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Sentencing as a Human Process by John Hogarth: An International Review Symposium

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Reviews

SENTENCING AS A HUMAN PROCESS BY JOHN HOGARTH AN INTERNATIONAL REVIEW SYMPOSIUM

INTRODUCTION

By SIMON CHESTER*

In recent years, there has been a very welcome tendency for scholars working in subjects closely related to law to apply their insights to legal topics, furthering our understanding of the political, sociological and psychological dimensions of the legal process. Parallel to this development, legal scholars, perhaps aware of a new academic professionalism, have been confident in using the techniques and insights of other disciplines in their own work.

The recently published book *Sentencing as a Human Process*[1] by Professor John Hogarth has shown us how rich this inter-disciplinary approach may prove. Hogarth has used recent developments in the human sciences to investigate judicial decision-making in relation to sentencing. Magistrates in Ontario took part in a comprehensive study, designed to discover the various factors which influence their sentencing decisions.

In presenting this review symposium on *Sentencing as a Human Process* we are pleased to be able to reflect in some way, the richness of Professor Hogarth's book. Rarely can a book be viewed from so many perspectives. The book offers much to the lawyer, the judge, the political scientist, or the professional criminologist. We asked leading authorities in each of these fields to comment on the book, assessing its value as a contribution to the respective literature, critically examining the methods used and the conclusions reached.

It is hoped that the reviews in this symposium will not merely focus attention on what is, by any account, a major contribution to criminological

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[1] John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1972).

research; but will stimulate thought on the place of such research, the difficulties of true inter-disciplinary co-operation, and the suitability of methods, such as Professor Hogarth used, for examining other areas of the legal process.

Given the importance and difficulty of the sentencing decision, we hope the symposium will give both academic and practicing lawyers an opportunity to critically examine their views of the process of judicial decision-making. Such questioning is crucially important if the machinery of law reform is to effect meaningful changes in the way sentencing is carried out. The problem is as urgent as it is difficult; we hope that the symposium has exposed some of the sensitive political and social dimensions behind what is still too often viewed as a specifically legal issue. The implications for the whole of the criminal law will become increasingly apparent; any work of reform or revision in the criminal law must take account of a whole multitude of social and political factors. Now, if ever, is the time for realism in the criminal law.

THE SENTENCING BEHAVIOR OF ONTARIO JUDGES: A METHODOLOGICAL OVERVIEW

By GLENDON SCHUBERT *

This would be virtually an impossible book for a person trained exclusively in the law to have written. It is the product of a rare but increasing phenomenon: the law and social scientist hybrid who combines at a professional level of competence the skills, substantive lore, and the characteristic points of view of two distinct fields of academic inquiry. Thus Professor Hogarth, internalizing as he does so well both the legal and the sociological perspectives, has produced what is clearly an extraordinary book even when one appraises his accomplishment on the basis of criteria appropriate to the definition of global excellence — as distinguished from research development in the field of legal sociology in *any* particular country — and it is the former standard that this reviewer, with no intention of either flattery or hyperbole, deems appropriate to apply in this instance. But such a statement implies that,

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premising his analysis upon the overall high quality of this work, a reviewer — and particularly one whose focus is upon the methodology of the research — is obliged to apply rigorous standards of evaluation suitable to the importance of his subject.

The author's approach is what he himself denominates as phenomenology, which he explicitly equates[1] with empiricism. Eschewing an overtly theoretical basis for identifying "the significant variables which are involved in the decision-process" of sentencing judges, the author purports to have proceeded with his analysis pragmatically as well as inductively, and thereby to have succeeded in "looking at sentencing through 'the eyes of magistrates.'"[2] Be that as it may, one of the many virtues of this book is the care with which relevant facets of theory are used, invariably, to preface both methodological and empirical discussions. The overweening bulk of this theoretical counterpoint is behavioral; and Hogarth manages to survey a substantial amount of recent scientific research, mostly from the social psychology of attitudes and the sociological subfields of criminology, social stratification, and socialization. The sources from which he draws are multidisciplinary, transcultural, and methodologically eclectic. His data are quantified, and his manipulation of them is statistical and necessarily dependent upon computer technology.

1. *Data*

In making this study, the author "assumed that there were three main classes of variables that ought to be considered, consisting of variables related to the cases dealt with, the legal and social environments in which sentencing takes place, and the personalities and backgrounds of the magistrates concerned."[3] Although he utilized various other data sources (including intensive in-depth interviews) and surveyed other populations at differing stages of the development of his avowedly agglutinative project, the major thrust of his analysis in this research report draws upon three primary sources of data. The first of these consists of the responses of 71 full-time Ontario magistrates (86% of the total of 83), to a questionnaire of 107 items putatively dealing with attitudes toward punitiveness and including four principal scales, six subscales, and 21 miscellaneous items. (Other populations surveyed by this same instrument included 116 probation officers, 103 police officers, 50 law students, and 59 social work students.) The second primary source of data was a capture-and-record self-observational study in which each of the 71 magistrates was asked to fill in 100 reports ("sentencing study sheets") at the time that he made sentencing decisions with regard to offenders convicted of having committed, or of having attempted to commit, any of seven indictable offenses (including breaking and entering; assault and bodily harm; dangerous driving; taking a motor vehicle; fraud; robbery; and indecent assault on a female). Optimally, a total of 7100 sentencing sheets would have been produced in the period of a year beginning in February 1966; in the event, a total

[1] P. 103. (This and all subsequent citations to page numbers alone are to Professor Hogarth's book, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1972).

[2] P. 18.

[3] *Id.*

of 2426 usable sentencing study sheets were returned over an extended period of 18 months, for an average of 33 per magistrate and with a range of 11 to 100. The purpose of these three-page reporting forms (which could be completed primarily by checking boxes for statements deemed pertinent) was to provide detailed and systematic information concerning the magistrate's perception of the offense and the offender, plus his description of the sentence and the process by which it was made. The third major data source consists of independent reports by police officers about the offenses, and by probation officers about the offenders, for all of the cases for which magistrates filed sentencing reports with the author; consequently, the size of this sample (said to be about 2500)[4] is roughly the same as that of the second source. It is noted that an additional sample of all indictable cases dealt with by Ontario magistrates during the years 1966 and 1967 was selected for less detailed study; the size of this sample is not given, but we are informed that indictable offenses (including the seven that define the second and third principal data sources, plus others such as theft) total only 2% of the caseload of Ontario magistrates, the remaining 98% consisting of summary offenses (such as municipal parking, 57%; provincial statutory and other offenses, 29%; and dominion summary offenses, 6%). The question of the extent to which the seven selected indictable offenses (which provide the basis for the second and third principal data sources) constitute a representative sample of the universe of the magistrates' sentencing behavior is not broached by the author, no doubt because he considered it obvious that one must presume a negative answer — that is, that although the 71 included magistrates are typical of the universe of those in office at the time of the author's field study, the sentencing behavior discussed in his analysis is representative of no more than what occurred in the disposition of the seven indictable offenses to which his case reports are primarily confined.[5] All three primary sources yielded survey data collected by the author in the field, and the interviews with magistrates in the sample were a source also of information concerning their background characteristics, including social class, family mobility, age, birthplace, religion, education, marital status, prior work experience (including experience as a magistrate), political affiliation, and integration with community of residence. A fifth data source of importance provided information for each of Ontario's 53 counties about "the situational context in which sentencing takes place,"[6] including density of population; urbanization; nativity; distribution by age, religion, occupation, and ethnicity; mobility and growth of population; crime rate; and magistrates' case loads. These aggregate data were reported by the Dominion Bureau of Statistics.

2. *Methods and Empirical Findings*

Turning now to the ways in which these (and other) data were used by the author, my opinion is that his procedures for data reduction and process-

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[4] P. 26.

[5] The author discusses (pp. 271-272) the possibility of bias in the case sample only in relation to the subuniverse of selected indictable offenses.

[6] P. 26.

ing, and for exploring the patterns of relationship among the major categories of his variables, are in general well selected and executed. (I do have a few reservations about some of the details of the methodological analysis, and I shall state these subsequently, below.) After having described the legal aspects of the system of magistrate's courts in Ontario, and the social background characteristics of the judges in his sample, Hogarth discusses the classical doctrines of penal philosophy. Interview data showed that the most popular doctrine avowed by these magistrates was reformation, followed by general deterrence, individual deterrence, and incapacitation, with punishment ranking last with a popularity less than half of that of reformation. Probation, institutional confinement, and parole were all viewed as being highly effective measures to achieve the goal of reformation; fines were deemed highly effective to achieve either general or individual deterrence; and nothing was considered to be effective to accomplish either incapacitation (sic!) or punishment.[7] But although "the majority of magistrates have images of themselves as being oriented towards the offender and his treatment, the actual decision-making rules [of thumb] applied would appear to be more closely associated with the offence and community protection."[8] The decision-making approach of the non-reformation oriented magistrates was more simplistic, requiring less information and placing greater reliance upon the (conviction-guiding) rules of thumb. But irrespective of the penal philosophy with which they identified, magistrates "appear to be inconsistent with each other but consistent within themselves," which is possible because they "interpret selectively their worlds in ways consistent with their subjective ends."[9]

After the use of Likert scaling techniques and item analysis had resulted in the four principal scales (plus, for some purposes, the subscales) mentioned above, responses to the 107 item questionnaire were factor analyzed to produce five rotated principal component factor scales that Hogarth preferred to use, as independent variables in measuring statistical associations with dependent sentencing behavior variables.[10] These factorial scales (labelled "justice", "punishment corrects", "intolerance", "social defence", and "modernism") seemed to distinguish, in conformity with his expectations, among the group of magistrates in relation to the criterion groups of police officers, probation officers, law students, and social work students, with the police ranking as most punitive on all five factorial scales, followed by the magistrates, then probation officers substantially tied with law students, and with social work students ranking as least punitive.[11] The dependent variables consist of 67 measures of the aggregate data on sentencing behavior, specifying for each of the seven indictable offense categories the frequencies with which the individual magistrates in the sample used sus-

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[7] P. 76.

[8] P. 81.

[9] Pp. 91-92.

[10] The split half reliability of the factor scales is almost as high as for the Likert scales; the factorial scales are the easier (he felt) to interpret; and the factorial scales are statistically independent of each other whereas the Likert scales are highly intercorrelated (at levels ranging from .63 to .65).

[11] P. 135.

pended sentences, probation, fine, and institutional confinement, and for the latter the type and length of confinement. Concluding that the factorial scales show stronger association than do the Likert scales with the sentencing variables, Hogarth conducted a multiple regression analysis of the factorial scores which demonstrated, in his view, that the sentencing behavior of magistrates was for every offense significantly associated with the magistrates' attitudes, and that these relationships obtained "irrespective of specific factual combinations of cases coming before the courts."[12]

Professor Hogarth then turns to his analysis of the judicial role, in particular regard to both legal and social constraints on sentencing behavior. He employs primarily correlational analysis to examine the self-perceptions of magistrates of their responses to legal guidance (from statutes and appellate court decisions) as a function of their attitudes, penal philosophy, knowledge, use of decisional rules-of-thumb, and a few social constraints. His findings include the observation that a majority of the magistrates adjust their sentences in the light of the possibility of parole being granted, thereby deliberately evading the contrary instructions of the Ontario Court of Appeal; and he concludes "that the socializing and educative influences of legal experience are far more important in controlling judicial behaviour than the formal rules laid down by parliament and the appeal courts."[13] Social constraints were defined to include such variables as the magistrates' images of their alters' (colleagues') penal philosophy; the extent to which each magistrate attempted to conform to what he believed to be the opinions or practices of other magistrates; magistrates' relationships with their professional organization; their attitudes toward probation officers, crown attorneys, and the Department of the Attorney-General; and their perception of public opinion, in their community, toward sentencing policy. The correlation of magistrates, by their own attitudes toward punitiveness in relation to their perceptions of social constraints, showed that punitive magistrates viewed the social influences in their environment as favorable to punitive sentencing policy, while non-punitive magistrates believe the community to be on their side. Thus Hogarth was led to conclude "that magistrates define selectively their social world in ways that maximize concordance with their private beliefs," subject to the sole qualification that punitive magistrates are more isolated socially and hence "more likely to deny the influence of others in their sentencing behavior."[14] His next step in the role analysis was to regress *both* attitudes *and* perceived constraints, against sentencing behavior, achieving results that he considered much more satisfactory than had been produced by the regression of *either* attitudes *or* constraints, alone, although he did conclude that "the constraints operating in the social world of magistrates assume significance, in

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[12] P. 164. The quoted portion of this statement seems to contravene the major assertion and finding of numerous reports of research by a leading American scholar in the field of mathematical prediction of judicial decisions: See, e.g., F. Kort, *Quantitative Analysis of Fact-Patterns in Cases and their Impact on Judicial Decisions* 79 Harvard Law Review 1595-1603. Cf., however, G. Schubert, *Quantitative Analysis of Judicial Behaviour* (New York: The Free Press, 1959) 216-363.

[13] P. 177.

