normative proposition that law should yield to social purpose, that is that law should be instrumentally responsive to social needs, claims and interests. (Selznick, 1967: 478-479.)

This reconstruction of law in the light of social analysis was at the same time the essential method of sociological jurisprudence and the theoretical foundation from which social science began its analysis of law and judicial behaviour. As the early received tradition of public law took as its method the conventional juridical view of the judicial process as a set of deductive premises and philosophical axioms exegetically determined from published judicial opinions, the later behavioural study constructed its program of research upon the

tenets of sociological jurisprudence and legal realism.

In the simplest sense, the arguments concerning the social purposes of law developed by Roscoe Pound, Benjamin Cardozo and Jerome Frank were critical of the mechanical view of judicial decision making and thus by extension of the conventional analysis as embodied in public law. (Vines, 1970: 126, 132.) But more importantly, the behavioural program accepted that legal norms and institutions are rooted in a social matrix, suggesting that those norms and institutions could be studied from functional and historical perspectives. As the latter, the law could be criticized from the viewpoint of its social history, in particular how legal institutions had supported the interests of one group over another.

It is the functional perspective, however, that is most important. The realists were most concerned with what was necessary in the practical aspects of daily affairs. This sociological approach emphasized the context of law as it was applied in the community. Selznick argued this required that the legal order be thought of as a mode of organization and decision making instead of a set of principles and rules. Law was therefore a kind of activity carried on by "living men in living institutions." Important then are the "the personal and social

characteristics of lawyers, judges, police, and administrators, as well as the social dynamics of the organizations in which they work." (Selznick, 1967: 479.) More than the concern with social policy and advantage, legal realism emphasized this notion of living justice. And at the centre of that justice was the judge. All law was judge-made law, its interpretation depending upon a judge's "intuition of experience" meaning that judges should 'know how' before they 'know what'. (Rogat, 1967: 421.) In other words, it was much more important to the realists for a judge to know how to consider the balance between fact and precedent and social policy rather than the content of those policies, precedents and facts. This freed judges from the narrow logic of precedent and replaced it with judicial discretion. (Rogat, 1967: 421.)

This framework with its tenets of functional law conducted in a community of organized individuals provided social science with the basic premises that subtend the analysis of judicial decision making, namely:

1) that judicial discretion is the petard of social policy. The agency, in other words, through which the social purposes of law are expressed and changed is judicial discretion, and

2) that the selection of one policy over another is best

> understood in terms of the individual, his social background, characteristics of personality and cognitive functioning.

The latter also gives rise to the corollary that structural and sociohistical factors limit the range of legitimate social policy choices.

There is, therefore, a homology between legal realism and judicial behaviourism. It can be said to proceed at two levels. At the first, the study of judicial decision making behaviour borrowed from legal realism a critical perspective and an individual-centered vocabulary. That is to say, the analyst acquired a conceptual framework from the jurist. This was in a sense providential as it gave to the new inquiry a set of incipient hypotheses concerning the relationship between decision and decision maker.

Related to this but at another level, the new inquiry accepted, along with the set of hypotheses, an epistemology which lead to kind of theoretical closure against which it was defenseless. To illustrate: the radical conversion in jurisprudence that occurred through the realist reconstruction found direct expression in social science as the new judicial behaviourism. As the realists rejected the ostensible, traditional role of legal rules and norms in judicial determination, empirical social science rejected public law as a robust form of analysis.

It took instead the legal realist view that what was important in understanding judicial behaviour was for the most part not attributable to the published justification of a decision but attributable to the judge, including:

> "his likes and dislikes; what he had for breakfast; his relations with his wife and family; his anxieties, hopes and aspirations; religious, social, economic and political beliefs." (Goldman, 1976: 157.)

For at least the first two decades of judicial behaviourism as a distinct enterprise, this approach, which viewed each judge as unique, was the principal form of inquiry. Thus the tenets of sociological jurisprudence, without competition from alternative perspectives, became paradigmatic for the new inquiry.

It is perhaps the case that much or even most science traces a similar path in its development. However, with many of the constructs and avenues of analysis derived more-or-less from the categories of realist judicial experience, the result was that the categories of critique were limited by the categories of realist interpretation. As the latter was emphatic and even exclusive in its reliance on individual level explanations of behaviour, whole classes of variables were disenfranchised from critical analysis. This disenfranchised

class of variables was made up mainly of exoteric (see chapter 2), variables and explanations. Hence, conceptions of sentencing with a basis in social class, systems theory or role analysis are comparatively recent developments in empirical judicial analysis. (2) The result was that instead of a cumulative program of iterative theory and research, judicial behaviourism through more than half its history produced an arcade of judicial characteristics of increasing methodological sophistication. Little was done to acknowledge competing explanations, even less to integrate incipient theoretical approaches. (Gibson, 1979: 83.) It could be demonstrated that judicial attitudes were important predictors of some sentencing behaviours but it was not clear how these fit together with the content or structure of attitudes in general. (Vines, 1970: 136.) Nor was it clear how the analysis of attitudes could be integrated with social background analysis, isolating the affective and cognitive aspects of the individual from the social matrix. (Becker, 1964: 33.) Least developed of all was the question of how the work of the courts in general, and judicial decision making in particular, are performed in relation to the wider, or dominant social ethos. (Bentzon, 1968: 142, passim.)

The early rejection by social science of legalistic accounts of

sentencing disparities and decision making behaviour was based upon the normative character of those accounts. These better described what a judge ought to do than what he did in fact. Discarded as an ontological fiction, the intellectual residue of that rejection resulted in the idiographic paradigm of most judicial behaviourism. Stated simply and with economy, judicial behaviourist analysis did not model nor account for social or cultural level forces. Notable exceptions now exist, particularly over the last decade. Hogarth (1971) and Levine (1977) are among the principle investigators. However, the behaviourist account hypotheses non fingo, that is makes no hypotheses, concerning interlevel models or systems. By an interlevel hypothesis is meant one that is amenable, or contains elements corresponding to, individual, social or cultural variables.

The features of an interlevel hypothesis, so-called, include a recognition that the court exists within a highly structured social environment consisting of other judges, jurists and offenders; of fixed norms and statutes, and of social events and processes accessible as public opinion, inter alia. In other words, such an account is systemic and incorporates behavioural, social and structural elements. Instead of attempting to predict individual microbehaviours, such a perspective would concentrate on the behaviour of the system of variables.

Primary among the theoretical constructions of social behaviour which meet the criteria of the notion of interlevel hypothesis is role theory.

The idea of social role as an explanatory principle would seem to cross the categories of judicial research. To the extent that role theory recognizes that behaviour is embedded with a set of ordered relationships with significant consequences for that behaviour, it represents an important advance in complexity over bivariate models. Judicial behaviour, it is both trite and meaningfull to observe, is social behaviour. Superficially, this would seem to mean that judicial behaviour is understandable in the context of its significance for others, as it surely is for sentenced offenders. But more than this, a judge is an <u>interbehaving</u> social actor, at one level mediating the effects of offense and offender variables; legal and social structural variables at another level, and at yet another, reifying the legitimate authority of the state.

If, then, role theory treats with equal emphasis individual and extraindividual variables, it may be useful in integrating the esoteric and exoteric accounts of judicial behaviour. Representationally, role theory could be identified as a third genus of research, fitting

between and across esoteric and exoteric categories. (See Figure 3.1) The utility of role theory to develop a model which is systemic and intercategorical is the task to which the discussion now turns.

Role Theory and Role Theoretic Models

The concept of social role has been a useful instrument of research and analysis in a number of social science disciplines, among them social psychology and psychotherapy (Sarbin and Allen, 1968: 488.), group behaviour (Hare, 1962 and Jackson and McGhee, 1965.) and more generally as social interaction theory (Mead, 1934, Merton, 1968 and Meltzer, 1972.) (3) In political science, role theory has been applied with some analytical and empirical success to such diverse areas of investigation as the political socialization of children (Landes, 1976.) and international relations. (Holsti, 1970.) For students of political institutions and processes, role analysis has provided a working perspective: Wahlke described the concept of role as one which, better than any other, yields a model of the legislator as an active agent consistent with theoretical and empirical expectations concerning individual and group behaviour. At the same time, it provides a description of legislatures as institutionalized social groups which

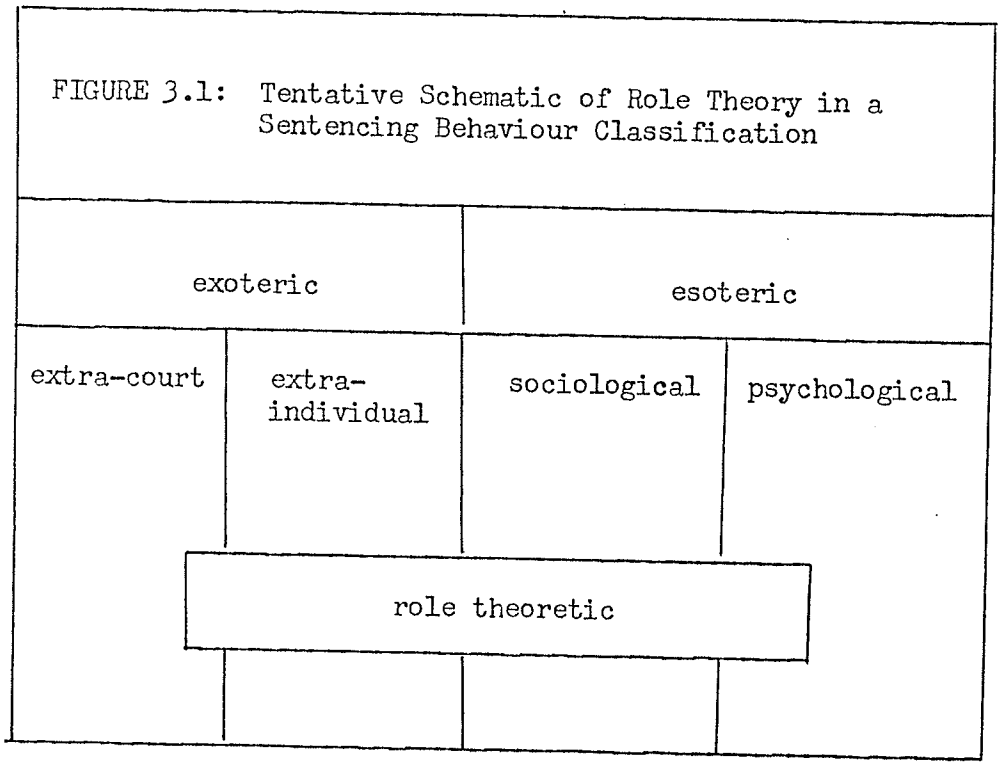


FIGURE 3.1: Tentative Schematic of Role Theory in a Sentencing Behaviour Classification

logically incorporate a model of the individual legislator and which relates the behaviour of the latter to problems of legislative structure and functioning. (Wahlke, et. al., 1962: 8.)

Role theory provides an observer with a number of analytic dimensions along which behaviour may vary: number of roles effort (Organismic involvement) and time (Preemptiveness). (Sarbin and Allen, 1968: 491-496.) 'Naturalistic' field studies have attempted to count the number of roles an individual may engage or enact. Wahlke's (1962) study of the legislator's role is illustrative of this approach. In three "role sectors", Walhke identified 12 potential substantive roles. (1962: 14.) (4) The second dimension, effort or organismic involvement, refers to the intensity of role enactment. Sarbin and Allen (1968: 492-496.) have delimited an eight part ordinal scale in an attempt to rate organismic involvement:

0. noninvolvement
1. casual role enactment
2. ritual enactment
3. engrossed enactment
4. classical hypnotic enactment
5. histrionic neurosis
6. ectastic enactment
7. bewitchment (sic).

The preemptiveness dimension concerns the amount of time a role is enacted and highlights the distinction between roles that are achieved,

that is roles which an individual may determine the period of enactment (eg., friend), and roles that are ascribed, that is roles in which an individual must enact as part of social existence (eg., adult). This distinction points as well to taxonomic differentiation among types of roles. On the one hand, there are taxonomies based on content, of which economic, political, military, kinship and religious classifications have been identified. Alternatively, taxonomic division may be organized on the basis of the type of recruitment through which role occupancy is attained. Defining the polar points of such a scale would be the achieved-ascribed distinction, with interpolated categories defined by the degree to which roles had strong achievement or strong ascription characteristics. (Sarbin and Allen, 1968: 535.)

Fundamentally, however, role is not a concrete act or behaviour, such as voting, but rather a much more tenuous construct based upon a dramaturgical analogy that has in usage become general. The term "role" can be traced to the Latin rotula which was a parchment leaf wound about a wooden roller. On this sheet was written the script for a player-actor. Indeed, the player-actor was the dramatis-personae, from which is derived persona and the English word "person". Interestingly, persona was the mask worn during performances by dramatis-personae,

though its precise meaning is unclear as it denoted the person speaking through the mask and the mask through which the voice came. Thus, by analogy, the person speaks and expresses the role. And by generalization, the person may become the role. In one emphasis then, role may mean function, office or capacity while in another it may refer to the individual performing the function, occupying the office or fulfilling the capacity. (Danto, 1967: 10-11.)

For social science, role is taken to mean a "collection of patterns of behaviour" which together represent an identifiable unit of behaviour. Perhaps the most ubiquitous proposition in role theory is that roles are associated with social positions which are in turn conceived of as an identity that designates a commonly recognized set of persons such as physician, school teacher, legislator or criminal. (Biddle, 1975: 5.) In other words, role theory is a propositional language constructed from observational and theoretical assumptions about patterns of behaviour of individuals and their relationship to social organization. By definition, the patterns of behaviour arise because individuals who occupy a position fulfill a:

> "complex of obligations and exercise a complex of rights associated with the position... The complex of obligations that define a social position are collectively called its role, and the equivalent complex of rights its status. These

> obligations and rights are defined in prescriptive rules called norms." (Chambliss and Seidman, 1971: 7.)

It is important, however, to distinguish analytically role from position. Turner insists that role refers to behaviour such that an individual enacts a role but occupies a position. (1956: 317.) In one sense, the distinction between role and position recapitulates the distinction between content and form. Social position is an aspect of form or structure while role is the content or substance through which the structure is reified and maintained.

This interpretation is reinforced by Robin who argues that a position is a "cognitive organization of expectations" and that role is a "patterned sequence of learned actions". (1974: 173.) The distinction is a powerful one: it asserts that at least some behaviours are associated with a collectivity rather than with an individual. The empirical suggestion is that individuals who occupy similar positions will enact similar roles.

This argument rests heavily on the behavioural efficacy of norms, or more generally, expectations of behaviour. Role theory is clear in its view that the social environment is ordered in terms of expectations from a number of sources. (Pfohl, 1974: 245.) Theoretically the range of expectations is diverse and boundless, but

analytically, role theory identifies three broad classes:

1. expectations that derive from norms that specify how an individual ought to behave. These expectations are generalized in content, that is, they are putative or commonly held expectations. Since the effect of norms and normative expectives are considered to vary, a central theorectical question in role analysis concerns the nature and operation of such mediating variables as scope, power, efficacy, specificity, clarity and conflict;

2. expectations that derive from individuals who occupy complementary positions, and

3. expectations that derive from social audiences, so-called. Social audience is a concrete or abstract social group or category whose expressed or perceived expectations are authoritative for the individual role interactant. (Turner, 1974: 162.)

Arguably, role theory's most important contribution to social analysis is the notion of role as the "point of articulation between the individual and society". (Turner, 1974: 165.) It offers a powerful and eclectic vocabulary for classifying behaviour that places explicitly the individual within a network of social relationships. But more significantly, with its emphasis on enactment, role theory is capable of generating interlevel hypotheses concerning the relationship of the individual to the social structure. (Sarbin and Allen, 1968: 490.) And the 'conceptual bridge' between the individual role interactant and the social structure is the expectations of role. Sarbin and Allen define role expectations as a "cognitive concept, the

content of which consists of beliefs, expectancies, subjective probabilities and so on." (1968: 497.)

In the simplest sense, role expectations define or specify appropriate conduct for an individual. More than this, however, role expectations are interbehavioural. That is to say, an individual role interactant interbehaves with other role interactants such that if expectations are not fulfilled a concatenated role failure could occur. Thus expectations are associated with sanctions that tend to increase the probability that the expected behaviours will obtain. (Sarbin and Allen, 1968: 503.)

It is from these central concepts of role expectations, behaviours and sanctions that are derived the conventional lexicon of role theory. These include role demands, role skills, self-role congruence, role audience, role conflict, and role learning. (5)

Role demand refers to implicit or explicit requirements of role behaviour. Implicit role demands may be contained in generalized role expectations pervasive throughout a culture, such as cultural models of parenting. Implicit role demands may also be adumbrative, that is unspoken but nonetheless transmitted in the form of behavioural, symbolic or artifactual cues. Explicit role demands, on the other hand,

are typically codified rules of conduct or practice, as may be seen in the standards that professional groups and societies promulgate for their members.