[14] Pp. 200-201.

both a statistical and theoretical sense, only when the attitudes of magistrates have been accounted for."[15] And of course, notwithstanding the separate designation and treatment accorded to them by Professor Hogarth, the *perceptions* of constraints are also, as used and defined by him, attitudinal.

Correlational analysis of the relationship of social characteristics to attitudes and beliefs revealed quite a few statistically significant empirical findings, and suggested hypotheses that were derived from them. If one posits a broad generalized distinction between an orientation that is favorable towards *treatment* (the reformation of the offender) as distinguished from an orientation that is *punitive* (seeking either to punish past offenses or to preclude their repetition), then Hogarth's evidence indicates the following profiles for archetypes of Ontario magistrates. Pro-treatment are those reared in a professional family; with legal training (which "leads to a more creative and flexible approach to the law"[16]) but without extensive professional experience (either in practice or as judges); situated in a rural environment; with a low work load; and with Roman Catholic religious affiliation (notwithstanding the ambiguity and inconsistency of evincing, in this instance, a degree of intolerance that otherwise is associated with persons whose fundamental standpoint is anti-treatment). Punitive magistrates are laymen (whose approach to sentencing appears to be more "legalistic" than that of lawyers); with a working-class background; any kind of experience in the criminal courts (which "leads towards some accommodation with the punitive goals of the criminal justice system" although "the number of years spent on the prosecution side of the administration of justice is associated with being rather more extreme in this direction"[17]); seniority as a magistrate (because the "longer a magistrate is on the bench the more likely he is to believe in deterrence"[18]); with a heavy work load (because such magistrates "tend to have higher intolerance and social defence scores" and "Busy magistrates tend to use fines in Criminal Code cases more frequently. They not only use fines frequently in lieu of probation and suspended sentence, but also in lieu of short-term institutional sentences. . . . Fines fit more easily into a tariff system in which the penalty imposed is automatically determined by the nature of the offense"[19]); located in an urban environment; and protestant — especially Anglican (which is "more offense- than offender-oriented" and involves "a more negative attitude towards parole than either Roman Catholics or other protestants"[20]). The relationship for both age and education turned out to be curvilinear: that is, the most extreme magistrates in the direction of *either* reform *or* punitiveness, when the large urban-rural differences are held constant, are young and well-educated. Confronted with this serendipitious observation, Professor Hogarth proffers a couple of pages of post-hoc

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[15] Pp. 205-206. The operative constraints all were social; a legal constraint variable was included in the analysis but it did not appear in any of the reported regression equations.

[16] P. 213.

[17] P. 215.

[18] P. 216.

[19] P. 217.

[20] P. 214.

speculations that, given the importance of the subject, are perhaps best viewed as guidelines for possible future research.

The next major step in the analysis focuses upon the way in which information is used in sentencing. Treatment-oriented magistrates are found to need, seek, and use more information (both qualitatively and quantitatively) than their more punitive colleagues; but *all* magistrates "tend to seek information consistent with their preconceptions"[21] of attitudes. Examination of the use and effects of pre-sentence reports by probation officers demonstrated that such reports tend to bring about a closer accommodation of perceptions of the offender on the part of *rural* magistrates (who tend, it will be recalled, to be reformation-oriented) but that "urban magistrates agree with their probation officers . . . only if they have *not* received a pre-sentence report"[22]). This seeming anomaly is explained by the circumstance that (1) urban magistrates tend to be more punitive than probation officers so that they perceive and interpret quite differently from the latter the information in the pre-sentence reports that are received; while (2) "In cases where pre-sentence reports were not requested, the probation officer completed the document shortly *after* the sentence"[23]; thus the indication is that probation officers brought their "pre" — but literally "post" — sentence reports into conformity with what were by then decisional *faits accomplis.*

Analysis of the relationship of penal philosophy or attitudes to magistrates' perceptions (as revealed in the sentencing study sheets) towards offenses and offenders showed that the philosophical/attitudinal impact upon offense percepts was unimportant, but that upon images of offenders it was marked. In a word, magistrates projected onto the offenders, as perceived characteristics, their *own* predispositions regarding reformation or punitiveness. Assessments of offenders (on the study sheets) indicated substantial magisterial ignorance about the persons for whom they were sitting in judgment: over half of the responses were "no problems" or "not knowns." It comes, therefore, as no surprise to learn that punitively-oriented magistrates "tend to attach great importance to factors concerning the offence and the criminal record, and very little importance to the others"[24] which concern the deterrence and treatment of the offender. More generally, "there is a tendency for magistrates to organize and integrate information concerning a case around their assessment of the *offence.*"[25]

The "cognitive complexity" of the magistrates was operationalized in terms of 17 variables extrapolated from responses to the sentencing study sheets. The inter-correlations among these variables were factor analyzed to yield three rotated principal component dimensions. These were interpreted to measure (1) discrimination among offender differences, (2) the size of the "information space" needed to satisfy a magistrate, and (3) the degree

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21 P. 244.

22 P. 258.

23 P. 263. Emphasis added.

24 P. 285.

25 P. 296.

of effort that he expends in making sentencing decisions. None of the background characteristics of magistrates was significantly associated with any of the three cognitive complexity factors, but attitudes were. Confirming the earlier finding that magistrates whose legal philosophy is non-reformation in orientation tend to rely upon simplifying (if not simplistic) rules of thumb (that are prejudicial to offenders), the attitudinal loadings on the cognitive complexity factors showed "that punitiveness in attitudes and beliefs is associated with a fairly simple (concrete) way of organizing information in the process of judgment. The thought processes of punitive magistrates appear to be characterized by stereotyped or compartmentalized thinking. . . . In contrast, non-punitive magistrates appear to use information in a more complex and subtle way. Their thought processes are characterized by flexibility, autonomy, and creativity. . . . They appear to be much more involved in the sentencing process and find it a more difficult and demanding task."[26] Thus, the more cognitively complex magistrates tend to avoid fines and institutional sentences; and when they do use institutional sentences, they avoid common jail and penitentiary commitments. "Punitiveness in both attitudes and behaviour," Hogarth concludes, "is associated with cognitive-simplicity."[27]

The phenomenological model with which the empirical presentation is completed combines the three major categories of variables which, according to the preceding analysis, are most significantly associated with sentencing behavior. These include: (1) attitudes toward punishment; (2) perceptions of social constraints; and (3) cognitive complexity. Attitudes include five subvariables (i.e., scores on the five rotated factors); constraints, ten subvariables constructed from the sentencing study sheets; and cognitive complexity, three (scores on the rotated factors). When aggregated as a set of 18 independent variables, their regression against the major sentencing categories (commitment; suspension; fine) yields gross statistical associations that are important and significant: for example, a combination of two of the cognitive factors (discrimination and effort) plus a single perceived constraint (respect for punitive magistrates) and two attitudinal factors (pro-treatment, and tolerance) produce a multiple correlation of .84, which is the maximum attained; the minimum value attained in the other equations is .55, and the average value is .70. The average length of institutional sentences, in all indictable cases, could be predicted at .65 using only four subvariables. On the average, knowledge of these facets alone, of what is in human terms the structure of Ontario magistrates, is adequate to account for fully half of the variance in their sentencing behavior. Clearly such knowledge must be important, albeit not readily available, information about judicial decision-making. But that is not all.

In making decisions, magistrates do not act out their passions, social biases, or inarticulate major presuppositions (however we may choose to denominate such matters) in *abstracto;* they make decisions only in regard to specific offenses, particular offenders, and the explicit facts of discrete cases. What is missing (both theoretically and empirically) in the structural model

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[26] Pp. 319-320.

[27] P. 339.

of sentencing behavior — no matter how impressive its statistical prowess — is a sense of what clearly intervenes between the structure of the magistrate's personality and the sentences that he awards to offenders: the offenders themselves. Or to put the matter another way, whatever may be a magistrate's attitude toward punishment, perception of role constraints, and intellectual complexity, he brings these qualities to bear in his evaluation of particular cases, and hence it is his *perceptions* of the "facts of the case" that intervene between the structure of his personality and the decisions that he reaches about particular cases. Professor Hogarth is acutely aware of this, and he presents an alternative phenomenological model in which he operationalizes magisterial perceptions of cases in order to predict the length of institutional sentences, for each of the seven major offense categories. Here he employs four sets of independent variables, all constructed from information in the sentencing study sheets; assessment of the offense; assessment of the offender; what the magistrate considers to be the determining consideration in the case (which appears to involve a repetitious regrouping of variables in the first two categories); and the magistrate's avowed purpose in choosing a particular sentence. This is a functional model of judicial sentencing, involving interaction between the structure of the magistrate's personality and the structure of the situation to which he is obligated to respond. It predicts just as well as the structural model, with multiple correlations averaging .72 and ranging from .55 to .85. Which model is to be preferred will depend, of course, upon the kind of information available to a particular researcher; from the point of view of their efficiency to predict sentencing behavior, they are equivalent.

In anticipation of the probable claim that he had overlooked an obvious, and far less expensive (to researchers — and therefore a more readily generalizable) basis for predicting sentencing outcomes, Professor Hogarth presents also a brief discussion of what he calls a "black box model," involving the use of "objectively defined facts" as independent variables. (Of course, there are no such things as objective facts, and particularly for a phenomenologist; what he means, as he takes pains later to acknowledge, are the " 'facts' as defined by the researcher himself,"[28] in this instance Professor Hogarth.) This model (which utilizes such variables as: severity of the crime; type of victim; sex of the victim; sex of the offender; the number of charges; the offender's plea; his age, marital status, and occupation; his record; and the recency of his latest conviction) produces less gratifying results, with multiple correlations ranging from .17 to .48 and an average value of .30. He concludes from this that the facts of the cases account for only about 9% of the variance in their disposition. According to the author, however, an alternative (discriminant) analysis of the same data indicated that for his sample of approximately 1500 cases, two discriminant functions — recidivism and culpability — together accounted for over 90 percent of the explained variance in their disposition; how much of the total variance is explained by the discriminant analysis is not reported, and neither his textual discussion nor the Technical Appendices make clear how the functions denoted discriminate among sentencing choices for the cases sampled. Certainly his Table 104

[28] P. 350.

(which lists centroid loadings on the two functions, by type of sentence) does not accomplish this clarification, because there evidently was considerable use of multiple penalties: 2905 sentences were awarded in 1500 cases. It is unlikely that many readers are going to be able to comprehend on a statistical (as distinguished from a verbal) level his discussion of this matter — and certainly this reviewer did not — on the basis of the limited information reported. It is clear that, as Hogarth says, high recidivism is associated with institutional commitment, while lower recidivism is associated with the other sentencing choices; and that high culpability is associated with fines (which rank first) or institutional commitment (ranking second), while lower culpability is associated with suspension of sentence. But it also seems clear that among those meriting suspended sentences, those with the lesser culpability— and with equivalent recidivism — are the offenders who are *denied* probation; this is a seeming anomaly that one would think deserves some sort of mention, if not explanation, by the author. Furthermore, the directionality of the two key variables in culpability — plea and age — is nowhere specified; and given the problems — to which I shall turn presently — associated with the author's lack of consistency in designating and assigning directionality to variable descriptors (and even to the factors to which these relate) in other parts of his analysis in this book, one does not feel justified in guessing at the meaning of two of the four chief variables that are said to support this two-dimensional model of sentencing behavior. Especially does this seem true when that model is supportive of the traditional view[29] — that is, that Ontario magistrates punish offenders according to their criminality and blameworthiness — against which virtually all of Professor Hogarth's book stands otherwise in opposition. The "black box" regression model clearly predicts decisional outcomes much less effectively than does the magisterial cognitive-perceptual model; but that does not resolve — as Professor Hogarth seems to believe it does — the questions left open by his "black box" discriminant analysis. Any technique that can predict sentencing behavior — even qualitatively — *without having to deal with such complications and complexities as judicial personality,* remains an intriguing and potentially useful competitor to the behavioral alternative posited by the author.

In closing this consideration of Professor Hogarth's empirical findings, there are two matters that may seem conspicuous by their absence from the discussion thus far. Much of the previous research in the field of the prediction of judicial decision-making behavior has been concerned with the importance of stare decisis in guiding judicial choice;[30] and here I simply observe

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[29] As the author puts it, "this approach is consistent with the traditional legal view of the process which makes the assumption that the only 'legally significant' variables governing judicial decisions, within a given legal framework, are differences in the factual makeup of the cases, the law being a constant and the personality of the judge being legally irrelevant." P. 341.

[30] See, e.g., Fred Kort, "Content Analysis of Judicial Opinions and Rules of Law", chapter 6 in Glendon Schubert (ed.), *Judicial Decision-Making* (1963); Martin Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?* (1965), 12 Law in Transition Quarterly 134; Edward Green, *The Effect of Stimulus Arrangements on Normative Judgment in Award of Penal Sanctions* (1968), 31 Sociometry 125; and Theodore L. Becker, *The Fall and Rise of Political Scientific Jurisprudence: Its Relevance to Contemporary Legal Concepts* (1967), I Law and Society Review 15, at 18.

that scant attention is given to the effect of precedent, in the analysis and empirical findings of this book, a circumstance from which one must conclude that Professor Hogarth's research turned up no evidence in support of the proposition that magisterial attitudes toward stare decisis have any important bearing upon their sentencing decisions. The other matter is plea bargaining, a subject that has been of considerable interest in the United States in recent years;[31] Professor Hogarth does bring up the subject of plea bargaining, but he devotes only half a page to a summary discussion of it and evidently he does not purport to analyze it as a part of this study, where it becomes relevant only by oblique reference as the "attitude to the crown attorney," one of the variables in the list of perceived social constraints.

3. *Comments on Methodology*

A. *In general*

One of the most innovative features of Professor Hogarth's study is his use of quasi-experimental design, by having the magistrates fill in the "sentencing study sheets" at the time (presumably) that they made decisions. Two points are particularly important about this procedure for data collection. The first and most obvious is that the use of these reporting forms can hardly qualify as an unobtrusive measurement device. Such forms are not part of the customary routine of sentencing decisions; they are not used in most decisions; and to use them at all required of the magistrate that he establish special signaling procedures (for himself) — otherwise they would never be used — and consequently any case in which a magistrate decides to use the form becomes, *ipso facto,* an exceptional one. Furthermore, a conspicuous effort — both intellectual and physical — is required of the magistrate personally, in order to fill in a form; so the very fact that he does this focusses special attention, and consideration, upon his decision in such a case. One would expect that, because the filling in of the form necessitates the clarification and articulation, to himself, of his perceptions, conceptions, and motives, he must achieve a higher degree of cognitive completeness — rationality, consistency, and closure — in the decisions that he reports than in the ones for which no such rationalization of his behavior is required. And this leads directly into the second point: the probability seems high that the magistrate fills in this form not in counterpoint to the incremental stages of his decision-making, and therefore not while the outcome remains *in igni* but rather strictly post hoc his determination of the sentence. That being the case — and there is nothing in the book to indicate the contrary — it follows that these reports of the magistrates' *per*ceptions ought to be evaluated, as data sources, exactly the same way as the author himself suggests should be done with the unso-

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[31] In the words of an American legal sociologist who has done extensive research and writing on the subject, "The overwhelming majority of convictions in criminal cases (usually over 90 per cent) are not the product of a combative, trial-by-jury process at all, but instead merely involve the sentencing of the individual after a negotiated, bargained-for plea of guilty has been entered." Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession* (1967), I Law and Society Review 15 at 18.

licited "pre" sentence reports of probation officers to urban magistrates. They should be viewed by the researcher, that is to say, as reports of *post*ceptions: as attempts (consciously or otherwise) to construct logical, rational, justifications for decisions reached on whatever grounds. It will not do to consider such reports to be objective revelations of the inner experiences of magistrates, captured (for purposes of recordation) *en passant,* as it were. Magistrates are social actors, not social scientists.

On another aspect of obtrusiveness I must again register my disagreement, although this time in the opposite direction. The author remarks that he decided "that a tape-recorder would be too threatening for some magistrates and for this reason it was decided to rely on an interview guide."[32] I think he gave up without even trying, thereby (if he did guess wrongly) paying unnecessarily high costs in the quality, quantity, and validity of his interview data. No interviewer can remember the details of even a one-hour conversation, to say nothing of one that extends to five hours. This reviewer has tried it; and he has observed at intimate range the efforts of fellow-professionals to do it; and he has also recently returned from a year's field work in Europe and Africa during the course of which he conducted interviews, averaging between two and three hours in length, with approximately a hundred supreme court judges. Incidentally, the reviewer had considerably less going for him, in the way of official sponsorship and facilitated entré, than did the author; and in only one instance did he encounter an outright refusal — and that, only in part — to permit the use of a tape recorder: the Chief Justice of the Republic of South Africa requested that a substantial portion (but by no means all) of his remarks be kept not off the record but rather off the recorder. On the other hand, the recorder certainly is not an unobtrusive measuring device, either; it makes both the interviewer and interviewee self conscious, diverting their attention repeatedly away from the engagement of each other to a mutual concern for the machine; whatever effect it may have, with different respondents, upon candor, must certainly be negative; and it entails future obligations concerning the security and use of data. In a way, the interviewer must choose between interview data that have become colored, reshaped, and filtered through the selection process of his *own* perceptions[33] — the price of no recorder — and an accurate, complete, and permanent record of interview data that have become colored, shaped, and filtered through the selective process of his respondents' perceptions with greater amplitude than would have been mustered for what at least seemed to be an open conversation, without a bug in sight. My point here is simply that Professor Hogarth perhaps could have assumed, and others can assume, a more potent research stance if recourse to the use of such devices as a recorder is deemed a question open for decision by the researcher, instead of one that has been foreclosed by fate.

Although Professor Hogarth is a sociologist, he is also a lawyer, and his non-sociological roots show up in his book, from time to time, in the expression of an outlook that is hardly characteristic of the cutting edge of the

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[32] P. 27.

[33] See Glendon Schubert, *Ideologies and Attitudes, Academic and Judicial* (1967), 29 Journal of Politics 3, and *Academic Ideology and the Study of Adjudication* (1967), 61 American Political Science Review 106.

behavioral sciences today. Much of this is doubtless relatively innocent, such as his allusions to sentencing options regarding offenders whom magistrates believe to be guilty, as degrees of interference with "the life and liberty of the subject."[34] Sovereignty becomes more manifest in other references, however, such as that "The State must have clear, unequivocal grounds for interfering when the liberty of the subject is involved."[35] (Perhaps it should be explained, for a Canadian legal audience, that in American political science, both Sovereignty and The State went out with Woodrow Wilson; this doesn't make Hogarth's use of such concepts wrong, but it does identify it as legalistic.) Or take the very next sentence following the one just quoted, in which he speaks of "the protection afforded by an independent judiciary acting as a brake on a possibly over-zealous administration." (Again, one would have supposed that, particularly for someone whose education was completed in the mother country, Lord Hewart's *New Despotism* would have been laid to rest by Harold Laski's generation, if not by Laski's specific writings on the subject of the relative merits of administrative as compared to judicial zeal.) But these graffiti have significance only as indicators of one principal component of the author's viewpoint, which at other times finds expression in more important statements, such as his assertion that other social science researchers (non-phenomenologists) ascribe importance to a few variables abstracted from the larger field in which such variables commonly operate, and then "ignore" the other equally relevant and common variables which they do not abstract for purposes of analysis.[36] That "ignore" is a powerfully loaded word, in the context in which it is used; and the author's citation (as supporting) of a well-known work in the philosophy of social psychology does not get him off the hook for misleading the readers of his own book. Neither any kind of science, any kind of art, nor indeed any kind of human perception, can or does take place except by "ascribing importance to a few variables. . . , [etc.]". Necessarily, phenomenologists also, and similarly, abstract from reality. Were it otherwise he (and we) could only confront phenomena of interest in inarticulate wonder, akin to Korzybski's description of the first level of abstraction from his semantic differential, at which one can only bark at his world.[37]

Equivalently unscientific is an occasional hyperbolic assertion such as that "The magistrates' court in Canada has a broader jurisdiction to try cases, and wider sentencing powers, than that given to any other lower court exercising criminal jurisdiction in the world."[38] This statement is so broad as to be virtually meaningless; and to the extent that we append to it non-tautological parameters, of either space or time, it is almost certainly untrue. It is legal

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34 P. 159.

35 P. 389. [My references in the text at this point purport to discuss the dysfunctionality entailed by reliance for analysis on concepts that are institutional fallacies and legal fictions, such as "the State"; I do not undertake to discuss here whether "there should be some proportion between the seriousness of the offence and the severity of the sentence imposed," as Professor Hogarth alleges in his "Reply." And concerning the post-Diceyan perspective in English administrative law, I suppose that one who cannot spell a scholar's name is not likely to have a very profound grasp of his views and their significance.]

36 P. 18.

37 Alfred Korzybski, *Science and Sanity* (1933).

38 P. 357.

verbiage. Neither Hogarth nor anyone else can prove it to be true (because of the unavailability of much potentially relevant evidence); whereas even a single example to the contrary (with which reports in legal ethnography abound) is disconfirmatory. I guess what I am questioning here is the usefulness of making legalistic remarks in what is overwhelmingly a scientific book. The legalisms jar any sensitive reader, whose expectations have become keyed to a different level of discourse. A few pages later, for instance, Hogarth refers "to a concern that crime be punished in proportion to its severity."[39] Now this kind of rhetoric is perfectly suitable for the libretto of a W. S. Gilbert, where overprecision could kill the rhyme, if not the reason, of a pretty speech; but in the language of social science, there is no operational way in which crimes can be punished; only criminals. And in this book the major question is why criminals are punished: for what they have been? for what they have done? for what they are? for what they may become? for what they may do on some future occasion?

Early in the book in his discussion of theory Professor Hogarth decries the "dilemma" that he confronts, if forced to choose between the logical explanations of judicial behavior proffered by traditional jurisprudence, and the irrational models of human behavior posited by clinical psychology (psychoanalysis) or by behaviorism (not by behavior*al*ism).[40] There were many research dilemmas that Professor Hogarth could not avoid in his work on this project, but this is one that he did not have to confront, particularly in view of the circumstance that his way out lay through behavioral theory — the main route generally preferred by him throughout his book. But another type of dilemma faced by the interdisciplinist is that of how to catch up (which is most difficult) and how to keep up with more than the superficial facets of theory development, in fields in which he has not grown up. In this particular instance, the principal interdisciplinary professional journal focused explicitly upon the interfaces of law, sociology, and political science (and edited in 1968 by the sociologist who is now dean of the law school at the State University of New York at Buffalo, across the lake from Toronto and Osgoode Hall) published an article entitled "Behavioral Jurisprudence" that features the discussion of three types of rationality in adjudicative decision-making, with psychological rationality — precisely what Hogarth himself favors and pursues in the present book — posited as a middle way between the logical theory of jurisprudence and the non-logical theory of biological determinism (whether in the form of Skinnerian behaviorism or neo-Freudian libidoism).[41]

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[39] P. 362.

[40] See David Easton, "Introduction: The Current Meaning of 'Behavioralism' in Political Science" in James C. Charlesworth (ed.), *The Limits of Behavioralism in Political Science* (1962), at 1.

[41] Glendon Schubert, *Behavioral Jurisprudence* (1968), 2 Law and Society Review 407, at 417-418. [Professor Hogarth's allegation in his "Reply," that my earlier work is based upon a stimulus-response model "that assumes that judges process facts, laws, ideas and people much like a computer" is utterly false, as my article *Behavioral Jurisprudence* (with which Professor Hogarth apparently continues to remain unfamiliar), and the references cited therein, make abundantly clear. If my earlier work has indeed been associated with a simplistic stimulus-response model, this was done by the likes of Becker and Grossman, with whose idiosyncratic view of political science research in judicial behavior Professor Hogarth seems determined to associate himself.]

Indeed, the more general observation can be made that the tendency to overlook the political science literature in judicial behavior is much more a problem for sociologists — who consider themselves to be *over*skilled in relation to political scientists — than for law professors, who typically feel more modest in this respect. One feels obliged to qualify both the specific point and the generalization by remarking that 1968 was evidently the cut-off for Professor Hogarth's supporting bibliographical references; but it is much more important to repeat, in the present context, my earlier statement that Hogarth does exceptionally well in his invocation, for both operational as well as citational purposes, of the relevant research literature in the behavioral sciences. On the other hand, specialists in other behavioral science disciplines may inevitably feel, as does the present reviewer, that the author has a conspicuous blind spot for the most relevant research in the specialist's *own* particular discipline.

The reader encounters, for example, a critique by the author of previous political science research on the background characteristics of judges. After assimilating to "a simple stimulus-response model" much of the early research in the field the author states as a fact about that work that "Regardless of the level or type of court being studied, unanimous decisions were eliminated."[42] Indeed, the thrust of Professor Hogarth's proposition is even stronger: that these scholars of judicial behavior rather perversely insisted upon limiting their attention to non-unanimous decisions even *after* critics — apparently, more discriminating political scientists — had brought this deficiency to their attention. Hogarth's proposition, with or without the innuendo, is simply false empirically, as I shall demonstrate shortly using as evidence primarily the research that he himself denotes as exemplifying his assertion. But first I must explain how errors such as this can and do arise on the part of interdisciplinary borrowers. Hogarth does not base his statement upon his own independent examination of the political science studies that he cites; he relies instead, upon an uncritical acceptance based on "good faith," of what was already by the mid-sixties a developing mythology propagated by such ideologically motivated commentators (who as professional insiders were also professional in-fighters) as J. Grossman, T. Becker, and W. Mendelson.[43] (Grossman is the one who Hogarth picked to cite and quote; but either of the others would, at that time, have served equally well.) My point is not, ça va sans dire, that Hogarth deliberately selected a misleading "authority;" it is rather that interdisciplinary researchers should be sensitized to the risk of this sort of undesirable side-effect.