There is a meaningful sense in which role demands may be thought of as modelled messages. In this light, the individual role interactant is the recipient of the message - demands. For role analysis, the veracity with which these message - demands are translated, or enacted, is a function of role skill.

Generally, skills are states of psychological, cognitive and physical competence that are accessible to the individual through volition to be applied in specific circumstances. Sarbin and Allen (1968: 520) cite experimental results reported by Bowers and London that describe moderate to high positive correlations (0.51 to 0.81) between age, intellegence, social maturity, perceptual ability and role enactment ability. This would seem to suggest that role skills are acquired in a manner similar to other interactive skills, such as performance on intellegence tests and appropriate social behaviour. That is to say, role skills are learned.

Accepting this premise tentatively, role skills may be dichotomized into those which are overt, and therefore may be learned from observation, and those which are covert and require a different

mechanism of acquisition. Of the former, motoric skills, so-called, include appropriate gestures, posture, facial expression and tone of voice. (Sarbin and Allen, 1968: 517.) To this may be added linguistic elements such as speech patterns, vocal accents and argot.

Covert role skills are cognitive skills which permit an individual to "infer validly from available cues the social position of the other, and of the self, and to infer appropriate role expectations for the position." (Sarbin and Allen, 1968: 515.) Of the dimensions which may be identified as covert role skills, the most well developed theoretical concept is the notion of role taking. Mead's social psychology, with its emphasis on the interpreted meaning of gestures and acts, that is social symbols, provides a developed theoretical treatment of role taking as a central process of interaction.

If behaviour is to be considered interactive, then there must be a mechanism or aspect of behaviour that is other-regarding. Simply stated, normal social behaviour responds to the behaviour of others. However, Mead argued that individuals do not merely react to the actions of others, but instead to the behavioural and cognitive intentions of those actions. Thus, the interactive nature of behaviour-interbehaving is supported by a process in which individuals become aware of the

intentions of the acts of others and construct behaviour on the basis of those intentions. This view therefore classifies behaviour as symbolic, that is a symbol whose meaning is to be interpreted. (6) (Meltzer, 1972: 6-7.)

It is a further premise of Mead's argument that if interactive sequences of behaviour are not to breakdown under the errors of misinterpretation, then the symbolic meanings conveyed by acts must, to a very large degree be shared. That this is the case leads to the notion of role taking as a central process of social interaction. To explain: since the symbolic meanings of acts are shared, then it is possible for individuals to imaginatively complete the act of another individual before it is finished. Indeed, Mead identifies the capacity to know the meaning of a social symbol (i.e., an act) completely with the ability to imaginatively finish an act of behaviour. This ability is role taking. As Meltzer notes:

> "(t)o complete imaginatively the total act which a gesture stands for, the individual must put himself in the position of the other person, must identify with him." (1972: 8.)

Role taking is the act of symbolically placing oneself in the position

of the other and completing a behavioural act from the standpoint of that other, and then interpreting its meaning for oneself. (Hewitt, 1984: 14-6.)

Note, too, that if an individual may symbolically take the role of the other, then role taking also provides the ability to view oneself as others are viewed. This creates for the individual the ability to treat his own behaviour as an object, that is he may imaginatively complete his own acts of behaviour. This "objectification" of one's own behaviour, in Mead's argument, may only result with development of the ability to take the role of the other and leads, with significant consequences, to the generation of a "self". Thus, through role taking, an individual is able to take the position of the other, understand symbolically the meanings of the other's acts, view his own behaviour as an object, and view his own behaviour from the symbolic viewpoint of the other. (Blumer, 1972: 180-182.)

Three stages of the development of self have been identified:

1. preparatory stage in which children imitate the behaviour of others (modelling of overt behaviour leading to the overt components of role skills),

2. play stage in which children engage in role play, and

3. game stage in which role behaviour matures and social selves are generated. (7) (Meltzer, 1972: 10.)

For Mead, a mature, fully developed social self has a dual nature. On the one hand, there is the "I", the undirected, energetic impulses toward behaviour. On the other, there is the "Me" representing the generalized meanings and expectations common to the social grouping of the individual. Hence, the notion of the "mirror" self obtains: the "Me" direct and limits the behavioural tendencies of the "I" as the individual may direct and limit his social acts by taking the role of the other and, viewing the self as object, imaginatively understand the meanings of his acts from the viewpoints of others and modify or adapt his behaviour. (Meltzer, 1972: 11.)

The final stage Mead's social psychology is the notion of Mind. For Mead, the self in social action is constantly constructing tentative sequences of behaviour based on repeated surveys of social cues. This involves extracting the symbolic meanings of the acts of others, projecting covertly the sequences of actions and assessing their outcomes by simultaneously taking the role of the other and treating the self as object. This process, which may be viewed as applying to single individuals constructing tentative acts to be later behaviourally enacted, to dyads fitting together their behaviour and to society as a whole, is Mind. (8) (Meltzer, 1972: 14.)

Within the broader literature of role theory, the symbolic interactionist concept of greatest utility has been self, particularly for the problem of self-role congruence. Self, as developed by symbolic interaction, is a more or less stable viewpoint from which others' and one's own behaviour may be evaluated. If, then, a social role requires behaviour which is inconsistent with self, then self-role congruence is diminished with the likely result that role enactment will be impaired.

The notion of self-role congruence is closely related to role conflict and is often regarded as a special variant of one form of role conflict. Self-role congruence, or more accurately incongruence, is the result of (role) expectations incompatible with the meanings of self. Role conflict results from concurrent or simultaneous roles which place upon the individual contradictory expectations. Behaviourally, such conflict may give rise to inappropriate responses in one or both of the social roles. Two variants are identified within the literature. The first is interrole conflict and arises when different roles generate conflicting expectations. For example, occupational and parenting roles may generate conflicting expectations if each requires the role occupant to devote significant portions of his or her time to the

duties each entails. The second variant is intrarole conflict and is evident in instances in which others who are significant for the individual hold contradictory expectations for the performance of the same role. Sarbin and Allen identify five 'modes of adaptive response' which serve to decrease self-role incongruence and role conflict:

1. instrumental acts and rituals, that is behaviours intended to modify the events which give rise to role conflict;

2. attention deployment, that is diverting or compartmentalizing awareness such that apparent role conflict is reduced for the individual;

3. belief system adaptation, that is changes in the cognitive organization of role expectations, the importance assigned to sanctions or the priority of enactment of role behaviours;

4. tranquilizers and releasers, that is, psychoactive agents and diverting activity, and

5. no adaptive response. (1968: 541-543.)

It is interesting to note that of the five modes of adaptive response developed by Sarbin and Allen only one mode, the first, acts directly upon external events (where in this case another individual interactant is considered an external event) to modify, alleviate or reduce the demands and expectations which give rise to incongruence and conflict. Every other mode of response affects or acts to adapt the individual for whom the conflict is problematic. This emphasis

serves indirectly to highlight the central and robust position that expectations and role demands occupy in role theory. Indeed, role theory has been criticized as investing expectations with an imperative determinism. However, it is moot whether the consequences for role enactment of, say, attention deployment are less efficacious than instrumental rituals for affecting adaptive changes in expectations which give rise to intrarole conflict: to say it is so may be to make it so, at least in role analysis. In any event, role theory classes such questions as accessible to inquiry through the concept of role audience.

Role audience derives in part from the dramaturgical origins of role theory and is closely related to the concepts of significant and generalized other. As Turner describes:

> "audiences can be real or imagined, constitute an actual group or a social category, involve membership or simply a desire to be a member. It is only necessary that the expectations imputed by individuals to such variously conceived audiences be used to guide conduct. As such, the audiences comprise a frame of reference, or reference group, that circumscribes the behaviour of actors in various statuses." (1974: 162.)

This seems to suggest that role audiences need be only 'cognitively

present[8] to be important for the manner in which role enactment occurs. This, too, is related to the symbolic interactionist viewpoint that behaviour is, in a sense, tested through imaginative construction by assuming the role of the other.

Audiences, whether extant or symbolic, serve to constrain behaviour in identifiable ways. One way is to constrain behaviour such that doctrinal conformity -- the public expression of institutionalized beliefs and values -- is enhanced. Attitudinal conformity is a second manner in which the perception audience demand may affect role enactment, and refers to the internalization or private acceptance of values and beliefs. (Sarkin and Allen, 1968: 533 - 534.)

Conformity is a problematic concept within role analysis, as are the perception and effect of role conflict, the enactment processes which lead to the inference of self and the capacity to take the role of the other. This is not to say, though, that the notion of conformity <u>per se</u> is problematic, but rather that within role theory the structure and operation of the antecedents of conformity (and conflict and self) are problematic. (9)

One manner in which conformity and other constructs have been examined is from the perspective of role learning. Role theory

considers the processes by which roles are acquired to be developmental in nature: hence, the prepatory, play and game stages of Meadian symbolic interaction. But, if enactment is learned, then it may not be unreasonable to suspect that the forms of behaviour which impede enactment may also be learned.

Sarbin and Allen argue that role theory implies that roles must be learned as a complete pattern, cognitively related and organized -- a Gestalt. (1968: 545.) Further, since roles are perforce interactional, enactment must be mapped in the context of complementary roles. This points to interesting corollary that for competent enactment not only must an individual learn the expectations attendant upon his or her own role, but also the expectations of the complementary roles. In this sense, one never acquires a role but rather a role set.

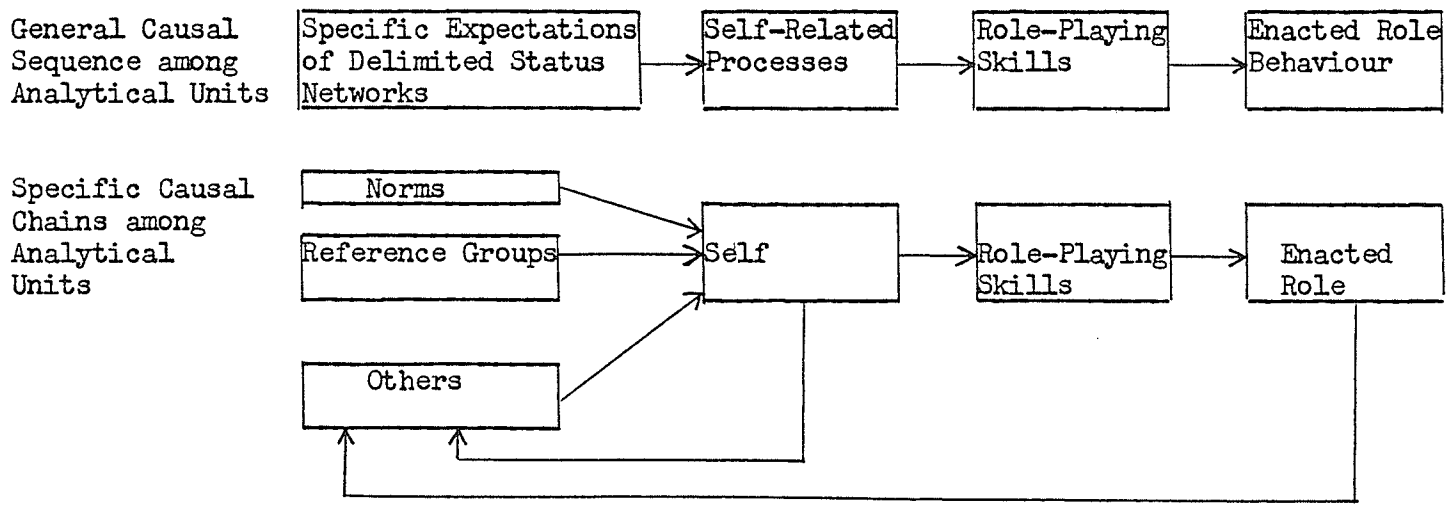
Two general stages of role learning have been identified which correspond loosely to the development of the individual. Early role learning consists primarily of the acquisition of ascribed roles, or role sets. Among these are sex roles and roles associated with kinship and property. At this point the individual may be said to be engaged in socialization. Later, second stage role learning occurs

when the individual acquires the knowledge and skills to enact particular achieved roles, such as teacher or student. Such second stage role learning has been termed enculturation. (Sarbin and Allen, 1968: 547.) Note that while this entails the perspicuous implication that the acquisition of the meanings of social action are mediated by socialization and enculturation, it also means that perceptions of self are also formed powerfully by these processes. In short, the construction of self is dependent on social meanings mediated by others. (Hewitt, 1984: 101.) There is no perception, not even perception of self, that is not social perception.

Turner (1974: 173.) argues that this observation, generalized into the postulate that behaviour is a determined function of 'specific expectations of delimited status networks' is the fundamental causal model of role theory. (See Figure 3.2, top.) For role theorists, this makes accessible one of the principle advantages of role analysis, namely the explicit emphasis that role hypotheses are inter-level hypotheses since there can be no behaviour without role and no role without socially determined meanings (i.e., expectations).

Somewhat more elaborately, role based models may be extended to nonrecursive structures in which lagged reciprocal causation is important (See Figure 3.2, bottom.). For example, role skills may be

FIGURE 3.2: Conceptual Causal Sequences of Role Theory
(Adapted from Turner, 1974: 167.)



either randomly or systematically deficient such that competing expectations cannot be cognitively integrated, resulting in intra role conflict in the role enactment. Such conflict "feeds back" to the source of the expectations, which in turn modifies their expression.

Role theory is thus invested with the analytical capacity to construct models of complex relationships. Though such models may be said to be at the limits of empirical detectability, they are robust tools for understanding social action and structures.

For the study of judicial behaviour, the lexicon of analysis provided by role theory would seem adaptable and fecund. For one thing, professional judicial socialization emphasizes complete constructions of normative expectations. (Shapiro, 1964: 18-33.) Indeed, norms of judicial behaviour are canonized into codified, sanctioned standards of behaviour. (Abraham, 1973: 330.) While such features are not unique to judges, few others impose so strongly or exhaustively as the special subculture of the court. (Hogarth, 1971: 300.) It is not surprising, then, that judges have been described as the most role conscious of all authoritative decision makers. (Flango, et. al., 1975: 277.) Conspicuous in the physical symbols of the robes and

rituals of office, the judicial role is unique in that its occupants are installed with the capacity to invoke the coercive power of the state in some instances (including the power of execution) to limit the behaviour of others. Significantly, that power can also be applied to force other individuals to comply with a judge's own conception of his role. (10)

The tenacity and pervasiveness of a judge's perception of role has been described as the central characteristic which distinguishes judicial decision makers from other value allocating political decision makers. These considerations have led Becker to highlight the concept of role as the central independent variable in the judicial equation. (1964: 40.) Thus, a role theoretic analysis would seem particularly apt and fecund. Simplifying only somewhat, it could be hypothesized that widely and strongly maintained perceptions of role could account for certain behavioural similarities among judges. Obversely, and rather more central to the general problem posed in this discussion, if competing conceptions of role could be delimited then it might be possible to develop a role theoretic account of sentencing disparities. That is, variations in the distribution, intensity and perception of expectations may give vise to variations in role enactment which are associated with disparities in sentencing decisions.

The application of role theory be judicial behaviour is the final task of this discussion. The aim of that task is to produce a tentative but elaborate inventory of testable propositions, informed by role theory, with general implications for other social and political analyses.

This chapter developed a critique of the research tradition of judicial behaviour of which special and general version were presented. It was first argued that empirical judicial behaviour research, particularly psychometric and other attitudinal perspectives, were frequently flawed in that the posited logic of the models was based on the fallacy of affirmation of the consequent. It was then argued that a more general criticism could be levied, namely that many of the categories of observation of empirical judicial behaviour research derived from the legal realist interpretation of sentencing. This intellectual paternity provided the behaviourist accounts of judicial decision making with important hypotheses based in a broader cultural critique. But, at the same time, it channelled the conduct of empirical inquiry into specific categories, particularly those centered on

individual psychological functioning. Thus, there can be a line of inquiry traced from a cultural critique to jurisprudence to contemporary behaviourist research.

However, it was argued that role theory could hold special promise for interpreting judicial behaviour as it conceptually crosses individual societal and cultural levels of analysis. In this manner, role analysis was termed an interstitial perspective, located between esoteric and exoteric accounts and thus constituting a third genus of research.

A representational sampling of the major constructs of role theory was presented. This ampling included: role demands, role skills, self-role congruence, role audience, role conflict and role learning. It was observed that this armamentum of role theory elements could generate highly complex models of social action incorporating nonrecursive linkages.

Lastly, it was argued that the lexicon of role theory appears fruitful for analysis of judicial behaviour. On the one hand, judicial behaviourism shares nominally a number of important terms, among them judicial socialization, judicial expectations and judicial role. A role derived model of judicial behaviour is the final analytical task of the discussion.

Notes to Chapter 3

1. For example, see: Schubert, 1964: 341-351.

2. Stone (1973) makes this argument, from which the one here was adapted. However, Stone restricts his argument to one particular attitudinal analysis of sentencing. As developed here, the argument is of course that individual level hypothesis derived mostly from sociological jurisprudence hindered systemic and other more overtly social structural treatments of judicial behaviour.