On the merits of the issue, it is easy to direct attention to numerous examples of political science research in judicial behavior in which both unanimous and non-unanimous decisions have been pooled (or compared)

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42 P. 51.

43 See, for example, Richard J. Wells and Joel B. Grossman, *The Concept of Judicial Policy-Making: A Critique* (1967), 15 Journal of Public Law 286; Theodore L. Becker, *Inquiry into a School of Thought in the Judicial Behavior Movement* (1963), 7 Midwest Journal of Political Science 254; and Wallace Mendelson, *The Neo-Behavioural Approach to the Judicial Process: A Critique* (1963), 62 American Political Science Review 593.

for analysis.[44] But unanimous decisions are included also in the samples analyzed: (1) by Ulmer on the Supreme Court of Michigan (the first reference cited by Hogarth in his first footnote on page 66); by Russell on the Supreme Court of Canada (same footnote); and (3) by Schmidhauser[45] (in the second footnote on page 66). Unanimous decisions were *not* included in the two studies by Nagel (cited by the author in the first and fourth footnotes on page 66). The other references in the first ten footnotes (same page) are irrelevant, in that they include no quantified analyses of judicial decisions, either unanimous or non-unanimous. Therefore, a majority of the relevant references cited by Hogarth himself, in his discussion in this chapter up to the point where he makes the false statement that ". . . unanimous decisions were eliminated," were of reports that feature the analysis of such "eliminated" unanimous decisions. Even at that, he could have learned enough more to have been more cautious, without the necessity of his having examined personally the original research reports in question, if he had only pushed a bit further in his search of the critical literature.[46] And one other matter along these same lines warrants comment: Hogarth's search of the American political science research in judicial sentencing evidently failed to turn up a study most directly relevant to his interests, an analysis by a psychologist and two political scientists of some 150,000 sentencing decisions, in cases of summary offenses, by a group of forty New York City magistrates over a period of sixteen years.[47]

B. *Conceptualization*

A major problem in conceptualization is raised by the semantic structure which the author has attributed to the factorial structure that was produced by varimax rotation of the principal component analysis of the attitudinal responses.[48] I should like to approach this problem by turning first to the Likert scales, which are constructed directly from the same items which, when pooled, are the basis for the factor analysis. Of the 107 items in the questionnaire,[49] 91 are used in the set of four scales and six subscales.[50] Of these 91 items that comprise the scales/subscales, 78% are punitive in direction, the remaining 22% being anti-punitive. Looking first at the four scales, and using the labels for them that the author affixed, we find that the ratios of punitive

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[44] For example, Harold J. Spaeth, *Warren Court Attitudes toward Business: The "B" Scale:* Joseph Tanenhaus, Marvin Schick, Matthew Muraskin, and Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory;* and Fred Kort, *Content Analysis of Judicial Opinions and Rules of Law;* chapters 4-6 in Glendon Schubert (ed.), Judicial Decision-Making (1963); and Glendon Schubert, *Jackson's Judicial Philosophy: An Exploration in Value Analysis* (1965), 59 American Political Science Review 940.

[45] Incidentally, J.R. Schmidhauser's surname is consistently mis-spelled as "Smidhouser" in the references of page 66.

[46] Sheldon Grossman, *Backgrounds, Attitudes, and the Voting Behavior of Judges: A Comment on Joel Grossman's "Social Backgrounds and Judicial Decisions"* (1969), 31 Journal of Politics 214.

[47] Albert Somit, Joseph Tanenhaus, and Walter Wilke, *Aspects of Judicial Sentencing Behavior* (1960), 21 University of Pittsburgh Law Review 613; reprinted in Glendon Schubert (ed.), *Judicial Behavior: A Reader in Theory and Research* 389-394 (1964).

[48] See his discussion of the "Labelling of Factors" pp. 128-129.

[49] Technical Appendices, pp. 65-70.

[50] Technical Appendices, pp. 71-77.

items, by scale, are as follows: (1) Punishment, 26:1; (2) Treatment, 12:7; (3) Deterrence, 8:2; and (4) Tolerance, 7:4. Of these four scales, the first and third are the most strongly unidirectional, while the second and fourth are only moderately so — but when thus analyzed quantitatively, it is at least evident that all four scales do point in the same direction, that of punitiveness. It is most difficult to apprehend, therefore, any good reason (logical, psychological, or sociological) for giving half of these scales names that point in one direction, and the other half names that point in the opposite direction. Evidently, the process of naming these scales was intuitive rather than quantitative; and the reason they are in fact co-aligned is that the items selected for the questionnaire *happened* to fall very lopsidedly in one direction instead of the other. But that being the case, the argument seems overwhelming for not confusing readers by mislabeling the contents of the scales. Clearly, the second scale should be called "*Anti*-treatment" and the fourth should be called "*In*tolerance," and these are the names that I shall use in the discussion that follows. (Similarly, three of the subscales are mislabelled: these should be "Anti-probation," 5:0; "Anti-Alcohol," 3:1; and "Anti-science," 4:1.[51] The penal philosophy of "Reformation" also is reversed in direction from the other four doctrines, which are co-aligned punitively. This raises unnecessary difficulty in interpreting certain of the author's tables, such as Table 30, page 120, where his reversal of the Antitreatment and Intolerance scales and the Anti-probation subscale largely succeeds in obscuring what would otherwise be the almost perfectly consistent scalar relationship among the population groups examined. Hogarth was forced to settle for the much weaker finding that there are significant differences — although apparently in the mixed-up manner in which he has arranged the data, no consistent ones — among these groups; but if he had co-aligned all of the scales and subscales in this table (so that, for example, social work students would then be *lowest* on Anti-treatment, Intolerance, and Anti-probation, instead of being shown as *highest* on Treatment, Tolerance, and Confidence in Probation) it would then denote a perfect scalar order with police officers most punitive, followed by magistrates, probation officers, law students, and with social work students least punitive.

Once I had the scales and subscales straightened out so that I could understand them, I examined the relationship between scale/subscale items, and the size and direction of factor loadings. This frequency scattergram showed that the first (Punishment) scale was apportioned primarily among Factors I, II, and IV; the second scale (Anti-treatment) was loaded primarily on Factor I; the third (Deterrence) scale, on Factor IV; and the fourth (Intolerance) scale, on Factor III. Looking at the matter from the other point of view, the modal loading on Factor I consisted of five items from the Anti-treatment Likert Scale plus five items from the Punishment Scale; for Factor III, it was three items from the Intolerance Scale plus seven items from the Punishment Scale; and for Factor IV, it was seven items from the Deterrence Scale plus seven items from the Punishment Scale. An analyst who approached the task of identifying these factors by using phenomenological rather than

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[51] I am aware that Professor Hogarth claims (p. 116) to have "abandoned" this subscale but its items remain in the questionnaire (as #31, 43, 91, 94, 99) and therefore, presumably, they entered into the factor analysis.

linguistic or intuitive methods would have to conclude that Factor I ought to be denominated as "Anti-treatment," because that is its principal identifiable content, rather than "Justice" which has about as much manifest relationship to this particular factor as it has to any of the other four factors — neither more nor less. Beyond that, "Anti-treatment" has a reasonably explicit, operational meaning; "Justice," I fear, is but another example of Professor Hogarth's occasional lapses into legal idealism, and God only knows what it means — the only thing I am certain of is that it is a perfect example of what Bentley used to decry as a verbal "spook" or "ghost."[52] There is even more, and more persuasive, internal evidence on this subject: pages 195-196 of the Technical Appendices lists the correlations between the sentencing study sheet variables and Factor I (which is there labelled "Justice", of course), and contrary to the sentencing form sequence in which these correlations are listed by the author, I shall list below in descending order those $\geq .300$, with the highest negative correlation *first* (because my argument is that this is a factor that should be called "Anti-treatment"):

Correlation	*Sentencing Study Sheet Variable:*
— .538	Purpose — To Reform this offender
— .449	Determining factors (grouped — Diagnosis)
— .414	Determining factor 11 — Offender's need for counselling "offender's") need for counselling
— .345	Determining factor 14 — Offender is likely to respond to treatment
— .344	Determining factor 13 — Offender's need for supervision
— .301	Determining factor 10 — Offender's need for psychiatric treatment
— .300	Determining factor 12 — Offender's need for training
.323	Determining factor 22 — Prevalence of offence in community
.360	Purpose — To punish this offender

I don't see how evidence could be clearer: as perceived by the magistrates themselves, this factor is overwhelmingly concerned with their opposition to the need for taking steps to rehabilitate offenders.

For similar reasons, the third factor, which consists mostly of items from the Punishment and *In*tolerance Scales, is (I am happy to be able to say, properly) designated as one of Intolerance; and the fourth factor, consisting mostly of items from the Punishment and Deterrence Scales, should be called a factor of Deterrence (rather than "Social Defence" as the author specifies: why use two differing semantic tags — a practice in which the author overindulges, as I shall explicate below — for the same content?). This leaves us with the second and fifth factors, upon which the Punishment Scale does *not* load strongly. Instead, Factor II[1] consists of all except one of the items from the capital punishment and corporal punishment subscales, plus four highly negatively loading Anti-treatment Scale items (i.e., four pro-treatment items). Particularly in view of the fact that it is hard to comprehend whom *capital* "Punishment Corrects," and also because this factor is so devoid of items from

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[52] Arthur Fisher Bentley, *The Process of Government* (1908). For an application of Bentley's approach, to the judicial process, see Jack W. Peltason, *Federal Courts in the Political Process* (1955).

the "Punishment Scale," it seems most in accord with the directionality of its content to denominate Factor II[1] as "Punitiveness."

Factor V[1] (which the author called "Modernism") presents several problems, not the least of which is the fact that the author has got it reversed — that is to say, he should have "reflected" it, which in factor analytic lingo means to have reversed its polarity by changing the directionality of all of its loadings, and therefore of course also of its semantic designation. His mistake in this regard shows up in a number of respects, not least of which is Table 40 on page 135, where (as in the case of the Likert Scales, once they become co-aligned) the five population groups of police officers, magistrates, probation officers, law students, and social work students, all are in correct and consistent scalar order for Factors I[1] — IV[1], but for Factor V[1] the scalar order is *reversed!* Furthermore all of the scale items on Factor V[1] (as reported by Hogarth in Table 38, page 134) have loadings opposite to both the semantic sense of the items (and their parent scales or subscales) and the direction of their correlations with the other four factors. For example, one of the Corporal Punishment Subscale items, "For certain crimes, corporal punishment should be imposed," seems on its face to be pro-punishment (rather than *anti*-punishment) in its orientation, and its loading with Factor II[1], Punitiveness (the author's "Punishment corrects") is + .750 — not maximal (because two pro-*capital* punishment items are more highly positive) but nevertheless healthy. The loading of this same item on Factor V[1], which Hogarth wants to call "Modernism," is reported in Table 38 as being a highly negative — .530; and my argument is that all of the loadings for Factor V[1] should be reflected so that — .530 becomes + .530, in which case it makes sense to presume that Factor V[1] is now pointing in the same direction as Factor II[1]. And once that has been accomplished, it makes more semantic sense to denominate Factor V[1] as one of "Puritanism" rather than as one of "Modernism," although "Anti-Modernism" would certainly be a sensible alternative possibility. Incidentally, the only objective justification — and it is not much of one — that I can figure out, for the author having decided to call this factor "Modernism," is that the word "modern" does appear in the highest positively — not the highest — loading item: "Corporal punishment should have no place in modern penal practice;" but 79% of the items, 11/14, are negative in Table 38, and the factor certainly is more appropriately designated on the basis of its lopsided content and directionality.

Robert H. Jackson, a late associate justice of the United States Supreme Court, once remarked (in speaking of legal fictions)that the difficulty with fictions is that they are most apt to mislead those who proclaim them.[53] Certainly Professor Hogarth's unfortunate choice of the concepts and of the words "Justice" and "Modernism," to denote his first and fifth factors, returns to haunt his analysis and discussion time and time again in this book. A typical example is found in an observation by the author concerning the factorial scales. His opening verbal gambit is that "It is interesting to note an apparent relationship between 'punitive' behaviour and 'modern' thinking. One cannot describe either the attitudes or the behaviour of magistrates in terms of a

[53] *Brown* v. *Allen*, 344 U.S. 443, 542 (1953).

simple punitive/non-punitive dimension." Certainly not, in lieu of one first having co-aligned his vectors consistently. And: "In fact, concern for justice, a doctrine considered old-fashioned and out of date by some, appears to have a number of *redeeming* features. In contrast to magistrates with high [positive or negative? who knows? and how can one find out? — certainly not either in the book or in its Technical Appendices] scores on the modernism and punishment corrects scales, magistrates with high justice scores appear to impose upon themselves certain restrictions on the degree to which they will interfere in the life and liberty of the subject"[54] etc., and hence further down the primrose path of nostalgic legalism, as already noted above. The empirical point that the author wishes to make here is that magistrates with high positive loadings on Factor I^1 tend, more than do those with (presumably) equivalent loadings on either II^1 or V^1, to impose light sentences for comparatively petty offenses.[55] My point here is that Professor Hogarth gets quite swept away with the semantic overtones of his intuitively selected factor labels, with the consequence that, instead of interpreting his (for better or worse, quite rigorously quantified) data he ends up interpreting the linguistic implications of *words* such as "justice," "corrects," and "modernism." John Roche once remarked that when a scholastic scholar ran out of gas, he would typically bolster his argument by intruding a Greek quotation; and Roche suggested that when a similar thing happened to an American political behavioralist, the latter will break out into calculus.[56] One begins to suspect that, when a legal sociologist runs into a weak spot in his argument, the natural inclination is to retreat from social psychology into jurisprudence.

A minor problem of conceptualization can be disposed of much more summarily. The author confesses, in his discussion of the discriminant analysis of sentencing sheet variables, that although "The first two discriminant functions are relatively easy to interpret and are quite distinct from one another, . . . Discriminant function 3 is more difficult to interpret." I should think so: #1 accounts for 64.37% of the variance, #2 for 33.99%, and that leaves only 1.64% to be attributed to the third function. The author tries to be fair, however: he gives equal space and equal attention, in his interpretation, to all three functions. He would doubtless have been well advised, under the circumstances, to have written #3 off as error variance, and to have limited his (and his readers') time and attention to the two functions which not only make good sense but which also, together, account for 98.36% of the variance, a proportion that for purposes of most analyses is considered to be quite satisfactory. At the very least, such an approach would have been more parsimonious.

C. *Technical Errors*

I have supplied the editors with a list of some score of technical errors (and a somewhat larger number of typographical and grammatical mistakes)

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[54] P. 159.

[55] Cf. p. 365.

[56] John P. Roche, *Political Science and Science Fiction* (1958), 52 American Political Science Review 1026.

together with my comments thereon. At the request of the editors, and in order to save space, I shall limit my discussion to four of the technical errors.

Page 219 includes the sentence: "Magistrates with high tolerance scores tend to come from rural, stable, French-speaking communities with a high crime rate." Table 70 immediately above on the same page identifies the relevant attitude scale as "Intolerance"; and *in*tolerance is evidently correct, according to the data presented in the table, subject to the qualification that none of the corresponding factor scores is particularly high (all are under .40) — what the author apparently means is "positive" rather than "high." (I would classify this as a typographical or proofing error were it not for the rather exceptional degree of confusion, previously discussed, manifest in this book concerning the directionality of the various types of dimensions for measuring belief systems; so I am not really *sure* whether this is an author's or printer's or an editor's error.)

On page 229, Herbert Simon and James March are credited with the idea that decision-makers typically seek "satisfying" rather than "optimum" solutions to problems. The concept and word proposed by March and Simon is: "satisf*ic*ing"; and particularly when the word is put in quotes, it is erroneous to attribute a more banal thought to them. (Incidentally, this is an instance in which, on the basis of many similar sad experiences of my own, I am virtually 100% sure that full credit should be given to some sweet little copyeditor who is certain that she knows better about such matters than authors, even though she has not read the books that her authors are quoting. After all, that other word isn't even in her desk dictionary.)

I rate also as a technical error the author's failure to standardize the variable descriptors in his tables. For example, Table 106, page 352, defines one variable as: "Respects magistrates not concerned for justice"; while Table 108, page 354, defines this same variable as "Respects magistrates who lack concern for justice." For another variation on a similar theme, contrast the first variable listed in Table 45, page 162, "Not concerned for justice," with the equivalent (and also the first listed) variable in Table 66, page 205, "Lacks concern for justice." But the problem is really *passim,* and it really does interfere, in a completely unnecessary way, with the comprehension — to say nothing of the enjoyment — of this book.

Finally, I must direct attention to the complete absence of *any* correlation matrices, either in the text of the book itself or in the Technical Appendices, in a book which is replete with both the discussion of correlation coefficients and of factor analyses.[57] This lack makes it impossible to resolve certain inconsistencies in the text, where one encounters repeated (and all too often, false) assurances that information will be provided in the Technical Appendices which, upon examination, do not contain it either.

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[57] Neither the book nor the Technical Appendices provide certain information (*e.g.*, rotated factor loadings $<\pm .64$ on I^1, $<\pm .49$ on II^1, $<\pm .57$ on III^1, $<\pm .37$ on IV^1, and $<\pm .30$ on V^1: see Tables 34-38, pp. 130-134; and Technical Appendix 2 pp. 77-83).

4. *Comments on Format and Related Matters*

This book has an excellent bibliography, including over five hundred items grouped under half a dozen major analytical categories. This bibliography is a strength and asset of the book.

The one-page index (it is spread over two pages: but it adds up to one, contentwise) is *hopelessly* inadequate for virtually any scholarly purpose. This is a complex four-hundred page book that neither I nor any other serious reader could consume in a single evening; and persons willing to tackle the task of coming to grips with the book ought not to be put in the position of getting more help out of the table of contents than they can get out of the index. An index is the one part of a book that competent third parties can be hired to do as well as, or better than, the author. It is my sad duty to report also that this book was very poorly proofread.

I have the gravest of reservations concerning the prudence of the decision — surely not the author's, I realize — to have the Technical Appendices not only published in a separate volume, but by a different publisher as well. I do sense that this reflected a problem in the economics of book publishing. But books are published to be used — or at least, that is among the reasons — and reading this work makes one feel like a schizoid tennis player. Moreover, I'll bet my last Chinese fortune cookie that a great many libraries — perhaps even a majority — that do buy the book never resolve the internal bureaucratic problems posed for them to acquire a copy of the Technical Appendices.

5. *In Conclusion*

We have now completed our consideration of the data, methods, and empirical findings of Professor Hogarth's book; and of my comments on his methodology (with particular emphasis upon certain conceptual problems and technical errors), and on the format and composition of the book. Having stated what the book is about, what I think is particularly good about it, and what I think went wrong in its writing and production, I wish to conclude by indicating briefly my evaluation of its importance as a contribution to law, social science, and behavioral science.

As a contribution to empirical jurisprudence, *Sentencing as a Human Process* certainly must be ranked as a major work. There is nothing like it — at least, nothing yet — for Australia, India, or South Africa; and although there is a first-rate sociological study of the English judicial profession,[58] and of course many legal ones,[59] nothing similar based on field survey data has yet been published to my knowledge. The situation is quite different in the United States; and Professor Hogarth himself surveys most of that research, in his introductory chapter. But the most apt basis for comparison is, in my opinion, the much publicized report by Kalven and Zeisel on *The American Jury,* purportedly the *pièce de résistance* of the University of Chicago Jury Project,

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[58] Brian Abel-Smith and Robert Stevens, *In Search of Justice: Society and the Legal System* (1968).

[59] Louis L. Jaffe, *English and American Judges as Lawmakers* (1970).

whose activities languished in and out of the news headlines and the halls of Congress throughout much of the latter fifties and the sixties. (It is almost too bad that Hogarth was not — and he is not — given to puffing, in which event he might have been willing to stretch a point and to have called his book *The Canadian Judge:* he certainly would have better justification for having done that than Kalven and Zeisel had for entitling their book as they did.) Zeisel is (like Hogarth) a sociologist affiliated with a law faculty; and his book (like Hogarth's) is based upon survey data provided by judges. But there the similarity ends. Hogarth's is by far the superior book, on almost any dimension that I can think of (with the possible exception of publisher's publicity for the book). Hogarth's methodology, in particular, is sophisticated and meets the highest standards of his profession; I have detailed elsewhere the fundamental methodological flaws that mar the Zeisel book. Hogarth's empirical findings articulate with other scientific knowledge about human decision-making behavior, in addition to their potential for guiding changes in the political and institutional processes as well as in the law relating to social control in Canada. And specifically because of their scientific character, Hogarth's empirical findings will be of interest to a legal audience of — as I stated in my introductory remarks — global proportions, instead of being limited to those relatively few persons whose concern is with Ontario criminal law and courts. So I think this book is a major contribution to the legal literature of the seventies.

When I speak of this book as a contribution to social science, I am thinking of it in relation to the burgeoning literature on law and society (as many legal sociologists like to call it in the United States) that has appeared in Europe and Japan as well as in North America during the sixties. Here the canons of scholarship are somewhat more severe; but even so, I think Hogarth's book will be well received as an important work which will have an impact in a variety of respects on the development of theory in this field. Certainly it should be widely used — as I intend to make use of it — in both upper division undergraduate courses and in graduate seminars concerned with social control, legal sociology, and the judicial process. It should also help slightly to slake the thirst of those many American professors who have lamented the lack of more detailed field studies of trial court decision-making.

In my opinion, Hogarth's book has relatively the least to offer to the behavioral sciences. However innovative and creative his work is from the point of view of its empirical context and contributions, from a strictly methodological point of view it employs techniques that are pretty well standardized, generally available, and commonly understood among persons who take advantage of the facilities of computer laboratories and institutes of social research — a point that the author would be, I have every confidence, the first to acknowledge. The empirical innovation which may attract some interest is his capture-and-record work using the "sentencing study sheets." And there may be some interest also in his final, summing-up model, in which he combines three types of variables: personality (cognitive-complexity), role (attitude towards social constraints), and cultural (attitudes toward social control).

In sum, this book's primary appeal will be for lawyers, and especially academic ones; it will have an important interest for sociologists, psychologists and political scientists; and it will be of definite but much more modest interest to methodologists. Anyone who has written a book that can appeal to such diverse groups has accomplished no mean achievement; and as I already have remarked repeatedly, I think Professor Hogarth's overall achievement with this work is of a very high order.

IMPLICATIONS FOR JUDICIAL POLICY

By ALFRED P. MURRAH*

The title of Professor Hogarth's new study of the sentencing process in itself speaks volumes to those of us who participate in the process from the bench. It is a call to us to recognize that the process is one that is administered, if I may paraphrase Lincoln, to humans, by humans, and for humans. Judges are often overwhelmed by the duty of sentencing. Sometimes the response to that sense of overwhelming responsibility is to retreat into the comforting concept that sentencing is somehow the product of superhuman processes. Professor Hogarth immediately draws us away from whatever fleeting reassurance might be gathered from that unsupported notion. Instead he calls upon us to recognize the essential humanity of the process and to draw strength from it rather than suppress it. In rejecting research approaches that would have concentrated on a single level of analysis, he has taken the far more difficult but infinitely more rewarding approach of totality of analysis. To do otherwise would have denied the thesis of the book — that the sentencing process derives its weaknesses and its strength from the human quality of all the people who are involved in it.

The resulting analysis is, at one and the same time, the most challenging and the most encouraging work yet done on this extremely volatile subject. It is challenging because it clearly portrays the vagaries of the sentencing process as it operates in Canada, and we may comfortably assume, in other jurisdictions of the common law tradition. The study clearly demonstrates

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that the variations are wide spread and deeply rooted. Sentencing decisions display great inconsistency when measured against almost any configuration of the objectives of the criminal process. Service to classical objectives of rehabilitation, deterrence, and retribution cannot be correlated with the overall product of the sentencing activity. If the study stopped there, as it would have if it had taken a more limited course, we might all despair of a solution. But fortunately, the study reached much further and the findings of this deeper research point the way for programs to achieve an overall rationality.

While overall consistency was missing, as everyone intuitively knew, internal consistency of each sentencing judge with the values and philosophy uppermost in his own mind was displayed to a degree that offers a realistic base for encouragement. This finding of the study was probably not so intuitively expected. To find that the actions of the judges are consistent with their perceptions of the role of the judge and the mission of corrections means that we can begin our efforts toward overall rationality with some real advantages. The judges are not haphazardly arriving at sentences; they are to some extent systematically handcrafting sentences to achieve an internally held objective of the system. That means, at the very least, that we have conscientiously striven to serve a goal and that in a substantial number of cases the effort produces sentencing decisions commensurate with that goal. The judges, therefore, know how to sentence to advance objectives.

In terms of training then, whether we speak of initial training, continuing training, or periodic retraining, our major task in achieving systematic and rational sentencing for the overall system must be focused on *achieving shared philosophy and goals for the system.* As formidable as that task is, it is not beyond attainment. Professor Hogarth's greatest contribution to the training problem, is to demonstrate that we can realistically expect to achieve sound sentencing practices through programs that explore the proper objectives of sentencing leading to careful examination of individually held views, and ultimately to an examined and collectively held view. To the extent that such a common objective can be articulated and embraced by judges, through their own efforts and with the help of others, the consistency of method and purpose that had been demonstrated can be brought to bear to produce a similar consistency for the overall system.

The inclusion of other participants in the sentencing process in addition to judges has strengthened the results of the study immensely, not only in the relevancy of its findings but also in the identification of the means of reform. The judge must work with many other people in the course of criminal corrections — police, lawyers, probation officers, social workers, custodial officials. The study has shown that the attitudes and values of many of these groups do not always fit the widely held stereotyped views of those groups. For example, it may not surprise many of us to find that the magistrate and the policeman rank high on Hogarth's justice scale, that is, giving the defendant his just deserts. But that fact is surprising when taken in conjunction with the further finding that magistrates believe that punishment is a means of protecting the community while policemen as a group did not.