3. The earliest formalist treatment of role theory can be found in R. Linton The Study of Man; New York: Appleton-Century, 1936.

4. Identified were clientele-roles (party role, areal role, pressure group role, administration role and other roles); specialized roles (leadership roles, expert role and other roles), and incidental roles (friendship role, kinship role, group-member role and other roles).

5. This short list of role related concepts is not intended to be exhaustive. Instead, it surveys briefly the main terms of analysis around which there appears to be stable consensus in the literature. The treatment of these concepts in the text is largely based on the consolidation by Sarbin and Allen (1968).

6. Mead's social psychology gave rise to the term "symbolic interactionism" which has become generalized and represents a larger body social theory.

7. Hewitt's reading of Mead distinguishes two stages of development of self: play and game stages. (1984: 102.) The demarcation between the prepatory and play stages outlined by Meltzer is imperceptible to empirical instrumentation, but is of value theoretically in the developmental sequencing of self acquisition.

8. This argument has given rise to the dictim of symbolic interaction that "mind is social and society is mental".

9. This implies that conflict is identified and modelled fully in terms of its antecedents. Such an approach makes accessible constructs which might otherwise be untestable.

10. That is, a judge is able to enforce respect for his role through penalties of contempt.

FOUR: A ROLE THEORETIC INTERPRETATION OF JUDICIAL BEHAVIOURISM

Role Research and Judicial Behaviour

GENERALIZED ROLE EXPECTATIONS, it was argued in the preceeding chapter, can constitute potent social perception variables both for the interpretation of the actions of others and images of self. Of the implications this holds for analyses of social processes and structures, it is central to observe that role conferred advantages are important for values held by self and others, and the valuation of self and others can be inextricably tied to social roles. Nascent in this perspective is a criticism of the conventional social science conception of the attitude - behaviour linkage. Role theory stands that conception on its head, arguing that behaviour may influence attitude as much or more than the reverse. If beliefs and attitudes are the products of behaviour, damaging inferences are evinced for psychometric models of judicial behaviour. The immediate hypothesis is that, ceterus parebus, sentencing is the outcome of enacted judicial role and its antecedents. The theoretical basis obtains a sociogenic model, in which social structural variables give rise to the content of both attitude and behaviour.

In a partial test, experimental findings indicate that, under

conditions of precisely defined role interaction, private opinion changes so as to bring it into closer correspondence with overt behaviour. Specifically, it was found that if an individual publically supports a point of view with which he privately disagrees, his private opinion will modify in the direction of the position advocated. (Festinger and Carlsmith, 1969: 19.) Similarly, Sarbin and Allen (1968: 531.) report that in a social experiment individuals debated issues taking positions they did not accept privately. Audience tallies for the winning position were falsified, with the result that the winner tended to shift his private opinion on the debated issue in the direction of the position argued.

These results suggest that perceptions of self, and the concomitant cognitive complexes of beliefs, attitudes and opinions, are mediated by how an individual understands others' perceptions of his behaviour.

In a more general vein, Garfinkel has reported that individuals experienced confusion and disorientation when they could not competently perceive a "sense of structure" in the social environment. In interaction experiments, participants presupposed a common sense body of knowledge and assumed that each, participant and experimenter, shared this knowledge. (Garfinkel, 1972: 370-371.) Phofl notes that these findings support the argument that social structure is an experiential

construct that does not depend on any systematic ordering of relations beyond the actor: sense of structure can be generated by the individuals. The "sense of structure", so-called, is the subjective experience of the self in social interaction. It evinces the interactionist perspective of role theory and draws attention to the socialized aspect of self, what has been termed the internalization of position. This highlights the manner in which individuals fit together their actions by defining one another's contribution to the joint act. (Wilson, 1970: 698.) This is what is meant by "sense of structure": viz, the tendency to understand the phenomenal world in terms of roles, never wholly suspending the tentative nature of that understanding. (Pfohl, 1974: 251.)

Social roles may therefore be understood as conditioning the limits of individual behaviour. An interesting series of experiments, using parent-child relationships as a basis, concluded that certain behavioural events, notably verbal self-disclosure behaviour, ententes little association to sociological or personality characteristics. The findings suggested:

> "...that an inculcated awareness that one is male or female, black or white, does not by itself govern one's rate of self-disclosure. In fact, contrary to expectations, such a generalized awareness seems to have little if any effect

> by itself. On the other hand, one's perception of one's role relationship to a given target parent does seem to condition one's willingness to disclose oneself to that particular person. Self-disclosure exhibits definite patterns that are clearly relational in character. (Balswick and Balkwell, 1977: 285.)

Though the effects of personality were not eliminated, their expression was tempered by the context of role relationships. Thus, social roles tend to mask information about the individual. Only when role performance departs from its associated normative expectations is it likely that characteristics particular to the individual will be revealed. (Jones, et. al., 1966: 171-179.)

Individuals it has been found also tend to judge other's behaviour in role-salient rather than personality-salient terms. Observers in an experiment were given five pseudo-scientific explanations for instances of co-operative and unco-operative behaviour. These were, first, unconscious conflicts within the individual; second, social approval and reinforcement; third, external circumstances such as coercion; fourth, informal role environments and fifth, formal role environments. The observers consistently chose role model explanations over all others. (Bierhoff, 1976: 369-374.)

If social perception is biased by social roles, then interpersonal encounters, or interaction more simply, provides an important

informational basis for self-evaluation and social judgement. But the scope of encounter performances is also restricted by role structures that confer unequal control over the duration and content of interaction. It has been reported, for example, that role conferred advantages distort the perception of the relative abilities and power of persons. In a pair of experiments, Ross noted that both observers of social interaction and the disadvantaged participants in the interaction, were "apt to underestimate the extent to which the seemingly positive attributes of the powerful (interactants) simply reflect the advantages of social control". (Ross, et. al., 1977: 485.) As well, Calder had argued that to the extent that occupations have become associated with generalized role expectations, knowledge of another's occupation can stand as evaluative information about that other. (1974: 121-125.)

This tendency has been described as a special case of the general attribution error. The error so-called is a predisposition to underestimate the influence of role determinants and overestimate the degree to which social action and events reflect the personal attributes of individuals. (Ross, 1977: 193-196.) Attribution error has been supported empirically in a number of settings. In one, members of an audience were made aware that a speaker was under an experimentally defined compulsion to act in a certain manner. Yet, even in this case,

the listeners drew a close connection between the observed verbal behaviour and the speaker's personal dispositions and opinions. Specifically, listeners assumed a correspondence between pro-Fidel Castro remarks and the speaker's private opinions, despite the knowledge that the speaker was under an experimentally imposed compulsion to communicate that opinion. (Jones and Harris, 1967: 1-24.)

Attribution error results in the inference of broad personal dispositions and the anticipation of greater cross-situational consistency in behaviour than actually occurs. (Mischel, 1973: 252-283.) In other words, much of the observed stability of behaviour stems not from enduring personality characteristics, but instead from the ordering of social relationships. (Jones, et. al., 1966: 178-179.)

The suggestions these results proffer for the analysis of judicial behaviour are perspicuous. It would not be unreasonable to hypothesize that judges' perceptions of self and others is mediated by the prepotent normative expectations of judicial roles. Further, personality and other ego characteristics would be influenced by variables associated with judicial roles.

However, the larger part of the judicial role literature is not concerned with questions of this nature. Instead, much of the effort

in constructing role theoretic explications of judicial behaviour has centered upon the degree to which judges are oriented toward precedent in their decision making vis-a-vis an orientation to exercise some measure of discretion, or 'judicial creativity'. As noted at the outset, this represents a fundamental question in jurisprudence with some -- notably legal theorists -- writing with the belief that adequate precedents exist for all sentencing situations, requiring but the trained legal technology of right reasoning to instantiate the precendential rules, and others -- often judges -- writing that additional factors such as the needs of society, a rehabilitative treatment for offenders or their own sense of justice is required for rational sentencing. (Traynor, 1977: 1-13; Alschuler, 1976, passim.)

In one formulation, Walker frames the precedent orientation as a law-regarding/public-regarding continuum of judicial behaviour. Magistrates were varied in the degree to which they reported themselves bound by precedent. The law-regarding judge tended to sentence narrowly; that is, he appeared to consider little else in the disposition of a case other than the offense and what the relevant law specified as a proper judicial response. Alternatively, the public-regarding magistrate appeared to sentence broadly; that is, he was more likely

to consider extenuating circumstances, the functional purpose of sentencing (viz., whether to attempt to punish or rehabilitate) and the public's evaluation of justice. (Walker, 1973: 5-7.) It was found that law-regarding judges sentenced rather more severely to the extent that they were more likely to regard institutional incarceration as the norm and probation as an uncommon determination. Public-regarding judges tended to regard institutional incarceration as uncommon and probation as the norm and hence were classified as sentencing with leniency. (Walker, 1973: 11.) The role explanation was extended and found to hold for civil cases as well. There, public-regarding judges were more likely than their strictly legalist counterparts to hear cases of marginal or innovative merit, support the claims of individuals over the claims of business, and extend government regulation into areas of the public good such as health and education. (Walker, 1973: 18-19.) Walker concluded that "a judge's role perception can be used as a predictor of his behaviour both in the criminal and civil area and can thus be termed a general predictor." (1973: 19.)

However, the dichotomy of judicial role types must be considered as ideal: a more recent study of American appeal court judges refined the approach by adding a third, more centralist position -- the realist -- to denote judges who tended to differentiate among types of sentencing

occasions and exercised judicial discretion accordingly. The extreme or polar positions emerged as first a judicial innovator who felt obliged to make use of judicial discretion as widely as possible, and secondly, an interpreter type who felt that all judicial law making should be held to a minimum. The realists exhibited characteristics of both types. (Howard Jr., 1977: 919-921.) The professional orientations, that is role behaviour, were moderately associated with a liberal-conservative split in voting behaviour. Interestingly, past political orientations were not found to be associated with either political voting tendencies or role behaviour. In fact, the latter was a better predictor of policy outcomes of cases than past political allegiances. (Howard, Jr., 1977: 935, 936.)

In a related analysis Sarat outlined four judicial role types argued to be defined by the degree of 'incentive' a judge demonstrated in sentencing. Briefly, the greater the incentive, the more likely a judge would admit the use of discretion such that high incentive judges would more often include extralegal information in sentence determinations. The classifications were defined as: the ritual or game type which saw case disposition as a formalized legal ritual; the task or program type which viewed sentencing as a problem solving situation; the power or status type which were judges most concerned

with their influence relative to other judges, and the precedent or obligation type which most closely approximated the traditional legal view that characterizes sentencing as a preoccupation with normative principles and precedents. Ritualists displayed little discretion, that is little incentive, and tended to sentence with comparative lenience. Task judges were active in their use of discretion and were also found to sentence leniently. However, status role judges sentenced with discretion and severity, while precedent magistrates employed little discretion and were severe sentencers as well. (Sarat, 1977: 376-383, 393.)

Unfortunately, the Sarat effort is faced with a number of serious methodological shortcomings. In particular Sarat's use of evaluative criteria for classifying decision making behaviour lessens the efficacy of the results. Nonetheless, they remain significant as they explicitly relate judicial role conceptions with specific sentencing behaviours.

Note too that while judicial activism, precedent orientation and law regardingness are important theoretical constructs, they are difficult to differentiate empirically. It would seem theoretically advisable to consider them as parts of the same thing unless cogent evidence can be brought to bear on their being held as unique and distinct. Tangentially, this raises a separate problem, namely that

even if essentially similar dimensions of role behaviour are recognized as much the same thing, there remains the suspicion that judicial decision making behaviour is too complex to be cabined by a single dimension. (Howard, Jr., 1977: 931.) Flango and Schubert provide some confirmation of this suspicion when analysis revealed that judicial discretion was better described as the intersection of two separate dimensions, public orientation and precedent orientation. (1969: 197-220.) The former differentiated judges who relied on their own personal standards of sentencing from those who incorporated community standards into their sentencing determinations. Precedent orientation, on the other hand, distinguished those magistrates who regarded precedent as significant for their decisions from those who only admitted its importance in the abstract.

In a later work, Flango and others dichotomized public and precedent orientation and rotated the dimensions until they were orthogonal, yielding a four-fold classification. (1975: 277-289.) The first type might be termed the 'Law Applier': these magistrates attach a high value to precedents, but have little regard for the social consequences of their decisions. A related type is the so-called 'Law Extender' who, though also placing high value on precedent, is also conscious of the public consequences of his sentencing practices. 'Mediator'

magistrates tend to be pragmatists: with less regard for precedent, and little concern for the public impact of his sentencing, the mediator defines his role as an arbitrator of specific conflicts. The final role type, that of 'Policy Maker' tends to import little precedent into his work. However, he is actively aware of the social nature of his decisions. This type approximates the 'Law Extender' role, but without being filtered by a strict adherence to precedent. (See Figure 4.1)

In a conceptually related approach, Ulmer argued that if judicial behaviour was multidimensional, there are at two ways in which behavioural change could occur:

> "(a) judge's behaviour which locates him on a given dimension at time t_1 might locate him at a different position on the same dimension at time t_2. Or a dimension appropriate for explaining a judge's behaviour at time t_1 might cease to exist for the judge at time t_2. As a corollary, a behaviour dimension may come into existence at time t_2 though it was nonexistent at time t_1. Finally, two dimensions, A and B, may exist for the judge at t_1 and t_2 with behavioural responses to the same item located on dimension A at t_1 but dimension B at t_2." (Ulmer, 1974: 42.)

Ulmer found, based upon scaled longitudinal judicial voting data in the U.S. Supreme Court, that it was both possible and reasonable to

FIGURE 4.1: Classification of Precedent and Public Orientation. (Flango, et. al., 1975: 277-289.)

Orientation		public orientation	
		low	high
precedent orientation	hi	law applier	law extender
	low	mediator	policy maker

interpret changes in the pattern of voting as intradimensional shifting in judicial political activism for two of the five justices. The voting behaviour of the remaining three, it was concluded, could not be described by the political activism dimension. (Ulmer, 1974: 65-67.)

This conclusion, as Ulmer observes, is important as it tends to undermine support for earlier scalogram analyses that located judges in collegial courts on the same dimensions. In particular, the Schubert psychometric model placed all justices on two scales for each of 16 terms. Although the Ulmer effort is not conclusive with final effect, it does question simplistic dimensional assumptions.

The core of this idea of dimensionality is reproduced in Vine's adaptation of Walhke's notion of the segmented role to describe a purposive dimension, that is what judges perceive to be their purposes, and a decision making dimension, that is, to what extent judges perceive their function to be one of making rather than interpreting law. The notion of role segmentation developed by Walhke refers to subsets of the set of norms which constitute a particular role. Any role can be divided analytically into role sectors based more or less upon identifiable and specialized relationships to complementary or counter roles. The larger the number of complementary roles, the larger the potential number of role segments. (Walhke, et. al., 1962: 14.)

Vines identified four 'purposive role conceptions': the ritualist, the adjudicator, the policy maker and the administrator; and three decision making role variations: the law interpreter, the law maker, and the pragmatist. Ritualist judges identified most strongly with the complexities of litigation as their purpose while adjudicators cited the judgement of conflicting arguments as the essential purpose of being a judge. Policy makers emphasized judicial adaptation of law; administrators saw as the purpose of judges the supervision of the development of law in the lower courts. (Vines, 1969: 468-469.) As decision makers, law interpreters favoured a restricted role in the interpretation of statutes, while law makers obversely advocated active judicial participation in the creation of law. Lastly, pragmatists seemed to fall somewhere between interpreters and law makers, recognizing that circumstances dictate the kind of decision making that must be engaged by a judge. (Vines, 1969: 474-476.)

Interesting and useful as these typologies may be, they reveal what has become a consistent problem in role theory as a form of analysis and as a method of inquiry and exposition in judicial research. The problem lies specifically in the delineation of role types: law-regarding vs. public-ragarding vs. realists; ritual, power and task

types; law appliers, law extenders, mediators and policy makers, and ritualist, adjudicators, policy makers and administrators are descriptive typologies that are assumed to reflect generalized role orientations which specify more or less the content of decision making behaviour. Indeed, most investigations of judicial role orientations proceed solely through the development of an empirically based typology. But while typological analysis is not inutile, taxonomic classification becomes incidental and even antitheoretical if the result is a unique typology immured from other research.

Further, taxonomic classification is based on an implicit argument that the categories of classification are, in effect, naturally occurring categories. They should, in other words, be relatively perspicuous and stable across observers. But the same judicial role data yielded at first four, then five, distinct role types. (Vines, 1969; Glick, 1971.) In short, the concern with classification and typology has not led to the discovery of "natural" role orientations.