A more disquieting finding relates to the difference between magistrates on the one hand and probation officers and social workers on the other in terms

of the notion that punishment corrects. Both groups have as their ultimate objective the correction of offenders. The magistrate apparently believes that he is handing the offender over to the corrections people with a substantial corrective weapon when he hands down a punitive sentence. Probation officers tend to believe that treatment is not possible in a punitive setting. From the vantage point of Professor Hogarth's studies, we can construct a hypothetical view of the impasse that is reached. The judge believes that the corrections people are not effective since the police and prosecutors have obviously done their job in bringing the offender to justice and the judge has obviously done his job in fashioning a punitive and corrective sentence. The corrections people on the other hand see themselves as hamstrung by punitive sentences which effectively block their best attempts at treatment and rehabilitation. Both groups probably convince themselves that their opposite numbers are not truly interested in the same ultimate goal. The judge sees the corrections officers as permissive and oblivious to community needs; the probation officer sees the judge as concerned only with vengeance and uninterested in the rehabilitation of individuals. Each is working with internal consistency in the light of his perceptions of the way correction works; both are working at cross purposes to the overall objective of crime control.

In our education and training efforts, we must attempt cross-fertilization between the occupational and disciplinary groups involved in the processes if we are going to achieve the goal of a more widely shared objective supported by a shared philosophy. The findings relating to differences among these groups constitute a warning against oversimplification in our efforts toward that goal. Unexamined assumptions about the way participants view the processes will lead, at best, to talking right past them; at worst it will lead to absolute alienation of the very people we wish to draw into a closer cooperation.

Sentencing as a Human Process is a monumental contribution to our knowledge in this most important area of judicial work. It has produced significant new insights into the dynamics of sentencing that will be of immeasurable value. Some of the findings surprise us. Some of them do not. Yet even those findings that are not surprising are of equal importance since they will cause us to face those matters that we have intuitively known but have been able to avoid confronting. There is no way at present to calculate the impact of this impressive work. There will be a great impact for those who study the work carefully and seek to apply the knowledge in their respective fields. There will be a great loss for those who ignore what it has to tell us.

THE CRIMINAL PROCESS IS A LEGAL PROCESS

By GRAHAM PARKER*

Professor Hogarth's book raises many issues — the future of criminological research, methodological problems (statistical and otherwise), the value of interdisciplinary studies and the problems of penology. *Sentencing as a Human Process* is aptly named. Professor Hogarth does not waste his time, and that of the reader, in writing exhaustively on the agonizing loneliness of the sentencer, the elusive search for uniformity, or the mechanics of sentencing. He looks at the sentencer as a whole person, a human being, and presents a comprehensive portrait of the magistrate.

Sentencing as a whole highlights many of the issues and problems which pervade the criminal law. The criminal law is a unique field for practice and study. The subject matter should properly be described as public law but this area of the law seems to be notoriously lacking in discussion of policy — unless we call moralizing by judges on the legal definition of criminal responsibility a formulation of policy.

The theory of the criminal law is sterile. No field of law in Canada or the United States has suffered such neglect despite royal commissions, presidential enquiries, crime surveys, and so on. The Canadian criminal law is a century old and total reform is overdue. With the exception of the redefinition of some moral offences and a cyclical re-interpretation of *mens rea* (ranging from subjective to objective tests depending on judicial viewpoint and public temper) there has been little thought given to craftsmanship and draftmanship of the criminal law. (There are hopeful signs that Mr. Justice Hartt and his law reform commissioners may soon be making amends or amendments).

All of these previous enquiries have looked at the end-product of the criminal law — the physical state of the prisons, their failure to reform, the dearth of therapeutic workers and facilities, and, of course, criminal procedure. All of them have taken the criminal law for granted. Any amendments to the criminal code have been housekeeping operations — streamlining procedures found irksome by practitioners, or ironing out verbal ambiguities which have required attention from appellate courts. Up to the present (and with the happy exception of the American Law Institute's Model Penal Code) all the reform of the criminal law has been exclusively in the hands of the lawyers. Except for the fact that lawyers man the criminal courts in one guise or another, the administration of the criminal process seems to have very little to do with Law.

Through his extensive research John Hogarth has pieced together a comprehensive portrait of the magistrate as sentencer. I found the legal

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element in this portrait the most interesting. Hogarth remarks: "The generative influences of legal experience are far more important in controlling judicial behaviour than the formal rules laid down by parliament and the appeal courts".[1] I am not sure what he means by this unless he is telling us that he is totally converted to the views of the Realists or that he believes in the supremacy of legal lore over Law (which are not, necessarily, the same thing). Earlier, he had said[2] "Legal training and experience on the bench bring the magistrate into direct contact with certain standards, expectations, values and sentiments associated with the law and the professional role of the judge". Are these elements — "standards, expectations, values and sentiments" — supposed to prove the "generative influences of legal experience"? Of what do these elements consist?

What does Hogarth tell us of "practical" jurisprudence, the workings of the judicial mind, or whatever one might care to call it, when he says that certain elements — "standards, expectations, values and sentiments" — are crucial influences in the judicial role. I do not raise these issues as direct criticisms of Professor Hogarth as they may have been outside his terms of reference or it may have been impossible to include them in his research program — because of vagueness or even irrelevance. Perhaps the author of *Sentencing as a Human Process* has really answered my questions by simply stating that "sentencing is not a rational process. It is a human process and is subject to all the frailties of the human mind".[3]

In adding to the debates about sentencing or planning the direction of further research, we must not neglect the legal issues; all too often the criminal law is left to atrophy while we harangue the converted about the iniquities of the law's end-product.

This book states that magistrates find themselves in the 'classical dissonance situation' which enables them (or forces them?) to rationalize their decisions to fit the facts of the case or the state of society. Magistrates make decisions which minimize internal inconsistency. Are these common human traits, learned legal double thinking or judicial craftsmanship? Or is this a form of criminal equity (similar to the juries' rationalizations in Kalven and Zeisel's *The American Jury)* which can add or subtract punishment depending on the "justice" of the case (if you will forgive the expression)? In descriptive, factual terms, is the magistrate or judge going through the same process when he says: you are technically guilty but because I disagree with the law, or because you are unlucky to find yourself in that situation or because the police acted improperly or because charges here are rare and you are being discriminated against, therefore I shall convict you without penalty. Of course the magistrate may take a harsh view of the facts of, and surrounding the case and announce that in all the circumstances, he will impose a maximum sentence even if it is the first offence.

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[1] See p. 177. (This and all subsequent citations to page numbers alone are to Professor Hogarth's book, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1972).

[2] *Id.*

[3] See p. 356.

Hogarth's study, of necessity, gives one the impression that the magistrate approaches his sentencing job as entirely separate from the guilt-determination stage. This is at best a dubious proposition. This possibility opens up the question of whether we should totally divorce the sentencing process from the guilt-determination proceedings. If the trial magistrate has applied his rationalization techniques to the facts of the offence, should we allow him to do the same in the sentencing process?

Should we also be concerned about the question of criminal procedure? One may argue that the Americans are pre-occupied with due process in general and the exclusionary rule in particular. Possibly the Anglo-Canadian judge acts very differently, deciding, in his discretion, that the pre-trial processes were not *too* unfair and would not therefore amount to a miscarriage of justice. The unstated basis for this 'equitable' rule is that if the judge feels that the man is guilty, then convict him anyway and if our sense of justice is uncomfortably disturbed, then it can be taken into account in sentencing. The English judge may look upon the American lawyer with amused superiority and label him and his due process philosophy as 'nitpicking' and giving undue attention to detail. In fact, a good argument could be made for saying that the American lawyer was the one very much concerned with principle and, just because he was not punctilious in his attempts to define *mens rea,* we should not consider that he was not talking about criminal law.

The judge's concern (or lack of concern) with due process or criminal procedure does not end with guilt-determination. Does the sentencing judge look upon the pre-sentence report and the role of the probation officer as a legal issue or a purely factual one?

To take just one example, should the sentencer have any obligation to use the services of the probation officer, and officer of the court, particularly when the magistrate had expressly requested such a report?

Most magistrates would probably say that they are bound by the law, that they must not take heed of public opinion and that it would be very wrong to take such an influence into account. Yet the magistrates in Hogarth's study admit that they sometimes increase penalties because of parole. The judges feel it is quite proper and legally legitimate to make statements about the need to 'crack down' on school vandalism, automobile theft, armed hold-ups, etc. On the other hand, they would not listen to a defence counsel who referred to studies showing that short-term imprisonment of young or first offenders was considered by criminological research to be a positive evil or that mandatory minimum sentences were criminologically wrong and should be overlooked by the magistrate. Perhaps this criticism will in turn be criticized as literal-minded and that judges take these deficiencies into account by being a *little* lenient.

What other factor should we take into account in Hogarth's "standards, expectations, values and sentiment?" There is no mention, for instance, of bargaining between the parties as to plea or sentence. This seems a serious omission. A serious critic of the criminal law process has described it as a

confidence game which enhances the relativity of the term 'justice'.[4] Sometimes, however, there are indications that the accused's lawyer does not go to all lengths to secure an acquittal and that sometimes a plea of guilty to a lesser charge is accepted or a minimum sentence is purchased at the price of a guilty plea to the charge. I am not being judgmental in stating these facts. I think they are worth consideration if they are factors which are taken into account by sentencers.

Similarly, what effect, stated or factual, does it have on a sentencer if the accused is (a) unrepresented, (b) represented by a leader of the criminal bar, (c) represented by counsel and paying hard cash for his lawyer or (d) is on legal aid? How do these factors affect the judge's perception of the case and the penalty he imposes?

Would it have helped if Professor Hogarth had asked his judges about the brotherhood of the bar — which is the core of the alleged confidence game? Would it be germane to enquire if the magistrates who did not want to be too close to probation officers felt any real diffidence in hearing cases argued before them by some of their best friends or ex-partners? Is the legal double-think the necessary corollary of this sort of game?

Finally, what is the role of the law in reforming the sentencing process? I realise this is partly reliant on effective criminological research, and its immediate prospects, of supplying relevant information to drafters of codes or to administrators of the criminal process, are not particularly bright. Should we ask more questions about the phenomenally high imprisonment rate in Canada and the wide discretion residing in the judiciary of the inferior courts?

Given Hogarth's finding that sentencing is at present, a human and not a mechanical process, should not lawyers give serious thought to this problem — applying their drafting and other skills to making sentencing a mechanical legal process or a well-controlled social process? Does it make any sense to have a sentencing code? This legislation would not only set out degrees and grades of offences and punishments, but would also give detailed guidance to sentencers. Perhaps the immediate objection is that researchers (criminological or otherwise) are in no position to make recommendations (except for fairly vague talk about minimal interference with human activities and liberties). What would the Federal Parliament do with a Model Sentencing Bill? Would the biases and pre-conceptions of that body be just as unsatisfactory as the reformers' model code in the eyes of prosecutors and police chiefs?

In conclusion, let me reiterate that all those interested in crime, criminal law and criminology are deeply indebted to Professor Hogarth for stimulating this discussion and interest in problems of mutual concern. We must remember that crime, by definition, is a *legal* problem and the best lawyers must apply the best of legal thought to ensuring that all facets of the criminal process are as good as we can make them.

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[4] Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Co-optation of a Profession* (1967), 1 Law and Society Review p. 15-39.

MEANING AND AMBIGUITY IN PUNISHMENT (AND PENOLOGY)

By JOHN M. FINNIS*

Sentences are for crimes. They follow convictions; they precede the execution of punishment; their meaning is as parts of a wider human process which Professor Hogarth calls "the criminal justice system" and which others have called "the institution of punishment".

Now some people, and even some Ontario magistrates,[1] say that the goal of this system or institution (within which sentencing takes a "central position")[2] should be the control or prevention of crime by the reformation (rehabilitation), the incapacitation or the (special) deterrence of the criminal, or by (general) deterrence of potential criminals. And no-one will dissent from this laudable desire to spare the community and its members future harm, pain and loss. But the curious will raise two questions about the suggestion that this should be the exclusive goal of the system or institution.

First: Is this goal to be pursued *à outrance?* Are we justified in doing to criminals whatever is necessary to prevent crime? The assumption that we are not so justified is implicit in the system of criminal justice, in Ontario as elsewhere. Professor H. L. A. Hart has shown with some success that this tempering of our pursuit of the future social good is explicable, not by any utilitarian calculus, but by limiting principles of "retribution in distribution" — viz., "Only criminals are to be punished" and "Criminals are to be punished no more than is proportionate to their offence".[3]

Second: Is the "forward-looking" goal the exclusive goal of the system? Should it be? Professor Hart argues that it arguably is and certainly should be; that the retributive principles of distribution do not express intelligibly desirable goals; that they merely limit the pursuit of the properly exclusive goal of preventing future harm, pain and loss. But the curious will persist with their question. For this laudable goal is equally the goal of a number of other coercive social systems (quarantine of the infectious, confinement of the mentally deranged, conscription of soldiers, among others). Why then is the institution of criminal justice, sharing (it is said) this common aim, so peculiar in building in "retributive" limitations on the pursuit of this aim, limitations quite unheeded in the other systems? Why, if sentencing is exclusively for future social protection, is it permissible only after conviction for crime? In short, why is the forward-looking goal of punishment (if that be its

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1 See Table 13. (This and all subsequent citations to page numbers alone are to Professor Hogarth's book, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1972).