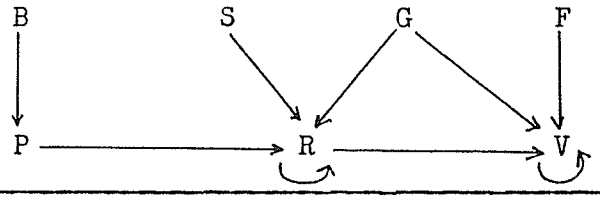
Nor has judicial role research, as a body, exhibited a capacity to make predictive statements about individual behaviour. In part, this seems due to the mechanism of linkage between role orientations and role behaviour not being adequately specified at the conceptual level.

(Gibson, 1979: 86.) The operationalization of those linkages has also proved to be difficult and disappointing. The failure of role theory as predictive theory stems as well from treatments which define role variables as independent (Schubert, 1964.), dependent (Becker, 1966.), and intervening. (Grossman, 1968.).

In an important critique of role theory as it is applied to judicial behaviour, Gibson notes that a complete role model should incorporate a mechanism describing the acquisition of role orientations or modal role behaviours; it too should attempt to elucidate the dimensions of role behaviours, precedent and public orientation unlikely being exhaustive. An explicated model of role behaviour must also be generalizable, at least across institutional contexts and lastly, a role model should be extensible to judicial behaviour other than sentencing. (1979: 96-97.)

In an attempt at just such a comprehensive model, Goldman and Jahnige employ the general logic of causal modelling to construct a nonrecursive, and therefore complex, prototype of judicial role behaviour. (See Figure 4.2) The model predicts that the social background characteristics of judges (B) are causally related to political characteristics (P), such as party affiliation, partisan activism, and political attitudes and values, which are in turn related

FIGURE 4.2: The Goldman and Jahnige Nonrecursive Model of Judicial Role Behaviour (Goldman and Jahnige, 1976: 208.)



to the role orientation (R) of the judge. The nature and expression of professional socialization (S) and group interaction (G) are also causally prior to the role precepts of the judge. This last linkage is important and unique as it represents the accumulative effects of role alters upon the conception of role in self. Thus the model takes into consideration that role concepts are subject to change over time due to feedback from previous decision making behaviour. That is, as the group of role alters reacts in fact or in abstract to the decision making behaviour of the individual, the precepts of role orientation will change, either so as to modify or to become installed in the individual with greater and more impervious stability. Role orientation, group interaction, and almost as an albeit necessary theoretical afterward, the pattern of facts (F) in a case immure the judicial decision (v). (Goldman and Jahnige, 1976: 208-209.)

While Goldman unfortunately does not operationalize nor test the model, it does seem to represent an advance over previous uses of role theory in judicial behaviour, at least in terms of scope and generality. However, Vines' earlier research provides at least a partial test. The differing conceptions of role — the purposive adjudicator, policy maker, administrator and ritualist, and the decisional types of law

maker, law interpreter and pragmatist -- imply different political orientations as they express divergent policy positions. In particular, the decisional role orientations seem to represent with relative veracity some ideological precepts of American competitive politics, namely that the state, and by extension the courts, should intervene and regulate as little as possible vis-a-vis the contention that, because of its position, the state is an ideal arbiter of the expressive interests of groups and individuals. However, Vines found little or no relationship: neither social attributes nor the degree of attitudinal conservatism or liberalism was found to be associated with judicial role orientations. Political party affiliations were unrelated as well. (Vines, 1969: 478,481.) Thus, based on Vines' work, the entire portion of the model west of the role variable could be eliminated as invariant and unrelated.

What remains, interestingly, recalls the normative models of judicial behaviour discussed in the earliest chapter. Professional socialization (S) provides the content of the judicial role while the reasoned bargaining of the collegial bench (groups interaction, G) tempers the impact of that role upon the interpretation of the facts (F) of the offense or case.

Yet this model too was discarded. Consistent and widespread disparities in the votes of appelate judges and the severity of sentences of judges of first jurisdiction cannot be ascribed to either professional socialization nor the patterns of facts.

It is not unreasonable to suspect that the problem, at least in part, lies in the analysis itself. For one thing, role theory has been applied in both descriptive and explanatory contexts as well as to individual, social and cultural levels of analysis.

At the level of the individual, role refers to the definitions and expectations associated with a particular identity, or with the structure and proximity of relationships with complementary roles. Lacking here, however, is a theoretical niche for social structure with the result that this use of the theory tends to overlook what is beyond the individual in the social system.

At the next level, role designates the construction of interaction that constitutes a relationship. The utility of this approach is found within the theorem that relationships cumulatively define a position in the social system. Difficulty arises with this usage as it tends to blur the distinction between interaction, that is behaviour, and normative expectations.

Cultural level role analysis concentrates on the systemic clustering of roles and the manner in which such clusters come to be recognized as a position. Here, the interactive basis is undervalued, resulting in a law-like and static view of social interaction. (Robin, 1974: 172-179.)

All three approach share a number of common elements: first, that behaviour has a normative basis; second, that all positions have associated with them sets of expectations that are shared, in varying degrees, among persons related to those positions, and third, that an individual's behaviour will conform to these expectations to a lesser or greater degree depending upon the nature of those expectations, the saliency they have for the individual and the sanctions attached to them. (Hare, 1962: 119.)

Much research grounded in role theory does not extend beyond this set of shared assumptions. (Pfohl, 1974: 245.) Indeed, as Gross notes, expectations are presumed to be the essential ingredient in behaviour by role theorists. (Gross, et. al., 1958: 18.) Role analysis is "rule governed", viewing individuals as "surrounded by and acting beneath the press of expectations". (Pfohl, 1974: 245.)

In consequence, role theory has been criticized as being narrow

and static, leaving unaccounted the requisite variety -- unexplained variance in another sense -- of observed social interaction. The conventional interpretation emphasizes the prescribed complex of complimentary expectations which posits a priori the existence of distinct, identifiable roles. This logic of exposition is such that:

> "(i)nteraction in a given situation, then, is explained by first identifying structures of role expectations and complexes of dispositions, and then showing that the relevant features of the observed interaction can be deduced from these expectations and dispositions..." (Wilson, 1970: 699.)

This emphasis has fostered the tendency in role research to develop taxonomic classifications. By observation or experiment, an investigator can produce taxonomic divisions consisting of two, three or more types. And though classification may be an elemental and indispensible stage in the development of an analytical science, it has contributed to typological competition without an apparent ground for reconciliation.

This reliance on static taxonomies of expectations has been termed by Turner as oversimplified and a modern version of normative or cultural determinism. (1974: 166, 173.) Instead, role interaction can be understood as a stochastic -- in the sense of being tentative -- process

of reciprocally responding self and other, challenging or reinforcing the perception of the role of alter, stabilizing or modifying one's own role enactment as a product of this inference-testing transaction. (Buckley, 1968: 503.) Rather than defined, distinct roles this conception is one in which role-making is foremost, that it is a process of 'discovering and creating more or less consistent patterns of behaviour'. (Turner, 1962: 22.) Individuals can thus be said to act as if there were roles, by their behaviour making them definite and explicit. The formal role is essentially then an elemental set of rules which provides the skeletal structure upon which interactive roles are built and validated. It is interesting to note that in this view bureaucratic organization is a distortion rather than a prototype as it regulates the adaptive capacities of the process. (Turner, 1962: 22.)

This interactive conception fits rather more closely with the body of empirical social psychology reviewed earlier. If social interaction is in a real sense constructed, then the general attribution error can be understood not as an error but as the misplaced experiential outcome of interpretive action. The extent to which it is misplaced is the extent to which personality centered arguments are installed as explanations for observations of role.

These treatments of role theory may with some reasonableness be termed static and dynamic. The former places at the center of the analysis a catalogue -- or taxonomy -- of expectations and behaviour, while the latter emphasizes instead the processes by which individuals build and maintain repetoires of role behaviours. These formulations represent not only divergent perspectives within the larger theory, but engender also different interpretations of social structures and their maintenance.

The conventional or static paradigm of role analysis as it is developed in judicial theory proceeds on the basis of delimiting the association of substantive attributes of the individual to variations in perceived role and role behaviour. Thus, the yardstick of political partisanship or inherited social class is laid against the yardstick of judicial role.

Alternatively, the interactive paradigm makes available for inquiry the process of role behaviour itself. The emphasis is shifted away from the manner in which social characteristics or personality constructs mediate the expression of role orientations and, in consequence, sentencing and instead focusses upon the manner in which the construction and behaviour of the role itself contributes to decision making.

(Wilson, 1970: 707.) The point this makes, and it is fundamental, is that there is no necessary relationship between an identifiable role orientation and sentence. In short, law applier, law extender, mediator and policy maker, and other taxological types are for this analysis empty taxons.

A Role Theoretic Model of Judicial Behaviour

The distinction between the static and dynamic versions of role theory leads to certain assertions about the modelled features of social interaction. The former leads to a strict constructionist perspective in which predictions about behaviour are made from inventories of categorial expectations, which, for the analyst and individual interactant, exist with independent compelling reality. Obversely, the latter develops a view of interaction that is stochastic in nature. That is, behaviour is tentative, with the emphasis placed on the processes by which it is built by interactants: predictions are made about the patterns of behaviour. (See Table 4.1.) The dynamic perspective in role theory is thus concerned primarily with the processes in which roles are enacted and less with the content of that enactment.

Indeed, Gibson has argued cogently that role models based upon

TABLE 4.1: Static and Dynamic Perspective of Role Theory.

static	dynamic
1. behaviour is the result of role expectations	1. behaviour is the result of immanent stochastic sequences
2. delimiting the source and content of expectations defines the structure of the system in which behaviour occurs	2. structure of the social system is projected on to social interaction by participating actors.
3. treats social objects (eg., expectations) as having an independent reality	3. treats social objects as dependent upon interaction
4. describes objects or events	4. describes systems or relationships
5. permits recursive models	5. permits nonrecursive and recursive models

dynamic or interactive axioms perforce cannot determine the substantive content of the dimensions of judicial behaviour. Gibson instead defines judicial role as an orientation or belief about the range of behaviour that is proper for a judge. Though this corresponds apparently to a conventional role interpretation of normative expectations, when applied to judicial decision making in sentencing behaviour, orientation refers to the process rather than the content of the decision. A decisional role orientation hence:

> "identifies for the judge the criteria that are legitimate for proper decision-making... Thus the basic function of decisional role orientations is to specify what variables can legitimately be allowed to influence decision-making criteria. Role orientations are conceptualized as normative weights attached by each judge to different decisional stimuli. A stimulus viewed as illegitimate, therefore, would receive a weight of zero." (Gibson, 1979: 87-88.)

In contradistinction to attitudinal models such as Schubert's psychometric argument or sociological models such Grossman's treatment of social background characteristics, Gibson argues that it is meaningless to say that a sentencing decision was either 'liberal' or 'conservative'. To a political policy-regarding observer, judicial decisions appear to support liberal or conservative viewpoints if those decisions

seem to coincide with certain features of either specific regieme policies or general cultural orientations. However, for the role-regarding observer, it is more accurate to say that a decision is neither liberal nor conservative, but rather that judicial role orientations admit criteria into a judge's decision making behaviour which may be classed as liberal or conservative. Similarly, taxonomic division of substantive role classifications, such as Vines' lawmaker and law interpreter types, fail at prediction as role orientations can vary within each taxa.

A role theoretic model, in Gibson's conception, treats as independent variables the interaction between role orientation and decisional criteria. That is, for example, public opinion may be identified as a decisional criteria for a particular subset of cases. (eg., Cook, 1973.) However, the effect of that criteria is mediated by a role orientation toward that criterion. Further, neither the criterion nor the orientation are predictive. It is the interaction term, public opinion weighted by the role orientation toward public opinion in judicial decision making, that is predictive. In symbolic terms:

$$Y = b(Z_1X_1) + b(Z_2X_2) + \ldots + b(Z_nX_n)$$

where:

Y = decision

X = criteria

Z = role orientation toward criteria. (Gibson, 1979: 91.)

The multiplicative terms (Z_nX_n) are the weighted effects of decisional criteria.

Interestingly, this recalls Levine's treatment of political culture, judicial selection systems and sentence decision making. Briefly, Levine found that judges in Minneapolis and Pittsburgh could be differentiated in the manner in which they came to decisions about sentences. Judges in the former city were 'universalistic' in that they tended to rely on professional doctrine in sentencing: the nature of the offense, penal deterrence and institutional rehabilitation. In the latter city, judges were 'particularistic' in the sense that they reported emphasizing the character of the defendant, his circumstances and family in sentencing decisions. (Levine, 1972: 342-346.) The choice of sentencing criteria, in a role theoretic interpretation, points to systematic differences in role orientations across groups of judges in the two cities. Levine also noted that the political cultures of the cities supported judicial selection systems that tended to select judges that respectively, were practicing jurists and overwhelmingly middle class or partisan political office holders

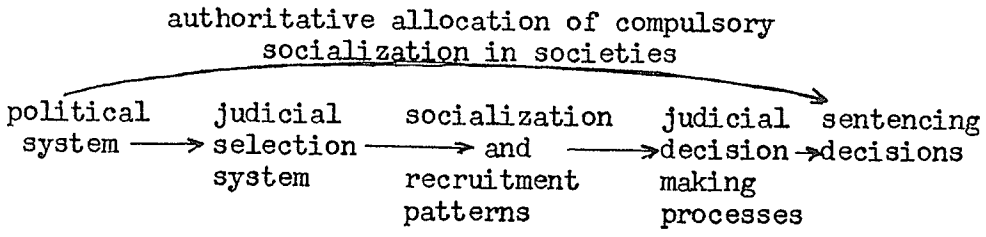
from working class backgrounds. That observation supported the inference that the 'covariation of the dominant socialization and recruitment patterns of the judges in each city with their decision making processes suggests a causal linkage'. (Levine, 1972: 348.) And though an empirical relationship was not explored, Levine's argument recapitulates broadly the logic of Gibson's role model. This is that each group of judges defined their purposes differently and from that, employed different criteria to determine sentences. Indeed, Levine's overall model is amenable to a role theory interpretation. (See Figure 4.2.)

Other results also become interpretable to a role theory perspective. Kritzer (1979b) argued that broadly disseminated folkfoot of political culture has an impact upon trial court functioning. That is, diffuse expectations rising from general cultural patterning affect judicial perception of role and sentencing behaviour.

A linkage from culture, or perhaps subculture, to individual behaviour is explicit within role theory. Suggestive of just such a linkage are results reported by Hogarth (1971), Cook (1977), and Harries and Brunn (1978).

The latter researchers found that a comparison of scaled sentence

FIGURE 4.3: General Causal Ordering of Political Culture, Judicial Selection and Sentencing Behaviour (Based on Levine, 1972.)



severity varied, with substantial and enduring consistency, with geographic boundaries that demarcated culturally homogeneous groupings. One geographic area was marginal economically, based upon low yield agriculture, and relatively low income. It was also characterized by anomalously high social pathologies such as homicide, high unemployment and low educational attainment. The second geographic area was more homogeneous ethnically, had a highly skilled workforce and was socially stable in comparison. Attitudinally, residents of the former region expressed preferences for sentences of greater severity than the latter. Indeed, though the mechanism was not specified, magistrates did tend to sentence with greater relative severity. (1) (Harries and Brunn, 1978: 114-116.)

Cook, in her examination of sentences of Vietnam Selective Service offenders, argued with important effect that about 56 per cent of the variation in such sentences could be accounted within a model constructed of measures of lagged public opinion and the behaviour of bureaucratic role alters including prosecutors, defendants and Department of Justice officials. Cook held that "a high correlation between public opinion and judicial decisions flows naturally from this noncoercive linkage (ie., socialization) without any apecial mechanisms for communication". (2) (Cook, 1977: 569.)

Hogarth also found that public opinion was an important predictor in judicial sentencing behaviour, particularly in instances in which judges formed images of public opinion. When such images were punitive, judges tended to sentence with greater severity. (3) (Hogarth, 1971: 197, 220.)

These results are consistent with the observation that attentiveness to messages is markedly modified by a persistent subcultural patterning founded, among other things, upon images and attitudes anchored in group norms. (Janis and Smith, 1965: 193, 198.) In other words, it is not unreasonable to observe that formal and informal socialization of judicial role installs with the judicial decision maker expectations that in particular circumstances sentences ought to reflect nonlegal -- exoteric in the language of this discussion -- criteria.

If, however, judges may be said to be attentive to demands or expectations for certain sentencing behaviours, then it consistent to argue that sentencing behaviour is a response to those demands. This describes, in nascent but clear terms, a quasi-cybernetic model of judicial behaviour in which, if it can be assumed that other things are constant, judges perceive messages within public opinion, collegial decisions and appellate reviews, and respond with a sentence of lesser

or greater severity, or of different penalties. Winick and others, for example, have argued that judges in their decisions may explicitly or implicitly be reacting to public opinion by sentencing with general deterrence in mind, to colleagues by sentencing with personal reputation in mind, or to appellate courts by sentencing with higher court reversal in mind. (Winick, Gerver and Blumberg, 1964: 124.) Hogarth's results support this view, in that socio-legal constraints such as the felt conformity to the law and to sentencing practices of other judges, the perception of public opinion, and the perceived accordance with other magistrates in sentence practices were found to affect sentences. (1971, 202-210.)