2 See p. 3.

3 See his *Punishment & Responsibility*, O.U.P. 1968.

goal) restrained by this backward glance, a glance that would be merely impertinent in the other coercive systems said to share its goal?

Of course, the resolute will declare that the backward glance (the scrupulous trial of guilt, the finicky search for *mens rea* and so on) is mere atavism, a lingering relic of benighted times. They would abolish "sentencing" as a distinctive human process. But no doubt the Ontario magistrates are as faint-hearted as I am. And the curious will suspect that these faint-hearted souls who wish to retain a distinct institution of punishing-exclusively-for-crime in fact see more *point* to punishment than merely the prevention of future harm. Perhaps the point to be revealed could be expressed like this:

> Every criminal act, insofar as it is freely chosen, represents (quite apart from the empirical success or failure of the criminal's overall purpose) the gaining of an advantage which the law-biding members of society have as such denied themselves; namely, the advantage of indulging one's will, of exercising one's freedom beyond the restrictions imposed by law. This is an advantage, a gain, a satisfaction in itself, precisely because freedom and its exercise is as such a good. And once gained, this advantage of the criminal *vis-à-vis* his fellow citizens cannot be lost unless and until the criminal undergoes a disadvantage in a precisely relevant respect, namely, by a restriction of his freedom (not necessarily by incarceration), a subjection of his will to the will of the society whose officially chosen restrictions on free choice he freely flouted in the criminal act. Now, quite apart from crime and punishment, it is *just* that, over a period of time, one person should not be able to gain and retain advantages over his fellows without good cause. So, although the crime itself cannot be undone, it is *just* (in this quite ordinary and general sense of justice) that the balance of advantages and disadvantages as between citizens should be restored by punishing the (free-willing) criminal, so that at the end of a period of time no-one should be able to say that he has been unfairly disadvantaged by being law-abiding. This then is the special goal of punishment, which distinguishes it from other coercive social institutions. Punishment is thus the most essential (because most specific) goal of the criminal justice system, though not necessarily the exclusive nor even the most practically important goal in the case-by-case working of the system.

Such is the theory of retribution. It is rarely stated with even the limited clarity of the foregoing paragraph. In its confused and distorted versions it is the object of almost universal and rather well-merited ridicule. But such is its intrinsic power and plausibility that, despite its public disrepute, it operates as a potent factor in the real attitudes and thus the actual decisions of those concerned in the criminal justice system. So one is not surprised by one of Professor Hogarth's most important but least stressed discoveries: that retribution is of considerably greater significance in the actual decision-behaviour of magistrates than in those magistrates' expressed penal philosophies and verbally expressed "attitudes".[4]

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[4] See especially pp. 289, 335.

Professor Hogarth himself is more or less unaware of any genuinely retributive theory of punishment. On page 4 he confuses retribution with Fitzjames Stephen's notion that punishment is to express society's disapproval of crimes. This notion of social catharsis through denunciatory expressions of hatred, anger, revulsion and/or "vengeance" has nothing to do with retribution, and is really a special notion of "forward-looking" social control: the safety-valve and pedagogical symbol of punishment is to maintain social solidarity and enhance the efficacy of society's moral code *in the future.* In the factor-scale which Professor Hogarth has labelled "social defence" (factor 4) this notion of denunciation/revulsion/vengeance predominates and is strongly linked both with express concern for "sharpening the public's sense of right and wrong" and with the similarly "forward-looking" beliefs that deterence (a) should be the principal aim of punishment and (b) is effective when punishment is severe.[5] A genuinely retributive notion makes its appearance only as the item with lowest loading: "crime creates an imbalance in the social order that can only be put right by an appropriate punishment".

Now the factor-scale most clearly structured by this genuinely retributive notion is factor 3, which Professor Hogarth has misnamed "intolerance".[6] Here the above-mentioned "imbalance" theory is seventh in loading and can well be linked in meaning with the second, eigthth and ninth items on the scale. Most of the remaining items express a strong sense of *community,* its importance and its persistence through time (both essential elements in the retributive theory of restoring a lost balance of advantages and disadvantages as between fellow-citizens), of the fragility of community and of the reality of free-will in human action. If "justice" means a concern for a just distribution of goods within the community (a distribution maintained by retributive restoration once upset by freely-willed crime), then this so-called "intolerance" factor 3 is indeed the principal "justice" factor.[7]

However, it is factor 1, not factor 3, that Professor Hogarth has named the "justice" (i.e. "just deserts")[8] factor. Yet, save for the last item on this scale ("criminals should be punished for their crime in order to require them to repay their debt to society"), every item in factor 1[9] would be affirmed by any anti-retributivist proponent of general deterrence who cares not a fig for "just deserts" but who fears that social defence (in the usual sense, wider than Professor Hogarth's) is being undermined by insufficient severity.

I suspect that the reason why Professor Hogarth has interpreted this statistically most important factor (factor 1) as being a measure of concern

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[5] See p. 133.

[6] See p. 132.

[7] "Justice" is used in three principal senses in Professor Hogarth's book. There is (i) the "criminal justice system", which might, he thinks, be purely forward-looking and unconcerned with (ii) "justice" i.e. with "just deserts", but which should in any event be concerned with (iii) "justice" i.e. with consistency of approach as between magistrates (see pp. 4, 386, 391, 139, 161, etc.). This variety of uses is of course perfectly standard and perfectly intelligible in itself.

[8] See p. 128.

[9] See p. 130.

for "just deserts" justice, is to be found in his unclarity about the terms "punishment", "punitive" and the like. While it would be tiresome to list all of the uses to which he puts these terms, there are broadly three:

(a) sometimes he means retribution, retributive, etc., *as opposed to* rehabilitation, reformation, deterrence or incapacitation (see e.g. pp. 3, 4, 68, 70, 289 . . .);

(b) sometimes he means deterrence, retribution and/or incapacitation *as opposed to* reform or rehabilitation (see e.g. pp. 91, 220, 325-327, 370, 390 . . .);

(c) sometimes he means by "punitive" nothing more nor less than severe *as opposed to* lenient — and severity may and does (p. 163) result from the pursuit of *any* goal, including reformation (see e.g. pp. 197, 220, 312, 370, 390 . . .).

And it must not be forgotten that "punishment" sometimes means no more than "what the court orders when it sentences".

In itself, Professor Hogarth's shifting use of terms is merely a trivial annoyance for the careful reader; but his inattention to the corresponding ambiguities in the utterances of his subjects has more serious consequences. Thus, the explanation[10] of the label "justice" for factor 1 entirely fails to allow for the fact that a Benthamite utilitarian, just as much as the retributivist whom he scorns, is "offence-oriented rather than offender-oriented", and is concerned "that crime be punished in proportion to its severity" (whether or not the utilitarian can give a satisfactory theoretical justification for his positions). In analysing the "psychological content" of factor 1, Professor Hogarth seems to have overlooked the fundamental fact that when a man affirms that courts should punish, not reform (items 1 and 11), or that "prisons should be places of punishment" (item 5), or that mollycoddlying "defeats the interest of justice" (items 3 and 13), he may very well be using the terms "punishment" and "justice," not retributively, but either in the sense of general deterrence or in the sense (neutral as between goals or justifications of punishment) in which *all* sentencing is to *punishment* and *in* the administration of *justice*.

I am not, of course, questioning here the statistically explanatory power of factor 1. Nevertheless by reasoning from its dubious label rather than from its intelligible contents, Professor Hogarth leads us very much astray. One or two striking examples must suffice, although if what I have been saying is justified much of the discursive text would need rewriting.

On page 139 he explains law students' relatively high factor 1 mean scores (which accompany their very low factor 3 mean scores) by appealing to an alleged concern of law students for abstract and idealized justice, consistency and fairness. But this concern is *at least* as prominently expressed in factor 3 as in factor 1. I am afraid that another explanation will have to be found; not having seen the statistical appendices I cannot invent one.

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[10] See p. 128.

On page 320 there is a rhapsodic passage about "non-punitive magistrates": they "appear to use information in a more complex and subtle way", their "thought processes are characterized by flexibility, autonomy and creativity", their "tolerance for conflict and ambiguity are higher" (can praise, however unintended, go higher than this in 1971?), and their "capacity[11] for abstract thought or conceptualization is enhanced". Now these paragons of reason are identified by Professor Hogarth as "non-punitive" because of their relatively high reformation *and "punishment corrects" (factor 2)* scores. Professor Hogarth seems to have forgotten that to believe that punishment corrects is one thing,[12] while to have a high factor 2 score is quite another: for to have a high factor 2 score is to believe strongly in capital and corporal punishment (six items), is to believe that crime is more usually vice than sickness (four items), is to favour severity in punishment (two more items), is to fear the release of prisoners from incarceration, even under supervision. "Non-punitive"?

Although I think that Professor Hogarth has been insufficiently phenomenological and empirical in his attention to human meaning, and that in this sense his methodology has been insufficiently rigorous, and although I have devoted my review to a brusque indication of some of these shortcomings, I want to record my admiration for the ingenious conception and resourcefully scientific execution of this study, as well as for the civilized and urbane tone of the book, a tone so rare in penological writings. Dissent and criticism has been a pleasure, an effort of collaboration in a difficult field which Professor Hogarth's care and skill have considerably illumined for me.

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[11] *Sic,* but contrast p. 372.

[12] Incidentally, Professor Hogarth produces other evidence to show that "belief in reformation is associated with belief in the efficacy of most penal measures" (p. 77). This casts some doubt on the unclouded rationality of reformation-minded magistrates (many of whom, incidentally, do little reading in penology: p. 87). Professor Hogarth insists that "as far as it can be determined, no one penal measure designed to prevent crime in individual offenders through reformation or deterrence is any more effective than any other" (p. 74). Belief in reformation starts to look more like faith than reason. And, for that matter, when Professor Hogarth himself says that his findings "underline the need for providing the courts with more systematic evidence as to the results of their decisions" p. 76, and p. 391), we are to remember that in one sense of "results" these results are about nil.

SENTENCING AND CRIMINAL JUSTICE

By LESLIE T. WILKINS*

Sentencing As A Human Process is well titled. The 'human element' is clearly established. Did anybody expect otherwise? If so, here is proof in plenty amidst a maze of correlations between sentencing behaviour and almost everything else.

The main text begins by quoting from the President's Commission report, *The Challenge of Crime in a Free Society:* "There is no decision in the criminal process that is so complicated and so difficult to make as that of sentencing judge". One interpretation of John Hogarth's findings could be that it is so difficult that the human process consists in simplifying it. For the judge the process of simplification can proceed from his own prior personal 'sets'. He can, and does, neglect large quantities of information about the individual cases, while unaware of the influence of his own personal equation. The process of explanation is much more difficult for the research worker. The research worker must seek out and attempt some explanation of both the situation dealt with by the decision-maker and the qualities of the decision-maker whose cognitive processes determine in large measure how the information will be perceived and assessed in the decision.

The approach favoured by John Hogarth is phenomenological. The present study obtained a vast quantity of data on the factors surrounding the sentencing decision as well as considerable background information about the decision makers and their social and cultural environment.

The difficulty with these kinds of mass data collection procedures is not so much in the collection, although this is expensive and time consuming, but in finding satisfactory ways of reducing the large quantities of material to manageable proportions so that it may be interpreted.

Hogarth uses two methods of reduction, both of which are acceptable in certain cases. One technique of reduction is known as 'factor analysis'. The other method is to take an 'external criterion' (such as, say, the disposition of offenders by the court) and then see how much of the variation in disposals can be accounted for by other variables (such as, personality of decision-maker, environment, type of crime and so on).

The acceptability of these techniques depends not upon the method itself, but rather upon the inferences which are made from the results of the analyses carried out. Factor analysis does reduce the information to a model of orthogonal dimensions, but it does not do anything more. The 'dimensions' (factors) extracted are artifacts or 'arrangements' which may help with interpretation because of the hierarchy produced. An item will have a larger or smaller 'loading'. The 'loading' may be seen as the contribution of the single item (variable) to the artifact 'dimension' which has been constructed out of

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all of the included items. The utility of this procedure, of course, depends upon what is put into the analyses — nothing more is extracted than what has been put in. Indeed, rather less is taken out, although what is taken out (or 'accounted for') by means of the dimensions may be easier to relate to the particular problem with which the research worker is concerned. The concept of 'general intelligence' was derived from a similar method of examining common elements in problem solving over a wide range of possible problems. But 'intelligence' is what intelligence tests measure. It is no more 'real' than that, and of course, no less. Scores by individuals on intelligence tests may be used, and quite reasonably, for certain purposes. This is only the case when the 'scales' relate to certain behaviours in which we may have an interest. It may, for example, be cheaper to give persons an intelligence test and to make predictions of their likely performance in a task than it might be to involve them in the actual task performance and to test their ability to perform it by direct means.