However, for a role theoretic interpretation, the central problematic task is not to accumulate an array of results consistent with that interpretation, but rather to model role behaviour such that those results form elements in a (relatively) self-contained and consistent representation. This approach, it is useful to note, replicates the argument that theory ought to be grounded in empirical data. (4) That is, the accumulative collation of converging results gives rise to hypotheses of increasing complexity. These hypotheses also accumulate, contributing to the formalization of theory. And in the process of

validation and verification, theory is tested against larger and more complex empirical data. Hence, if the general model developed asserts that, under certain conditions, judicial sentencing behaviour can be understood as role behaviour, the model must also specify the nature of those conditions, the manner in which they affect role behaviour and what testable hypotheses may be formulated.

In this regard, Blalock has stated that theories must contain theorems and axioms both. (1969: 10.) The latter, following natural science, are propositions that are assumed to be true. The former are deduced from the axiomatic propositions, and are tested against empirical data. This, then, is the formalistic method the discussion will follow: that is, the identification of propositions grounded in empirical analysis that may be taken as axioms, the deduction from these of testable theorems, and the development of a formal model which summarizes the axioms and deduced theorems.

A principle tenet of both the larger body of role literature and the argument developed here is that expectations, or more properly the perception of behavioural expectations, mediate role behaviour. The role behaviour in this case is defined as sentencing behaviour, while the expectations have been defined rather less vigorously in terms of

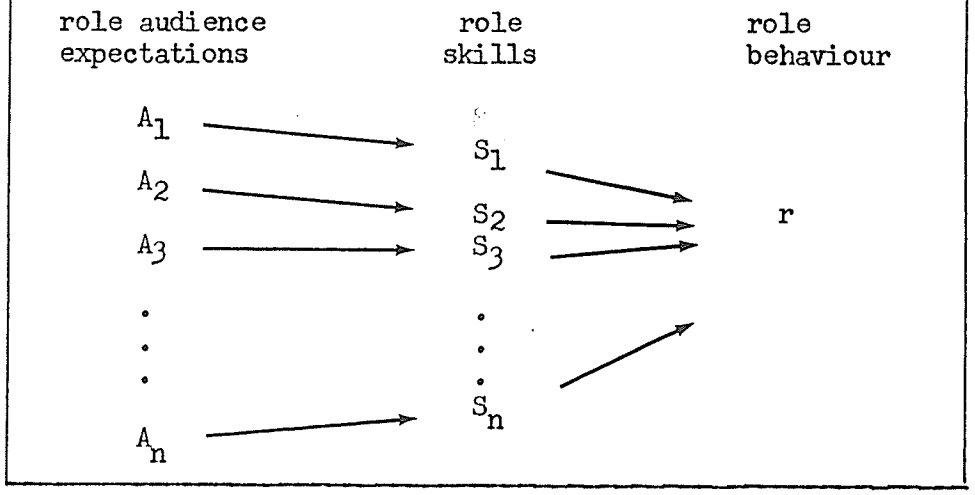
perceived demands from a number of sources, including other judges, other jurisdictions and the community. Thus, the basic model traces a line from expectations to behaviour. (5) In the language of role theory, role audiences mediate role behaviour. Further, role theory argues strongly that role audiences need only be "cognitively present". (6) (Turner, 1974: 162.)

A second principle tenet is that role skills affect the transcription of expectations into behaviour. Skills, to recapitulate briefly, are states of psychological, cognitive and physical competence that are accessible to the individual through volition. (Sarbin and Allen, 1968: 520.) Indeed, Gibson has stated that a fundamental question in role analyses, and one which differentiates approaches in role theory, is the empirical question of the degree to which role expectations are accurately transcribed in role behaviour. (1979: 94.) (See Figure 4.4.)

Now, if the task is to take these principle tenets as axioms in a testable model, they must have empirical referents. That is to say, they must be operationalized. (7) And borrowing from Blalock, they must also be:

1. grounded in empirical data, and
2. constructed of variables that are taken to be "directly

FIGURE 4.4: General Model of Judicial Role Behaviour



> linked causally; axioms should therefore be statements that imply direct causal links among variables". (1969: 18.)

An empirical referent, grounded in data, which may be taken as an axiom of perceived expectations, is the gravity or seriousness of an offense. Rather more accurately, seriousness or gravity is an aggregate surrogate variable for a number of expectations from a variety of sources. For example, Gottfredson's review of empirical findings on sentencing reported that the serious of the offense was highly significant in the determination of sentence. (1980: 181, 183.) Tiffany likewise found that the variation in the severity of a sentence was associated to the greater degree with variation in the severity of an offense. (1975: 378.) Similarly, Hogarth's examination of sentences, the manner in which offender and offense information contributed toward determination and the attitudes and purposes of judges in sentencing, concluded that there was a robust tendency for judges to organize and integrate information concerning a case around their assessment of the gravity of the offense. (1971: 296.)

The sources of estimations of seriousness are manifold: as noted above, Cook argued that public opinion of the apparent seriousness of Selective Service violations was highly correlated on both a state and regional level with the sentences for such offenses. (1977: 580.) And

Hogarth too found that if a judge was concerned about public opinion. (1971: 197, 332.) Seriousness also cabins statutory expectations, in the form of prescribed lower and upper limits for penalties, and professional expectations, in the form of sentences determined in other courts of first jurisdiction and in appellate courts. In short, the perceived seriousness of an offense is an empirical axiom for expectations of judicial sentencing behaviour as it aggregates for the individual decision maker community, professional and statutory evaluations of the content of an enacted role.

Expressing, then, this empirically grounded axiom as a causal statement:

1. the greater the perceived seriousness of an offense, the greater the severity of the determined sentence.

And, as a corollary to Axiom 1, above:

2. the lesser the perceived seriousness of an offense, the lesser the severity of the determined sentence.

An empirical referent of role skills, also grounded in the data on sentencing behaviour, is the policy purpose of sentencing. By policy purpose is meant the classic goals, so-called, of sentencing: individual deterrence, general deterrence, retribution, incapacitation and rehabilitation.

Role skills, it has been argued, mediate the transcription of

role expectations into behaviour. Thus, the perceived seriousness or gravity of an offense is taken to be an axiom with references to role expectations, then those skills which mediate the effects of the expectations upon behaviour — the severity of a sentence -- are skills which are consequential for sentencing behaviour.

Again, Hogarth's seminal study is illustrative in this regard: different sentencing policies were associated with the tendency to rate as effective specific penal measures. In particular, judges with high rehabilitation scores on a sentencing policy scale tended to rate institutional incarceration and probation as effective sentences (i.e., likely to change the future behaviour of the offender), judges with high general and individual deterrence scores rated fines as effective; high retribution policy scores were moderately associated with probation as an effective penal measure while incapacitation was not associated the estimated effectiveness of any measure systematically. (Hogarth, 1971: 81.) Since the range of offenses for which comparisons were made between sentencing policy and rated effectiveness of penal measures were controlled, it may be concluded that, for the same offenses, differences in sentencing policies were consequential for sentencing decisions. This, it is noteworthy to emphasize, is the central observation around role skills, namely, that they modify the behavioural

effect of expectations.

In convergent results, McFatter noted that sentencing policies were important for both the information considered central to sentencing and the severity of the determinations. (1978: 1490.) Experimental results for ten offense and ten offender combinations were clear in that the adoption of a particular sentencing policy was predictive for the severity of the imposed penalty. (McFatter, 1978: 1495.)

More recently, Clancy and others concluded that judicial dissensus regarding the purposes (viz., policies of general and individual deterrence, incapacitation, retribution and rehabilitation) that sentencing ought to serve was systematically related to sentencing disparities. In particular, the policy of incapacitation yielded significantly ($p < .05$) longer periods of institutional incarceration while the reverse was for the policy of rehabilitation. That latter policy was also associated with longer periods of probation supervision and comparatively severe financial penalties. Lastly, both policies of deterrence, and the policy of retribution were associated with lengthier sentences of probation supervision and comparatively greater financial penalties. (Clancy, et. al., 1981: 543.) It is thus evident that as role skills mediate the effect of expectations upon role enactment, sentencing policies mediate the effect of perceived seriousness upon sentencing decisions.

Tangentially, note the interesting implication this holds for the study of judicial sentencing behaviour. The clear suggestion is that, for the same offense, judges will impose different sentences based, at least in part, on the policy purposes it is their aim to achieve. Sentences, therefore, in and of themselves do not distinguish judges; instead they are differentiated by the policy outcomes of those sentences. (9)

However, it is difficult to express this relationship between sentencing policy and sentencing decisions as a causal axiom except as a series of conditional statements which describes the effect of the relationship upon sentences for a variety of offenses. What is required to express the relationship in the axiomatic form is a generalization of the conditions under which the relationship is effective. That is, what events or circumstances tend to select for the conditional effect of sentencing policies and what events or circumstances tend to suppress the effect.

It is possible to access the structure of this relationship by examining in detail the nature of the empirical linkages among seriousness, policy and decision.

Clancy's evidence is of direct relevance: eight different configurations of offender and offense characteristics formed the basis of

sentencing decisions by judges for each of the two crimes of bank robbery and fraud. It is possible to examine two sets of circumstances for the same offense, one which represents a slightly less serious or grave version of the offense and one which represents a slightly more serious or grave version. (See Table 4.2) A young offender without a criminal record represents a more serious level of offense than an old offender even with a long criminal record as the former is beginning rather than near the end of a criminal career. Additionally, the more youthful offender was a member of a criminal organization and was the principal participant in the offense. (Clancy, et. al., 1981: 531.)

For the first, less serious offense, the sentencing policy of retribution tended to elicit relatively severe sentences, while for the second, more serious offense, the sentencing policy of individual deterrence tended to elicit comparatively severe sentences. Thus, for the same offenses differentiated by perceived seriousness, judges tended to select different sentencing policies, but without substantive differences in the severity of sentences imposed.

Hogarth's data also lends support, though indirectly. A factor analysis of judicial attitudes and the policy purposes of sentencing

TABLE 4.2: Less Serious and More Serious Versions of Fraud Offenses (Clancy, et. al., 1981: 531.)

	Offense Versions	
	1: Less Serious	2: More Serious
Offense Circumstances		
offender age	old	young
record	long	none
role	accomplice	principal
guilty by	plea	plea
dollar amount	low	low
criminal organization	no	yes
weapon	not applicable	not applicable

revealed that institutional sentences were determined for serious violent offenses when the decision making was guided by factors informed by general deterrence and retribution. (Hogarth, 1971: 128, 129, 152, 157.) In comparison, less serious minor property offenses resulted in sentences of probation and suspended sentence when the factor was informed a policy doctrine incorporating individual deterrence, and sentences of fines, suspended sentences and institutional incarceration when the sentence was informed by a doctrine incorporating general deterrence. (Hogarth, 1971: 129, 157, 158.) In general, Hogarth found that:

> "... if magistrates rate the offense as being particularly grave, they are more likely to give greater weight to the deterrence of potential offenders (i.e., general deterrence), punishment (i.e., retribution) and the removal of the offender from society (i.e, incapacitation) than either reformation (i.e, rehabilitation) or the deterrence of the particular offender (i.e., individual deterrence)." (1971: 295.)

In short, the perceived seriousness of the offense selects for sentencing policy.

To recapitulate: relatively less serious offenses tend to select for sentencing policies which lead to relatively less severe sentences, and relatively more serious offenses tend to select for sentencing

policies which lead to relatively more severe sentences. However, it was also found, that for the same offense, different sentencing policies lead to sentences of varying severity, a complicating if not potentially contradictory result. It appears that, in some circumstances, sentence decision making is impelled by offense seriousness through sentencing policy, and in others by sentencing policy alone.

These results can be integrated into consistent model if a third area of perceived offense seriousness is postulated, that of moderate seriousness. Green's results, cited by Gottfredson, are instructive: in a study of 1437 cases sentenced by eighteen judges, it was concluded that "as cases move from the extreme of gravity or mildness toward indeterminacy (of seriousness) judicial standards tend to become less stable and sentencing increasingly reflects the individuality of the judge." (Green, cited in Gottfredson and Gottfredson, 1980: 184.)

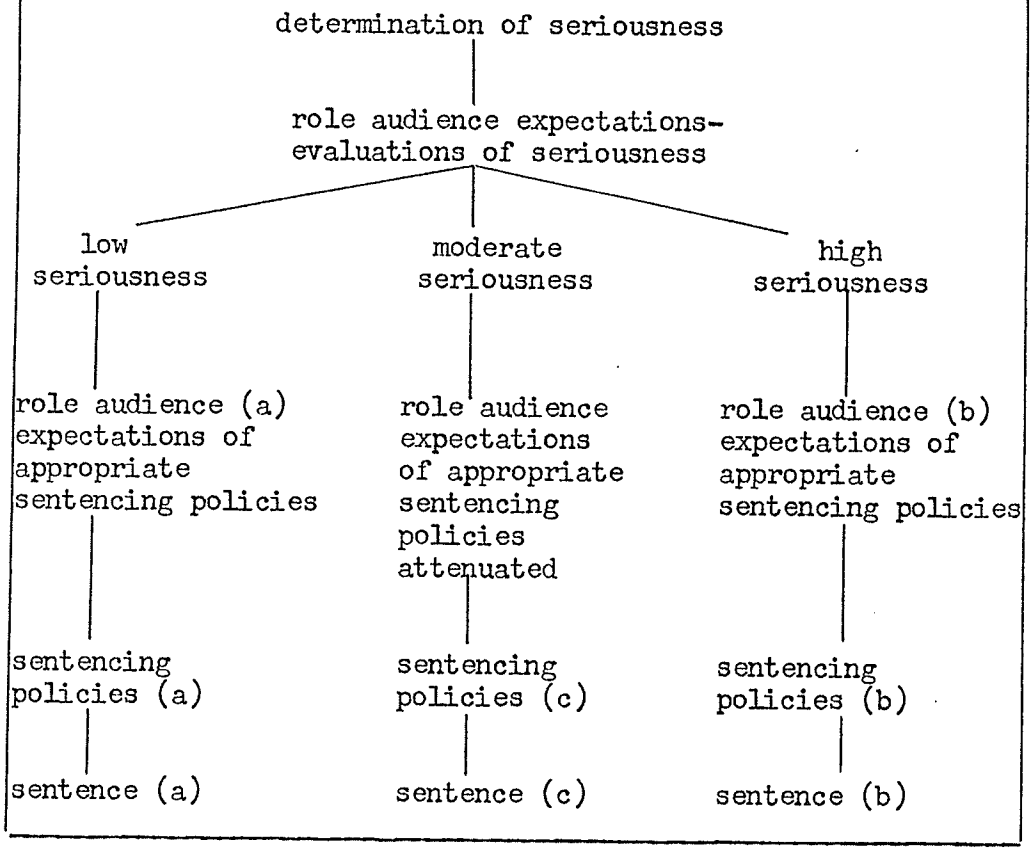
Expressing this in the language of role analysis, an iterative process of role taking, imaginatively completing the act of sentencing, determining the responses of role audiences and role enactment — sentencing -- is elucidated. Presented as a series of steps or stages, the gravity or seriousness of the offense is determined by a judge imaginatively taking the role of the other. The determination of seriousness will be either low, moderate or high. If seriousness is low, the

role taking process conjointly locates self (the judge) in relation to a role audience whose perceived expectations select sentencing policies leading to a sentence of low severity. Similarly, if the initial determination of serious is high, the process of role taking locates self in relation to a role audience, different from the audience relevant under conditions of low seriousness, whose perceived expectations select sentencing policies leading to a sentence of high severity. If, however, the initial act of role taking leads to a determination of moderate seriousness, then the role taking process does not fix self relative to a role audience, but instead permits sentencing policies to be selected from self. (See Figure 4.5.)

This model presents the social act as a sequence of stages, iterative and complex. In real time terms, the amount of time elapsing from the beginning of a social act to role enactment is infinitesimal: role location of an other or role audience occurs in a social ecology; attribution of expectations occurs next. And, in locating the role of the other, the role interactant reciprocally locates self. Role enactment is the 'overt behaviour pattern that terminates the social sequence'. (Sarbin and Allen, 1968: 507, 514.)

Now it is possible to express causal axioms dealing with seriousness

FIGURE 4.5: Role Taking Process in Judicial Sentencing Behaviour



sentencing policies and sentence severity. (following Axiom 1 and Axiom 2, above):

3. the greater the perceived seriousness of the offense, the greater the effect of perceived role audience on the selection of sentencing policies (a);

4. the greater the effect of perceived role audience on the selection of sentencing policies (a), the greater the severity of the sentence;

5. the lower the perceived seriousness of the offense, the greater the effect of perceived role audience on the selection of sentencing policies (b);

6. the greater the effect of perceived role audience on the selection of sentencing policies (b), the lower the severity of the sentence;

7. the more moderate the perceived seriousness of the offense, the lesser the effect of perceived role audience on the selection of sentencing policies;

8. the lesser the effect of perceived role audience on the selection of sentencing policy, the greater the effect of self sentencing policies (c), and

9. the greater the effect of self sentencing policies (c), the less predictable the severity of the sentence.

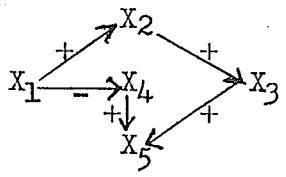
These may be modelled as three causal systems corresponding to

the conditions of high, low and moderate seriousness. (See Figure 4.6.) Note that all the relationships are for this argument assumed to be linear and recursive. They are not all positive, however. In Models 2 and 3 the paths p_{21} are inverse, while in Model 1, path p_{41} is inverse. For the moment, the implications these hold for deriving propositions for testing and total path correlations are postponed. Note that seriousness is treated as an exogenous condition in all three models. This, together with the presentation of what is essentially a nonrecursive (reciprocal) relationship as three devolved or separate models of behaviour, allows the entire relationship to be mapped as a linear system built completely of recursive pathways. The advantages this holds for analysis are a variant of the systems model known as block-recursive systems. (Blalock, 1969: 71-74.) Such a construction permits recursive systems of variables to be developed within 'blocks', with reciprocal causation permitted between blocks or for some values of the exogenous variables. There are, however, limitations associated with this approach, which are discussed below.

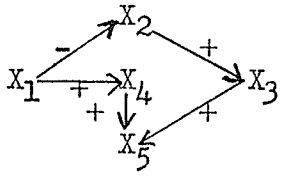
The models display graphically the relationships cast as verbal statements in the inventory of Axioms developed above. As Blalock

FIGURE 4.6: Causal Models of Sentencing Role Under Conditions of High, Low and Moderate Seriousness

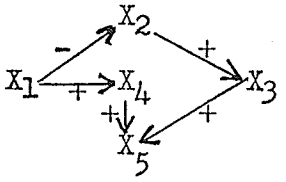
Model 1: High Seriousness



Model 2: Low Seriousness



Model 3: Moderate Seriousness



X_1 = seriousness
X_2 = perception of role audience
X_3 = perception of audience sentencing policy
X_4 = self sentencing policy
X_5 = selected sentencing policy

notes (1969: 20.) propositions of this nature may be posed as direct predictions of the nature: 'there will be a high positive correlation between perception of role audience and audience sentencing policies, and between audience sentencing policies and sentencing policies employed in sentencing under conditions of either low or high offense seriousness'.

With the structures of the relationships thusly modelled, it is possible to derive a number of theorems which may stand as tests of the theory. There is a difference, it ought to be noted, between predictions implicit within Axiomatic propositions and theorems which are tests of the model. The former are by theoretical design assumed to be causal and true. That is, in any test of verification, they are either not subject to direct test or are considered fundamental relationships the "truth" of which quantitative estimators may or may not find accessible. In contrast, the latter provides more direct tests of the variable structures — and hence an indirect test of the theory — by providing specific predictions of the direction, sign and magnitude of the model.

From the Axioms identified above, and the modelled systems of relationships in Figure 4.5, it is possible to state 15 axiomatic

propositions. Note that even though the second and third models have the same signs for the same relationships, the different initial states of seriousness (X_1) produce significantly different propositional predictions:

1. Model 1:

1.1 the higher the offense seriousness, the stronger the perception of role audience (p_{21})

1.2 the stronger the perception of role audience, the stronger the perception of role audience sentencing policy (p_{32})

1.3 the stronger the perception of role audience sentencing policy, the more likely it is to be selected as the sentencing policy (p_{53})

1.4 the higher the offense seriousness, the weaker the perception of self sentencing policy (p_{41})

1.5 the weaker the perception of self sentencing policy, the less likely it is to be selected as the sentencing policy (p_{54})

2. Model 2:

2.1 the lower the seriousness, the stronger the perception of role audience (p_{21})

2.2 the stronger the perception of role audience, the stronger the perception of role audience sentencing policy (p_{32})

2.3 the stronger the perception of role audience sentencing policy, the more likely it is to be selected as the sentencing policy (p_{53})

2.4 the lower the seriousness, the weaker the perception of self sentencing policy (p_{41})

2.5 the weaker the perception of self sentencing policy, the less likely it is to be selected as the sentencing policy (p_{54})

3. Model 3:

3.1 the more moderate the seriousness, the weaker the perception of role audience (p_{21})

3.2 the weaker the perception of role audience, the weaker the perception of role audience sentencing policy (p_{32})

3.3 the weaker the perception of audience sentencing policy, the less likely it is to be selected as the sentencing policy (p_{53})

3.4 the more moderate the seriousness, the stronger the perception of self sentencing policy (p_{41})

3.5 the stronger the perception of self sentencing policy, the more likely it is to be selected as the sentencing policy (p_{54}).

From the axiomatic inventory and the causal variable systems, it is now possible to produce an inventory of deduced theorems taking the form of a series of partial correlations that ought to approximate or attain zero: (Blalock, 1969: 20.) These specific theorems of magnitude are listed in Table 4.3. Theoretically, three other theorems are possible, based on the total correlation along a variable system path. Based on the Costner - Leik Sign Rule, the total correlations along path p_{541} in Model 1, and along paths p_{5321} in Models 2 and 3 are negative. (10) The assumptions which guide these deductions are,

TABLE 4.3: Deduced Theorems of Sentencing Role Behaviour: Partial Correlation Predictions of Zero

Model 1	Model 2	Model 3
$r_{13.2}$	$r_{13.2}$	$r_{13.2}$
$r_{15.2}$	$r_{15.2}$	$r_{15.2}$
$r_{15.3}$	$r_{15.3}$	$r_{15.3}$
$r_{15.4}$	$r_{15.4}$	$r_{15.4}$
$r_{25.3}$	$r_{25.3}$	$r_{25.3}$

firstly, that there are no other direct links between the variables, and secondly, that all the variables have been adequately measured.

It is important to observe that, though paths p_{45} in Models 1 and 2, and path p_{53} in Model 3 have been specified as positive, in practice they may be revealed to be significantly attenuated. That is to say, the direct correlations between these covariates may be very low because of the dynamics of the general model. Keeping this in mind, the variables of each model may be written as a linear recursive equation. (11) (See Table 4.4) Because of the attenuation of paths p_{45} in Models 1 and 2 and path p_{53} in Model 3, three equations have been deleted from the equation systems:

Model 1: $X_5 = b_{45}X_4 + b_{41}X_1 + u_5$

Model 2: $X_5 = b_{45}X_4 + b_{41}X_1 + u_5$

Model 3: $X_5 = b_{53}X_3 + b_{32}X_2 + b_{21}X_1 + u_5$

If included, these equations would have resulted in overidentification, that is more equations than unknowns (variables) in the models, rendering unique solutions to the equations impossible. This, then, constitutes the complete exposition of the proposed model and its attendent axioms and deduced theorems. The final part of the chapter and thesis examines a new set of terms compatible with the view of role theory as a dynamic perspective and the models developed above.

TABLE 4.4: Linear Additive Recursive Systems for the Causal Models of Sentencing Role Under Conditions of High, Low and Moderate Seriousness (12)

Model 1: High Seriousness

$$X_1 = u_1$$
$$X_2 = b_{21}X_1 + u_2$$
$$X_3 = b_{32}X_2 + b_{21}X_1 + u_3$$
$$X_4 = b_{41}X_1 + u_4$$
$$X_5 = b_{53}X_3 + b_{32}X_2 + b_{21}X_1 + u_5$$

Model 2: Low Seriousness

$$X_1 = u_1$$
$$X_2 = b_{21}X_1 + u_2$$
$$X_3 = b_{32}X_2 + b_{21}X_1 + u_3$$
$$X_4 = b_{41}X_1 + u_4$$
$$X_5 = b_{53}X_3 + b_{32}X_2 + b_{21}X_1 + u_5$$

Model 3: Moderate Seriousness

$$X_1 = u_1$$
$$X_2 = b_{21}X_1 + u_2$$
$$X_3 = b_{32}X_2 + b_{21}X_1 + u_3$$
$$X_4 = b_{41}X_1 + u_4$$
$$X_5 = b_{54}X_4 + b_{21}X_1 + u_5$$

Conclusion: A New Role Theoretic Nomenclature

The model of judicial role behaviour developed as a theoretical construct incorporating a dynamic view of social interaction, particularly as that interaction is iteratively built has been fully elucidated as a tentative, but elaborate explication of three specific models of sentencing behaviour. These models allowed 15 specific predictive axioms and 15 specific deduced theorems available for testing. At this point, certain speculations can be forwarded for the longer term development of role theory as an analytical perspective for judicial behaviour in particular and social research in genral.

The development of role behaviour was described as an interactive process of taking the role of the other, imaginatively completing a sequence of behaviour, adjusting that sequence based upon the expected behaviour of the other, and so forth such that role enactment could be as a stochastic series of linked social events, some of which were internal and some external, but all directed toward a relevant social other.

The perspective this engenders is very much a linear view of social relations in which one stage occurs before the next in a fluid but sequential manner. Consider, however, the nature of the "dependent

variable" -- sentencing policy -- of the three empirical models.

Sentencing policy is the immediate antecedent to sentencing, in the logic of the model. As such, it offers to the individual the menu of behaviours from which is constructed the social act. If, then, the universe of sentencing policies available which are consequential for behavioural outcomes is considered a repetoire of policies, then the policy repetorie is, effectively, the role repetoire.

However, it must be the case that the policy role repetoire is not the only role repetoire of judicial behaviour. To explain: sentencing can be thought of as the end act of a larger set of judicial behaviours. Other aspects of judicial behaviour available for study include the process of adjudication prior to determination of sentence, the role behaviour which occurs during bargaining for plea, interjudicial role behaviour which occurs on collegial courts and, in broader terms, the generalized social role of judge in society.

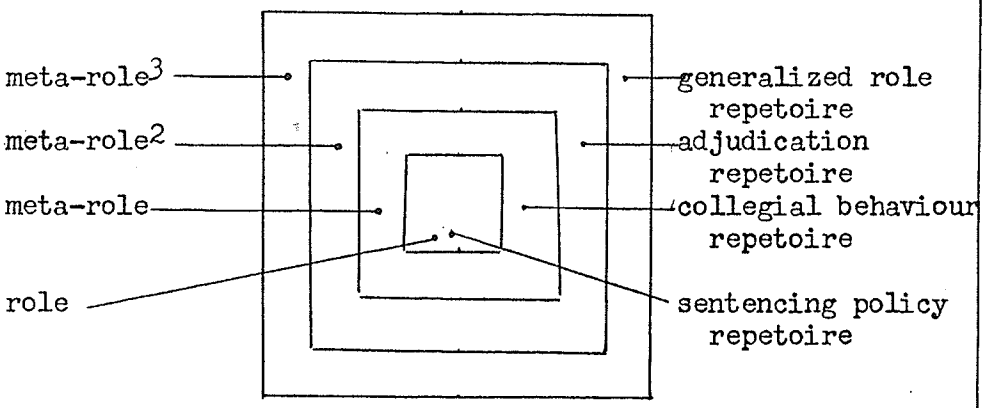
If viewed as elements in a linear array, then the concatenation of these elements proceeds step-wise, through the array until sentencing is complete and, presumably, the behavioural process returns to some ground or zero state at the beginning of array. The questions this conception poses for the analyst center on the linkages between the

elements and the values of the conditions which lead to transitions between the elements.

The difficulty with linear, or for that matter hierarchical, formulations is that early stages of a sequence or process are not accessible during later stages. For example, if there is a generalized judicial social role, the expectations of behaviour attendent upon that role are, in a sense, present but dormant during sentencing behaviour associated with a policy repetoire. That is, they must still be accessible to the individual role interactant and consequential for his or her behaviour. However, a linear construction of role repetoires or behaviours does not preserve the information of antecedent elements in later stages. Its representation is not fully isomorphic.

One manner in which this may be overcome is to re-cast the structure of a set of role repetoires as a nested grouping of elements. That is, a policy repetoire of sentencing behaviour is structured within a repetoire of interjudicial collegial behaviour, within a repetoire of adjudication, within a repetoire of generalized judicial social roles. (See Figure 4.7.) For the theory of role behaviour, this suggests a nomenclature which designates the "innermost" behavioural repetoire as role, the next "outward" behavioural repetoire as

FIGURE 4.7: Hypothetical Nested Role Structure



meta-role, then the next as meta-role^2, and so on for meta-role^n role repetoires.

Taking further this notion of nested role repetoires, the questions can be posed concerning the nature of the linkages among the role repetoires, the mechanisms which effect movement from one repetoire to another, and what critical values of the mechanisms signal a transition across role repetoires. That is, role behaviour is organized in nested repetoires across which the locus of behaviour transits when the values of certain exogenous variables exceed or fall below threshold levels. And since the locus of role behaviour responds to threshold values of exogenous variables, role behaviour can be said respond to role push. Stated in another fashion, there are role gradients associated with repetoires of role behaviour. The locus of behaviour must be pushed beyond the threshold of the repetoire gradient by an exogenous agent before the behavioural locus may access another role repetoire set.

The value of this new nomenclature -- nested roles, role repetoire, meta-role, locus of behaviour, role gradient and transit threshold -- lies in its capacity to re-structure role theory and role analysis. If, in tests, the specific hypotheses concerning the relationship of expectations (seriousness), skills (sentencing policy) and behaviour

(sentence) are borne out, then a new set of concepts is available to elaborate the hypotheses into a role theoretic model. Succinctly, judicial role repetoires are nested such that behavioural expectations and skills of the more specific role are contained within the more general meta-role^{n}. The locus of behaviour, that is the role behaviour being enacted changes — or transits — from one nested repetoire (eg., adjudication behaviours) to another (eg., sentencing policies) when an exogenous value exceeds or falls below the threshold of the repetoire gradient. The transition is effected by the exogenous factor __ the other actor in a dyadic relationship, or the more purely cognitive process of taking the role of the other.

These concepts point to certain limitations and problematic aspects of both role theory and the particular model examined in this discussion. Role theory, for the empirical researcher, poses significant problems in measurement. Most generally, it must be noted that, as a question of method, role theory can be framed as a problem of measurement near the limit of detection. Heuristic instruments tend to be phenomenological that is, based up an individual's self-reports, and in most cases difficult to replicate. This is further evident as role behaviour, for an observer at least, is treated as an

asperiodic or inconstant flow of information. The gradient transitions, that is the points at which role behaviour changes from one repetoire to another, can then be treated as discontinuities in which the information value falls to zero. (13) In more familiar terms, this highlights the problem of omitted variables.

For the posited models based on offense seriousness, antecedents to the seriousness and the sentencing policy variables are unmeasured. Plausible alternative hypotheses can be stated, therefore, by adding one or more variables to any of the models. Additionally, since seriousness, role audience and audience policy are partly perceptual from the vantage of the individual, the error terms could be related to each other and to the independent variables.

In general, however, the model of judicial sentencing behaviour presented here, the specific predictions concerning the operation of the models, and the heuristic currency of a set of new theoretical terms represent a tentative but elaborate re-formulation of role theoretic interpretations of judicial behaviour.

SUMMARY

As a question of critical and systematic inquiry, the forms of reasoning by which judges decide cases has been a principal concern

of writers on jurisprudence in this century. This question has been framed at many levels of abstraction. Its most concrete variant centers on the problematic issue of sentencing disparities for the administration of criminal justice. In perhaps its most abstract form it becomes part of a broader concern for the maintenance of order in society and the ways in which that order depends upon the monopoly of the legitimate use of force by the state.

The importance of sentencing as a social construct is also found in its interpretation as a mechanism of the state to assign individuals, with compulsory effect, to enforced re-socialization. This can be more important for the individual for whom authoritative political decisions are distant and abstract.

Judicial decision making, as sentencing certainly is, is also relevant in the context of political regieme policy. As another elite among other decision making elites, judges and judicial behaviour have important consequences for the political process, particularly when judicial review declares invalid legislation enacted by representative democratic bodies.

In Canada, judicial behaviour is important to consider in light

of the role it has played in interpreting the relationship of powers of federal and provincial governments, and more recently, in applying the Charter of Rights and other sections of the 'patriated' Canadian Constitution.

The central concern of the discussion, however, is neither the political consequences of judicial elites for democratic theory nor the issue of judicial review. Rather, it is the problem of sentencing. In Canada virtually all cases coming to court are tried in a criminal court of first jurisdiction. And of those cases, the majority of accused individuals plead guilty, making the decision of sentence the most significant decision made by the court.

Jurisprudence has recognized the fundamental importance of sentencing and has developed accounts of the logic by which decisions are reached. Primary among these are the conventional doctrine of legal reasoning or analytic jurisprudence, and legal realism, or inter essen-jurisprudenz -- the jurisprudence of interests. The former views judicial decision as a product of a legal technology, neutral and analytic. The latter cast legal reasoning as a reconciliation of self-interests, based upon social and political factors.

For political science, jurisprudence -- or more properly, public law -- was an active area of inquiry in the early part of this century.

However, in the 1950's, public law became increasingly marginal to both political science and the sociology of law, the disciplines most concerned with a social analysis of judicial behaviour. But at about that time, a new emphasis was giving rise to a quantitative treatment of law, courts and judicial behaviour. This emphasis was empirical in nature, and centered on behaviour as the foremost aspect of interest. From that time an extensive and important array of explanatory concepts, variables and empirical results have been collected. These include: court hierarchies, judicial policy preferences, public opinion, social background characteristics of judges, judicial attitudes, judicial value preferences, personality characteristics of judges, offender characteristics including sex, age, race and socioeconomic status, microcultural variables, macrocultural variables, the pattern of facts in a case, bureaucratization of the courts, certiorari policy and judicial cognitive complexity. It is possible, when viewing these efforts from the perspective of critical evaluation, to class them as esoteric-systemic (social characteristics, economic and political variables); esoteric - individualistic (personality, attitudinal and cognitive variables); exoteric - systemic (political culture and bureaucratization variables) and exoteric - individualistic (offender characteristic variables).

Yet despite the new empirical character of behaviourist research into judicial decision making, two criticisms can be applied. First, much of the research into decision making took as its basis a generalized psychological account of attitude-behaviour covariation. Though this perspective is rationalist and sophisticated, it is threatened by a fundamental logical fallacy, namely affirmation of the consequent. This shortcoming is evident in the argument that punitive sentences are indicative of conservative attitudes. Second, and somewhat more fundamental, many of the categories of explanation of judicial behaviourism derive from legal realism, emphasizing the personal characteristics of judges, their backgrounds and interests. This lent to the new behaviourist account of sentencing a sort cultural legitimacy as well as many concepts of explanation. It, however, also channelled the early behaviourist effort into microvariables and other individual - based analysis at the expense of social-structural and systemic accounts. These two criticisms were labelled the specific and general critiques of judicial behaviourism.

A social structural explication of judicial behaviour can be found, on the other hand, in role theory. As a system of analytical concepts, role theory appears to hold a member of advantages for the investigator: foremost among these is its explicit capacity to generate

inter-level hypothesis, that is hypothesis which relate the individual to the social structure in which he lives and acts. Thus, role theory may be useful in unifying the exoteric/esoteric division of judicial research.

A number of central role theory concepts can be applied to judicial behaviour: role demands, role skills, self-role congruence, role audience, role conflict and role learning.

Empirically, role variables are demonstrably efficacious in constructing accounts of social interaction. Experimental evidence has shown that role variables influence evaluations of the competence of others, changes in private opinion and in self-disclosure behaviours. Individuals also tend to choose role based explanations of the actions of others in particular circumstances.

Unfortunately, role analysis of judicial behaviour has tended to concentrate upon classification and taxonomy, producing such taxa as law-regarding/precedent-regarding types; realist types; legal ritual, precedent obligation, task and status types; law applier, law extender, mediator and policy maker types, and law mader, law interpreter and pragmatist types. These taxa while interesting and useful in organizing observations of judicial behaviour, have not resulted in a replicable

explanation of that behaviour.

Part of the difficulty may be identified as an overdetermined view of role behaviour. Taxonomic divisions emphasize collections of normative expectations at the expense of more interactive but tentative conceptions of role behaviour.

An interactive view, so-called, places at the center of the discussion the manner in which behaviour is constructed by individuals, imaginatively completing their own and other's acts. This would seem to highlight the manner in which behaviour is the outcome of a process built from the interaction of role expectations and role skills.

Taking as axiomatic certain tenets of judicial behaviour grounded in empirical data, an inventory of 15 predictive axioms was constructed. Further, 15 theorems were deduced as direct tests of three models of judicial sentencing role behaviour under the conditions of high, low and moderate perceived offense seriousness. The predictions of these models were that, under conditions of high and low perceived offense seriousness, sentencing role behaviour would be associated with the perceived sentencing policies of role audiences while under conditions of moderate perceived offense seriousness, sentencing role behaviour would be associated with self sentencing policies.

These models -- or hypotheses -- of judicial sentencing role behaviour can be coupled with a new lexicon of role theory terms. These are nested role, that is the manner in which roles may be thought to be nested within one another; role repetoire, that is the collection of behaviours associated with a nested role; locus of behaviour, that is the enactment of role; role gradient, that is the tendency for role behaviour not to change from one nested repetoire to another and transition threshold, that is the external agency or exogenous variable which is required to overcome the role gradient and transit the locus of behaviour to the next nexted repetoire of role behaviours. The three proposed models of sentencing role behaviour and the new lexicon of role theory terms may advance our understanding of judicial behaviour in significant ways.

Notes to Chapter 4

1. See page 68, above.

2. See page 73, above.

3. See page 73, above.

4. For the seminal discussion of grounded theory as a term describing the relationship of theory to data see: Glaser, B. and Strauss, A. The Discovery of Grounded Theory; Chicago: Aldene, 1967.

5. Note that the discussion variously refers to expectations and perceived expectations. However, unless it is explicitly stated that an expectation is present in some tangible, nomothetic form such as an appellate court ruling, expectations should be considered as perceived expectations in every case.

6. To be "cognitively present" is a social psychological equivalent of the act of "taking the role of the other".

7. To operationalize a concept is to define empirical referents of its effect. A relatively common and well adapted example is taking electoral vote as the operational indicator of political partisanship. In practice, there are typically many indicators for a concept or variable. Indeed, there may be a "universe" of indicators for each concept, any selection of which represents a sample. To continue with the example cited, it may be than voting is a poor indicator of partisanship. Policy preference and political activity (donating money, volunteer assistance to candidates, campaigning and holding public office) may be more robust indicators. The choice of indicator is partly guided by theoretical considerations, partly by earlier empirical data and partly by the manner in which the present research question is framed.

8. See Chapter 2 for a complete review of this literature.

9. Note the suggestion this engenders for judicial behaviourism: namely, that the substantive outcome of judicial decisions, as the principle object of inquiry, is a misplaced emphasis.

10. The Costner-Leik Sign Rule states that, along a recursive causal sequence, an even number of negative signs in the intervening relationships yield a positive total correlation, while an odd number of negative signs in the intervening relationships yield a negative total correlation. (See: Blalock, 1969: 17.)

11. In such formulations the constant terms are ommitted since it is assumed that the variables X_i have been measured around their means and that the error terms are zero. Since the latter are often unmeasured, these assumptions must be carefully examined. (See: Blalock, 1969: 49.)

12. The error terms (u_n) are not entered into the diagrams of the causal models, but are considered operative nonetheless.

13. This is suggestive of catastrophe theory. (See: Zeeman, 1977.)

BIBLIOGRAPHY

Abraham, H.J., The Judicial Process; New York: Oxford University Press, 1975.

Adamany, D., "The Party Variable in Judges Voting: Conceptual Notes and a Case Study", American Political Science Review; 62: 57-73, 1969.

Alschuler, A.W., "The Trial Judge's Role in Plea Bargainning, Part 1", Columbia Law Review; 76(7): 1059-1154, 1976.

Balswick, J.O. and Balkwell, J.W. "Self-Disclosure to Same and Opposite Sex Parents: An Empirical Test of Insights From Role Theory", Sociometry; 40(3): 282-286, 1977.

Baum, L., "Implementation of Judicial Decisions: An Organizational Analysis", American Politics Quarterly; 4(1): 86-114, 1976.

Baum, L., "Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction", American Journal of Political Science; 21(1): 13-35, 1977.

Becker, T.L., Political Behaviourism and Modern Jurisprudence: A Working Theory and Study in Judicial Decision-Making; Chicago: Rand McNally, 1964.

Becker, T.L., "A Survey of Hawaiin Judges: The Effect on Decisions of Judicial Role Variations", American Political Science Review; 60(3): 677-680, 1966.

Becker, T.L., "Judicial Theory", in Approaches to the Study of Political Science, (eds. M. Haas and H.S. Kariel); Scranton: Chandler, 1970

Bennett, S.E. and Tuchfarber, A.J., "The Social-Structural Sources of Cleavage on Law and Order Policies", American Journal of Political Science; 19(3): 419-438, 1975

Bentzon, A.W., "The Structure of the Judicial System and its Function in a Developing Society", Acta Sociologica; 10: 121-146, 1968.

Berns, W., "Law and Behavioural Science", in Jurimetrics, (ed. H. Baade); New York: Basic Books, 1963.

Bertrand, F., "Public Opinions About Criminal Justice Issues: Some Cautions about Poll Data", Impact; 1, 1982.

Beth, L.P., Politics. The Constitution and the Supreme Court: An Introduction to the Study of Constitutional Law; New York: Harper and Row, 1962

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

Biddle, B.J., Role Theory: Expectations, Identities and Behaviours; New York: Academic Press, 1979.

Bierhoff, H.W., "The Use of Psychological Theories By 'Naive' Judges: A Second Look", European Journal of Social Psychology; 6(3): 369-374, 1976.

Blalock, Jr., H.M., Theory Construction: From Verbal to Mathematical Formulations; Englewood Cliffs: Prentice-Hall, 1969.

Blawie, J.L. and Blawie, M.J., "The Judicial Decision: A Second Look at Certain Behavioural Assumptions of Research", Western Political Quarterly; 18(3): 579-593, 1965.

Blumberg, A.S., "The Criminal Court as Organization and Communication System", in Criminal Justice: Law and Politics, (ed. G.F. Cole); Duxbury Press: North Scituate, 1972.

Blumer, H., "Society as Symbolic Interaction", in Symbolic Interaction: A Reader in Social Psychology, (eds. J.G. Manis and B.N. Meltzer); Boston: Allyn and Bacon, 1972.

Blumberg, A.S., Criminal Justice: Issues and Ironies; New York: New Viewpoints, 1979.

Bowen, D.R., The Explanation of Judicial Voting Behaviour From Sociological Characteristics of Judges; Unpublished PhD. Dissertation: Yale University, 1965.

Buckley, W., "Society as a Complex Adaptive System", in Modern Systems Research for the Behavioural Scientist: A Sourcebook, (ed. W. Buckley); Chicago: Aldine, 1972.

Burns, T. and Stalker, G.M., The Management of Innovation; London: Tavestock, 1961.

Calder, B.J., "Informational Cues and Attributions Based on Role Behaviour", Journal of Experimental Social Psychology; 10(2): 121-125, 1974.

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

Carson, B., The Supreme Court of Canada in the Political Process: A Background Paper for Parliamentarians; Ottawa: Library of Parliament, 1982.

Carter, J.D., The Warren Court and the Constitution; Grenta: Pelican, 1973.

Chambliss, W.J. and Seidman, R.B., Law, Order and Power; Reading: Addison-Wesley, 1971.

Clancy, C.; Bartolomeo, J.; Richardson, D. and Wellford, C., "Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity", Journal of Criminal Law and Criminology; 72(2): 524-554, 1981.

Clarke, K.L.; Barnhorst, R. and Barnhorst, S., Criminal Law and the Canadian Criminal Code; Toronto: McGraw-Hill Ryerson, 1977.

Cole, G.F., Criminal Justice: Law and Politics; Wadsworth: Belmont, 1972.

Cole, G.F., Politics and the Administration of Justice; Beverly Hills: Sage Publications, 1973.

Cook, B.B., "Role Lag in the Trial Courts", Western Political Quarterly, 25: 234-248, 1972.

Cook, B.B., "Sentencing Behaviour of Federal Judges: Draft Cases - 1972", University of Cincinnati Law Review, 42: 597-634, 1973.

Cook, B.B., "Public Opinion and Federal Judicial Policy", American Journal of Political Science, 21: 567-600, 1977.

Cook, B.B. "Judicial Policy: Change Over Time", American Journal of Political Science, 23: 208-214, 1979 (a).

Cook, B.B., "Sentencing Problems and Internal Court Reform", in The Study of Criminal Courts: Political Perspectives, (ed., P.F. Nardulli); Cambridge: Ballinger, 1979(b).

Dahl, R., "The Role of the Supreme Court as a National Policy Maker", Journal of Public Law, 6: 279-295, 1957.

Danto, A.C., "Persons" in The Encyclopedia of Philosophy, Volume 6, (ed. P Edwards); New York: Macmillan, 1967.

Dowes, R.E. and Hughes, J.A., Political Sociology; John Wiley and Sons: London, 1972.

Ely, J.H., Democracy and Distrust: A Theory of Judicial Review; Cambridge: Harvard University Press, 1980.

Everson, G., "The Human Element in Justice", Journal of Criminal Law, Criminology and Police Science; 10(1): 90-99, 1919.

Fairman, C., Mr. Justice Miller and the Supreme Court 1862-1890; New York: Russell and Russell, 1939.

Feinberg, J., "Analytic Jurisprudence", in Encyclopedia of Philosophy, Volume 1, (ed. P. Edwards); New York: Macmillan, 1967.

Felkenes, G.T., The Criminal Justice System: Its Functions and Personnel; Englewood Cliffs: Prentice-Hall, 1973.

Festinger, L. and Carlsmith, J.M., "Cognitive Consequences of Forced Compliance", in Role Playing, Reward, and Attitude Change, (ed. A.C. Elms); New York: Van Nostrand Rheinhold, 1969.

Fisher, F.M., "The Mathematical Analysis of Supreme Court Decisions: The Use and Abuse of Quantitative Methods", American Political Science Review, 52: 321-338, 1958.

Flango, V.E. and Ducat, C.R., "Toward an Integration of Public Law and Judicial Behaviour", Journal of Politics; 39(1): 41-72, 1977.

Flango, V.E. and Schubert, G.A., "Two Surveys of Simulated Judicial Decision-Making: Hawaii and the Phillipines", in Comparative Judicial Behaviour: Cross Cultural Studies of Political Decision-Making in the East and West, (eds. G. Schubert and D. Danelski); New York: Oxford University Press, 1969.

Flango, V.E; Wenner, L.M. and Wenner, M.W., "The Concept of Judicial Role: A Methodological Note", American Journal of Political Science; 19(2): 277-289, 1975.

Fouts, D. E., The Canadian Supreme Court, 1950-60: A Study of Judicial Policy Making, Unpublished Doctoral Dissertation, University of Minnesota, 1967.

Frankel, M.E., Criminal Sentences: Law Without Order; New York: Hill and Wang, 1973.

Furstenberg, Jr., F.F., "Public Reaction to Crime in the Streets", in Criminal Justice: Law and Politics, (ed., G.F. Cole); Duxbury Press: North Scituate, 1972. pp.382-90

Garkinkel, H., "Common Sense Knowledge of Social Structures: The Documentary Method of Interpretation", in Symbolic Interaction: A Reader in Social Psychology, (eds. J. Manis and B. Meltzer); Boston: Allyn and Bacon, 1972

Gaudet, F.; Harris, G. and St. John, C., "Individual Differences in the Sentencing Tendencies of Judges", Journal of Criminal Law and Criminology; 23: 811-818, 1933.

Gaudet, F.J., "The Sentencing Behaviour of the Judge", in Encyclopedia of Criminology, (eds., V.C. Branham and S.B. Kutash); New York: Philosophical Library, 1949.

Gibson, J.L.,"Discriminant Functions, Role Orientations and Judicial Behaviour: Theorectical and Methodological Linkages", Journal of Politics; 39(4): 984-1007, 1977.

Gibson, J.L., "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model", American Political Science Review; 72(3): 911-924, 1978(a).

Gibson, J.L., "Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study", Law and Society Review, 12: 455-578, 1978(b).

Gibson, J.L., "A Role Theoretic Model of Criminal Court Decision-Making", in The Study of Criminal Courts: Political Perspectives, (ed., P.F. Nardulli); Cambridge: Ballinger, 1979.

Giles, M.W. and Walker, T.G., "Judicial Policy-Making and Southern School Segregation", Journal of Politics; 37(4): 917-936, 1975.

Ginsberg, M., On Justice in Society; New York: Cornell University Press, 1965.

Glaser, B. and Strauss, A., The Discovery of Grounded Theory; Chicago: Aldine, 1967.

Glick, H.R., Supreme Courts in State Politics: An Investigation of the Judicial Role; New York: Basic Books, 1971.

Goldman, S., "Behavioural Approaches to Judicial Decision-Making: Toward a Theory of Judicial Voting Behaviour", Jurimetrics Journal, 142-164, 1971.

Goldman, S. and Jahnige, T.P., The Federal Courts as a Political System, (2nd. ed.); New York: Harper & Row, 1976.

Gottfredson, M.R. and Gottfredson, D.M., Decisionmaking in Criminal Justice: Toward the Exercise of Discretion; Cambridge: Ballinger, 1980.

Goulding, M.P., "History of the Philosophy of Law", in Encyclopedia of Philosophy, Volume 6, (ed. P. Edwards); New York, Macmillan 1967.

Greenawalt, K., "Discretion and the Judicial Decision: The Elusive Quest for the Fetters That Bind Judges", Columbia Law Review; 75: 359-399, 1975.

Greenstein, F.I. and Polsky, N.W., Handbook of Political Science; Reading: Addison-Wesley, 1975.

Gross, N.; Mason, W.S. and McEarchern, A.W., Explorations in Role Analysis: Studies in the School Superintendency Role; New York: Wiley, 1958.

Grossman, J.B., "Role Playing and the Analysis of Judicial Behaviour: The Case of Mr. Justice Frankfurter", Journal of Public Law; 11(2): 285-309, 1962.

Grossman, J., "Social Backgrounds and Judicial Decision-Making", Harvard Law Review; 79: 1551-1564, 1966.

Grossman, J.B., "Dissenting Blocs on the Warren Court: A Study in Judicial Role Behaviour", Journal of Politics; 30(4): 1068-1090, 1968.

Grunbaum, W.F. and Newhouse, A., "Quantitative Analysis of Judicial Decisions: Some Problems in Prediction", Houston Law Review, 3: 201-220, 1965.

Hagan, J., "Extra-Legal Attributes and Criminal Sentencing: An Assessment of Sociological Viewpoint", Law and Society Review, 8: 357-381, 1974.

Hagan, J., "Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice", Social Forces; 55(3): 597-612, 1976-77.

Haines, C.G., "General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges", in Judicial Behaviour: A Reader in Theory and Research, (ed. G. Schubert); Chicago: Rand McNally, 1964.

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

Hare, A.P., Handbook of Small Group Research; New York: Free Press, 1962.

Harries, K.D. and Brunn, S.D., The Geography of Laws and Justice: Spatial Perspectives on the Criminal Justice System; New York: Praeger, 1978.

Hart, H.L.A., "Legal Positivism", in Encyclopedia of Philosophy; Volume 4, (ed., P. Edwards); New York: Macmillan, 1967.

Hart, H.L.A., "Problems of Philosophy of Law", in Encyclopedia of Philosophy; Volume 6, (ed. P. Edwards); New York: Macmillan, 1967.

Harvey, A.S.; MacDonald, E.G.; MacDonald, W.S.; Elliot, D.H.; Clark, S.M. and Wood, K.S., A Blueprint for Core Social Indicators: Meeting Social Data Needs for the 1980's; Halifax: Institute of Public Affairs at Dalhousie University, 1980.

Henderson, D.W., Social Indicators: A Rationale and Research Framework; Ottawa: Economic Council of Canada, 1974.

Hewitt, J.P., Self and Society: A Symbolic Interactionist Social Psychology; Boston: Allyn and Bacon, 1984.

Hogarth, J., Sentencing as a Human Process; Toronto: University of Toronto Press, 1971.

Holsti, K.J, "National Role Conceptions in the Study of Foreign Policy", International Studies Quarterly; 14: 223-309, 1970.

Howard, Jr.; J.W., "Role Perceptions and Behaviour in Three U.S. Courts of Appeals," Journal of Politics; 39(4): 916-938, 1977.

Jackson, I. and McGehee, C., "Group Structure and Role Behaviour", Annals of the American Academy of Political Science; (361): 130-145, 1965.

Jaffary, S.K., Sentencing of Adults in Canada; Toronto: University of Toronto Press, 1963.

Jones, E.E.; Davis, K.E. and Gergen, K.J., "Role Playing Variations and Their Informational Value for Person Perception", in Role Theory: Concepts and Research; (eds. B.J. Biddle and E.J. Thomas); New York: John Wiley, 1966.

Jones, E.E. and Harris, V.A., "The Attribution of Attitudes", Journal of Experimental Social Psychology; 3(1): 1-24, 1967.

Jones, H.W., "The Trial Judge: -- Role Analysis and Profile", in The Courts, the Public and the Law Explosion, (ed. H.W. Jones); Prentice Hall: Englewood Cliffs, 1965.

Khan, R.A.; MacKown, S.A. and McNiven, J.D., An Introduction to Political Science; Georgetown: Irwin-Dorsey, 1972.

Klecka, W.R., Discriminant Analysis; Beverly Hills: Sage, 1980.

Kort, F., "Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the Right to Counsel Cases", American Political Science Review; 51: 1-12, 1957.

Kort, F., "Reply to Fisher's 'Mathematical Analysis of Supreme Court Decisions'", American Political Science Review; 52: 339-348, 1958.

Kort, F., "Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions", in Jurimetrics, (ed. H. Baade); New York: Basic Books, 1963a.

Kort, F., "Content Analysis of Judicial Opinions and Rules of Law", in Judicial Decision-Making, (ed. G. Schubert); Glencoe: Free Press, 1963b.

Kort, F., "Quantitative Analysis of Fact-Patterns in Cases and Their Impact on Judicial Decisions", Harvard Law Review; 79: 1595-1603, 1966.

Kort, F., "A Nonlinear Model for the Analysis of Judicial Decisions", American Political Science Review; 62: 546-555, 1968.

Kort, F., "Linear and Nonlinear Functions as Criteria for Distinction Between Judicial Decisions in Different Legal Systems", Mathematical Applications in Political Science, (eds. J.F. Heindon and J.L. Bernd); University Press of Virginia: Charlottesville, 1972. (pp. 5-31.)

Kort, F., A Special and A General Multivariate Theory of Judicial Decisions; Beverly Hills: Sage Publications, 1977.

Kritzer, H. M., "Federal Judges and Their Political Environments: The Influence of Public Opinion", American Journal of Political Science; 23: 194-207, 1979a.

Kritzer, H.M., "Political Cultures, Trial Courts and Criminal Cases", in The Study of Criminal Courts: Political Perspectives, (ed., P.F. Nandulli); Cambridge: Ballinger, 1979b.

Landes, R. G., "The Use of Role Theory in Political Socialization Research: A Review, Critique, and Modest Proposal", International Journal of Comparative Sociology; 17 (1-2): 60-72, 1976.

Lasswell, H.D., Politics: Who Gets What, When, How?; New York: McGraw Hill, 1936.

Lasswell, H.D. and Kaplan, A., Power and Society: A Framework for Political Inquiry; New Haven: Yale University Press,1950.

Law Reform Commission of Canada, Sentencing and Dispositions: A Study Paper by the Sentencing and Dispositions Project; Ottawa: (August), 1973.

Law Reform Commission of Canada, The Principles of Sentencing and Dispositions: Working Paper No. 3; Ottawa: (March), 1974.

Levin, M.A. "Urban Politics and Policy Outcomes: The Criminal Courts", in Criminal Justice: Law and Politics, (ed. G. F. Cole); Duxbury Press: North Scituate, 1972.

Levin, M.A., Urban Politics and Criminal Courts; Chicago: University of Chicago Press, 1977.

Linton, R., The Study of Man: An Introduction; New York: Appleton - Century, 1936.

Lizotte, A.J., "Extra-Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice", Social Problems; 25(2): 564-580, 1977-78.

MacGuigan, M.R., "The Development of Civil Liberties in Canada", Queen's Quarterly: 72: 270-288, 1965.

Maleka, K., "Public Sense of Justice and Judicial Practice", Acta Sociologica; 10: 42-67, 1968.

McFatter, R.M., "Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions", Journal of Personality and Social Psychology; 36(12): 1490-1500, 1978.

Mead, G.H., Mind, Self and Society; Chicago: University of Chicago Press, 1934.

Meltzer, B.N., "Mead's Social Psychology" in Symbolic Interaction: A Reader in Social Psychology, (eds. J.G. Manis and B.N. Meltzer); Boston: Allyn & Bacon, 1972.

Merton, R.K., Social Theory and Social Structure; New York: Free Press, 1968.

Mileski, M., "Courtroom Encounters: An Observational Study of a Lower Criminal Court", Law and Society Review; 6: 473-538, 1970.

Mischel, W., "Towards a Cognitive Social Learning Re-Conceptualization of Personality", Psychological Review; 80(4): 252-283, 1973.

Mohr, L.B., "Organizations, Decisions and Courts", Law and Society Review; 10(4): 619-642, 1975-76.

Nagel, S., "Political Party Affiliation and Judges' Decision", American Political Science Review; 55(4): 843-850, 1961(a).

Nagel, S., "Using Simple Calculations to Predict Judicial Decisions", Practical Lawyer; 7: 68-74, 1961(b).

Nagel, S., "Ethnic Affiliations and Judicial Propensities", Journal of Politics; 24(1): 92-110, 1962.

Nagel, S.S., "Off-The-Bench Judicial Attitudes", in Judicial Decision-Making, (ed. G. Schubert); Glencoe: Free Press, 1963.

Nagel, S., "Applying Correlation Analysis to Case Prediction", Texas Law Review; 42: 1006-1017, 1964.

O'Donnell, P.; Churgin, M.J. and Curtis, D.E., Toward a Just and Effective Sentencing System: Agenda for Legislative Reform; Praeger: New York, 1977.

Peltason, J.W., Federal Courts in the Political Process; New York: Random House, 1955.

Pfohl, S.J., "Social Role Analysis: The Ethnomethodological Critique", Sociology and Social Research; 59(3): 243-265, 1974.

Prichett, C.H., The Roosevelt Court: A Study in Judicial Politics and Values; 1937-1947; New York: Macmillan, 1948.

Redmount, R.S., "Psychology and Law", in Legal and Criminal Psychology, (ed. H. Toch); New York: Holt, Rhinehart and Winston, 1964.

Robin, S.S., "Three Approaches to Role Theory" in Theories and Paradigms in Contemporary Sociology, (eds. R.S. Denisoff; O. Callahan, and M.H. Levine); Itasca: F.E. Peacock, 1974.

Rogat, Y., "Legal Realism", in Encyclopedia of Philosophy, Volume 4, (ed. P. Edwards); New York: Macmillan, 1967.

Rosen, P.L., The Supreme Court and Social Science; Illinois: University of Illinois Press, 1972.

Rosenblum, V.G., Law as a Political Instrument; New York: Random House, 1955.

Ross, L., "The Intuitive Psychologist and his Shortcomings: Distortions in the Attribution Process", in Advances in Experimental Social Psychology, (ed. L. Berkowitz); Vol. 10, New York: Academic Press, 1977.

Ross, L.D.; Amabile, T.M. and Steinmetz, J.L., "Social Roles, Social Control and Biases in Social-Perception Processes", Journal of Personality and Social Psychology; 35(7): 485-494, 1977.

Sarat, A., "Judging in Trial Courts: An Exploratory Study", Journal of Politics; 39(4): 368-398, 1977.

Sarbin, T.R. and Allen, V.L., "Role Theory", in Handbook of Social Psychology, (eds. G. Lindzey and E. Aronson); Reading: Addison-Wesley, 1968.

Schick, M., Learned Hand's Court; Baltimore: Johns Hopkins Press, 1970.

Schubert, G.A., Quantitative Analysis of Judicial Behaviour; Glencoe: Free Press, 1959.

Schubert, G., Constitutional Politics: The Political Behaviour of Supreme Court Justices and the Constitutional Policies That They Make; New York: Holt, Rhinehart and Winston, 1960.

Schubert, G., "Introduction: From Public Law to Judicial Behaviour", in Judicial Decision-Making, (ed. G. Schubert); Glencoe: Free Press,1963.

Schubert, G., "Prediction from a Psychometric Model" in Judicial Behaviour: A Reader in Theory and Research, (ed. G. Schubert); Chicago: Rand McNally, 1964a.

Schubert, G., "A Psychological Model of Supreme Court Decision-Making" in Judicial Behaviour: A Reader in Theory and Research, (ed. G. Schubert); Chicago: Rand McNally, 1964b.

Schubert, G., The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices; Evanston: Northwestern University Press, 1965.

Schubert, G., The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology; New York: Oxford University Press, 1974.

Schubert, G., "Political Culture and Judicial Ideology", Comparative Political Studies; 9(4): 363-408, 1977.

Selznick, P., "Sociology of Law", in Encyclopedia of Philosophy, Volume 7, (ed. P. Edwards); New York: Macmillan, 1967.

Shapiro, M., Law and Society and the Supreme Court: New Approaches to Political Jurisprudence; Glencoe: Free Press, 1964.

Shapiro, M., "Courts", in The Handbook of Political Science, Volume 5, (eds. F. T. Greenstein and N.W. Polsby); Reading: Addison-Wesley, 1975.

Shoemaker, D.J.; South, D.R. and Lowe, J., "Facial Stereotypes of Deviants and Judgements of Guilt or Innocence", Social Forces; 51: 427-433, 1973.

Smidhauser, J., "Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States", University of Toronto Law Journal; 14: 194-212, 1962.

Smith, A.B. and Blumberg, A., "The Problem of Objectivity in Judicial Decision-Making", Social Forces; 46: 96-105, 1967.

Spaeth, H.J., "An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behaviour", Midwest Journal of Political Science; 5 (May, 1961.)

Stone, A., "Sentencing as a Human Process by John Hogarth," Harvard Law Review; 86: 1352-1364, 1973.

Swisher, C.B., Roger B. Tanney; Hamden: Archon Books, 1961.

Tanenhaus, J.; Schick, M.; Muraskin, M. and Roser, D., "The Supreme Court's Certiorari Jurisdiction: Cue Theory", in Judicial Decision-Making, (ed. G. Schubert); Glencoe: Free Press, 1963.

Tanenhaus, J., "The Cumulative Scaling of Judicial Decisions"; Harvard Law Review; 79: 1583-1594, 1966.

Tepperman, L., "The Effects of Court Size on Organization and Procedure", Canadian Review of Sociology and Anthropology; 10(4): 346-65, 1973.

Tiffany, L; Avichai, Y. and Peters, G., "A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-68", Journal of Legal Studies; 4: 369-390, 1975.

de Tocqueville, A., Democracy in America; New York: Alfred A. Knopf, 1945.

Traynor, R.J., "The Limits of Judicial Creativity", Iowa Law Review; 63(1): 1-13.

Turner, J.H., The Structure of Sociological Theory; Homewood: Dorsey Press, 1974.

Turner, R.H., "Role-Taking, Role-Standpoint and Reference Group Behaviour", American Journal of Sociology; 61: 316-328, 1956.

Turner, R.H., "Role-Taking, Process Versus Conformity", in Human Behaviour and Social Processes, (ed., A.M. Rose); Boston: Houghton Mifflin, 1962.

Ulmer, S., "The Analysis of Behaviour Patterns on the United States Supreme Court", Journal of Politics; 22: 629-653, 1960.

Ulmer, S.S., "The Political Party Variable in the Michigan Supreme Court", Journal of Public Law; 11(2): 352-363, 1962(a).

Ulmer, S.S., "Public Office in the Social Backgrounds of Supreme Court Justices", American Journal of Economics and Sociology; 21(1): 57-68, 1962(b).

Ulmer, S.S., "Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications", in Jurimetrics, (ed. H. Baade); New York: Basic Books, 1963.

Ulmer, S., "Toward a Theory of Sub-Group Formation in the United States Supreme Court"; Journal of Politics, 27: 133-152, 1965.

Ulmer, S.S., "Mathematical Models for Predicting Judicial Behaviour" in Mathematical Applications in Political Science III, (eds. J.L. Bernd and A. Jones); Charlottesville: The University Press of Virginia, 1967.

Ulmer, S.S., "Social Background as an Indicator to Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms", American Journal of Political Science; 17: 622-630, 1973.

Ulmer, S.S., "Dimensionality and Change in Judicial Behaviour", in Mathematical Applications in Political Science VII, (eds. J.F. Herndon and J.L. Bernd); Charlottesville: University Press of Virginia, 1974.

Van Loon, R.J. and Whittington, M.S., The Canadian Political System: Environment, Structure and Process; Toronto: McGraw-Hill Ryerson, 1976.

Vines, K., "The Judicial Role in American States: An Exploration", in Frontiers of Judicial Research: The Shambaugh Conference on Judicial Research, (eds. J. Grossman and J. Tanenhaus); New York: Wiley, 1969.

Vines, K.N., "Judicial Behaviour Research", in Approaches to the Study of Political Science,(eds. M. Haas and H.S. Kariel); Scranton: Chandler, 1970.

Wahlke, J.C.; Eulau, H.; Buchanan, W. and Ferguson, L.C., The Legislative System: Explorations in Legislative Behaviour; New York: John Wiley, 1962.

Walker, J.L., "Role Perception as a Linkage Between Urban Courts and the Local Political System: Are Trial Judges Reactionary?" Paper delivered at the 1973 Annual Meeting of the American Political Science Association.

Wilson, T.P., "Conceptions of Interactions and Forms of Sociological Explanation", American Sociological Review; 35(4): 697-710, 1970.

Winick, C.; Gerver, I. and Blumberg, A., "The Psychology of Judges" in Legal and Criminal Psychology, (ed. H. Toch); New York: Holt, Rhinehart and Winston, 1964.

Wollheim, R., "Natural Law", in Encyclopedia of Philosophy, Volume 5, (ed. P. Edwards); New York: Macmillan, 1967.

Woodward, B. and Armstrong, S., The Brethren: Inside the Supreme Court; New York: Avon, 1979.

Zimring, F. and Hawkins, G., "The Legal Threat as an Instrument of Social Change", Journal of Social Issues; 27(2): 33-48, 1971.