However, there will always be errors of two kinds associated with the decision based on the correlation between the task and the test utilized. Some who might have done well on the actual task will be rejected, and some who do badly on the actual task will be accepted — this is closely related to the statistical concept of errors of the 'first and second kind'. But in this kind of argument we have moved, as Hogarth also moves, from an internal to an external criterion in terms of utility. We have argued the resemblance of some of his measures to intelligence testing, not because intelligence tests measure 'intelligence', but because we have assumed in our example a demonstrable utility in selection procedures. It does not follow that we have *understood* the external 'task' any better because we can *use* 'intelligence' tests as selection devices.

We must, then, be very careful about imputing 'meaning' of any kind to 'factors', the rankings of items so derived, or the correlations these might show with other kinds of behavioural data. Hogarth finds by means of his analyses, five dimensions which he claims may reasonably be 'extracted' from the attitude questions which he gave the judges. The items which had the heaviest 'loading' (after rotation for simple structure) on each of these five factors were:

FACTOR 1

Agreed to the statement:
"In sentencing the duty of the court should be to punish; the reformation of offenders belongs to the correctional agencies".
This he labels "Justice".

FACTOR 2

Disagreed with the statement:
"Capital punishment should be abolished completely."
This he calls "Punishment Corrects".

FACTOR 3

Agreed to the statement:
"Obedience and respect for authority are the most important virtues children should learn". This he labels "Intolerance".

FACTOR 4

Disagreed with the statement:
'Neither the treatment nor the application of penalties is a deterrent to potential offenders". This he labels "Social Defence".

FACTOR 5

Disagreed with the statement:
"The use of alcohol usually leads to the lowering of moral standards". This he labels "Modernism".

It is difficult to select one word which represents the agreement or disagreement with some fifteen or so statements. The reader will, however, have difficulty in holding in his mind exactly what the 'package' labelled in one or two words, means as he reads the later sections of the book.

While the loadings used throughout the work as a basis for most analyses and inferences are the 'rotated' factors, a table is given (p. 126) of the loadings of the first unrotated factor. The major interest from this table is in that it reveals the great "discriminant power" of the attitude towards capital punishment: the heaviest loading (with a positive sign)[1] being *"capital punishment should be retained for certain types of murder"*, and the heaviest *negative* loading (sixth in rank order), *"capital punishment should be abolished completely"*.

These two statements are of the same form of construction in English usage, and are of the same logical kind. Both statements are statements of belief and include the word *"should"*. The second heaviest loading (positive, unrotated) is *"capital punishment is a deterrent to murder"*. It will be noted that while the first item is prescriptive, the second may be seen as a form of 'truth claim'. Further information which could logically change the statement cannot be invoked in the first case, whereas in the second case the claim is open to challenge by expansion of the term 'deterrent'. Hence the collection of data relevant to 'deterrence' could falsify the claim. Psychologists may not think this distinction of types of statements to be of significance or interest; attitude 'scales' seldom seem to be constructed with regard to logical or linguistic form. Careful examination of the rotated loadings seems to suggest, however, that these two types of statements are somewhat separated. In the first factor extracted there are eight specific 'should' statements, while there are only two or three of the second type. It is not always clear as to what type of

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[1] The first few factor loadings for the unrotated analysis (principal components method) are in excess of unity. This does not seem to be due to rounding errors, indeed the loading for, *"capital punishment should be retained for certain types of murder"* is 1.07. Loadings are correctly interpreted as the correlation between the item and the 'factor' — thus loadings of unity indicate that the total variance of the factor is 'explained' by the one item, and loadings in excess of unity are impossible. There are two, or perhaps more, reasons for this result — there may have been an error in the calculations (which seems unlikely) or there may be multiple co-linearity due to very high correlations between the items (in excess of 0.90). Ragnar Frisch (1934) noted problems of this type in his work on 'statistical confluence analysis'. The exact implications of the observed excess loadings in the unrotated analysis for the rotated results and the uses made of these data for classification of attitudes and for correlations with other data is not clear. The general findings of the work seem unlikely to be prejudiced by this result.

logical form a statement might be allocated. The statement, *"the use of alcohol usually leads to lowering of moral standards"* is, perhaps, closer to a prescriptive statement than a 'truth claim'. It may be that certain personality types are more inclined to accede to prescriptive forms of statement than to a form which could be expanded and challenged on further evidence. This is an interesting point which might be examined at some future time.

This work (the book and the tables) lays a foundation for much further needed work upon the problem of sentencing. It is also certain that similar issues to those raised in this work could be raised in all cases where one human being makes a decision which affects another human being. In the sentencing process in particular, claims are made regarding the qualities of decision over and above those made by decision-makers outside the criminal field. But as Hogarth shows this claim must be regarded skeptically. Perhaps as a beginning, criminal justice decision-makers should be more modest in their claims — learn to accommodate uncertainty, realize their own prejudices and get out of the business of the enforcement of morals.

THE JUDICIAL PERSPECTIVE

By JUDGE R. G. GROOM*

From the time of Adam, Eve, and the apple, how to deal with people who break the rules has been a constant problem. The latest book dealing with the manner in which our laws treat transgressors is this volume by John Hogarth. The study involved seventy-one of the judges of the Ontario Provincial Court (Criminal Division).[1] The intention was to examine, in depth, the sentencing practices of judges, their experience, training, philosophy, and attitudes towards the function of sentencing. From his research material, Professor Hogarth has produced an exhaustive study of the sentencing pro-

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[1] At that time they were titled Magistrates, and for the remainder of this review the word judge will mean Ontario Provincial Court Judge (Criminal Division).

cess.[2] So far as is known, this is the most comprehensive study to date to have covered so many of the facets of sentencing; and not only the sentencing results, but the examination of the sentencer. The judges submitted themselves to the scrutiny in the hope that more would be learned about the sentencing process. This was done despite the Biblical injunction, "Judge not, and you will not be judged". The judges, of course, continued judging and so did Dr. Hogarth. Fortunately, the judges did not come out too badly.

The President's Commission reported that "There is no decision in the criminal process that is as complicated and as difficult as the one made by the sentencing judge. The sentence prescribes punishment, but it also should be the foundation of an attempt to rehabilitate the offender so that he does not endanger the community, and to deter others from similar crimes in the future. Often these objectives are mutually inconsistent, and the sentencing judge must choose one at the expense of the others."[3] The judges don't have to be reminded of the difficulty of the role that they perform and it is well, from time to time, to bring the difficulty of their position to the attention of other people who are working in the correctional field.

A book of this erudition and complexity is difficult to review. The book is a prodigious performance by Dr. Hogarth involving vast research in addition to the communication with the judges involved. It will, surely, make a large contribution to the international criminological literature; but more importantly, it blazes a trail in Canadian criminology, which will, in all probability, be used as a point of reference for future studies.

Chapters four and five, dealing with the background characteristics of judges and their penal philosophy, did not reveal anything that was not already known to the judges. Each judge comes to the bench as an individual, to paraphrase the poet, "Being part of all that he has met", and of course, all that he has met becomes part of him. This is not surprising because, any professional person, be he judge, clergyman, teacher, doctor, or even professor, finds that his individuality in his profession is his outstanding characteristic.

In chapter five, there is a table that sets out the types of cases that offer the judges the greatest difficulty. While it is agreed that sex offenders are most puzzling to deal with because of the limited knowledge in medical circles of the cause of this form of misbehaviour, the one problem area that offers considerable difficulty is the young recidivist. This is the young man who is not a danger to the community in the sense that he is violent, but who persists in breaking the law, petty thieving, breaking and entering, who is a

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[2] Some idea can be gained of the depth in which this study has been done by some of the chapter heads, which included: The Penal Philosophy Among Magistrates (Judges), The Meaning and Measurement of Judicial Attitudes, Sentencing Behaviour Resulting from these Attitudes, together with Legal and Social Constraints on Sentencing. These chapters deal in great detail with the manner in which the judge's sentencing behaviour is affected by his background, the probation officer, the crown attorney, the police, and the general public.

[3] In the report by The President's Commission on Law Enforcement and Administration of Justice in the volume entitled: *The Challenge Of Crime In A Free Society*, at 141.

constant thorn in the flesh of the police, and a considerable irritation to the merchants, service station operators etc., who are preyed upon. While they are not dangerous to the public they are so anti-social that it is not possible to permit them to continue their illicit behaviour, and the necessity of imposing a term of imprisonment is almost mandatory. It is this particular group that the critics of our penal system encounter when visiting institutions, and quite frequently suggest that there is no reason why they should be imprisoned. It is hoped, of course, while they are there, that they will receive some training and at least have their attitude towards the law altered. To suggest that they can be rehabilitated in the community by fines or probation or some milder form of punishment is incorrect, since these things have nearly always been tried, without success.

Chapters seven, eight and nine, concerning the measurement of judicial attitudes and their use in predicting sentencing behaviour, require considerable sociological or criminological expertise to digest. To the lay person and to a judge who is not too skilled in the use of this special language, it would seem that the principal reasons for imposing a particular sentence are being made too complex. Over the past few years it is becoming apparent that those who are either dangerous, a nuisance, or dedicated criminals are being imprisoned. As many people as possible are dealt with by way of fines, probation, halfway houses such as the House of Concord, so that they will be in close touch with their home environment, and receive the support and assistance of people of goodwill in their own community. The psychopath or sociopath who resorts to violence, having no sense of right or wrong, or any remorse for what he has done, or any feeling of compassion towards his victims, has to be imprisoned. The hope for the future is that these people may be dealt with in the same fashion as people who are mentally ill. Until such time as it is safe to release them to society, they have to remain in custody until the parole board considers that a reasonable risk can be taken in giving them their liberty.

Had Professor Hogarth been prescient in knowing of the recent discussion concerning plea bargaining, he might have amplified that portion of his book which refers to the relationship between the judge and the crown attorney. The negotiated plea is the form of plea bargaining, whereby counsel for the defendant and the crown agree that the defendant will plead guilty to a less serious charge if the crown attorney will withdraw the more serious charge. Counsel for the defendant, of course, wishes to have his client plead guilty to an offence where the judge's sentencing discretion is more limited. In smaller communities this negotiating usually goes on without any consultation with the judge, and the judge may impose a penalty greater than that envisaged by either counsel and this is, of course, a risk that has to be taken. In a smaller centre where there is only one judge sitting, it would be quite improper for him to sit in on such negotiations, and then in the event that if the negotiations broke down, he would have to hear the case against the defendant on a not guilty plea.

In the chapter on the legal constraints on sentencing, one of the surprising things to the writer was to find that there was a division of opinion as to the helpfulness of the decisions of the Court of Appeal. This is rather puzzling, since any sentencer has to apply the proper principles in any sentencing

situation, usually sets them out in some detail, so that if an appeal is taken against his decision, the Court of Appeal will be aware of the basis of the sentence, and what the dominant principle was that resulted in the sentence being imposed. In recent times the Court of Appeal for Ontario has given a number of guideline decisions particularly in the drug area. For the last two or three years, judges have been holding regular sentencing seminars, particular attention being given to drug cases, which have come so abruptly to their attention. They have made sharp distinction between the possessor of drugs and the trafficker, and subsequently, when some of their decisions were appealed, it was helpful to find that this distinction was sustained by the Court of Appeal in a number of comprehensive decisions which assisted the judges in this area. With respect to reasons for judgment, it has been the practice of judges increasingly to give their reasons. Recently there has been an increased reporting of sentencing situations in the Court of Appeal when reviewing sentences. The court has usually been giving reasons, for any variation in the sentence if the sentencing judge has proceeded on an incorrect principle. It might well be that in order to establish uniform principles throughout Canada, the Supreme Court of Canada should be given the authority to hear appeals as to sentence, so that the Provincial Courts of Appeal might, in turn, be guided by the opinion of Canada's highest tribunal.

Perhaps the most useful portion of the book to be commented on by a judge, is the last chapter, Implications For The Improvement of Sentencing. The suggestion that there be some legislative changes would seem to reverse the trend in Canadian sentencing procedures. It is considered that the only changes in legislation should be ones that give the judge even greater latitude and more discretion. The judges in Canada deal with all summary offences, and 94% of the indictable offences, with great latitude in sentence, ranging from probation to life imprisonment. In these two areas Canadian judges' jurisdiction is greater than any criminal jurisdiction in Europe, the Commonwealth, and the United States. Apparently parliament agrees with this proposition, since recent amendments to the Criminal Code have amplified the provisions concerning probation, and provide for absolute and conditional discharges, which will enlarge the judges' area of discretion. The American Law Institute in its Model Penal Code, establishes a number of grades of felony and misdemeanours, and suggests a maximum penalty for each grade, however, the judge still retains the authority, if the crime has been particularly atrocious or the offender is an especially dangerous one, to sentence beyond the maximum. There should be no attempt to hamper the discretion of the judge, in these areas. It is considered that the judge should have as complete discretion as possible, since his sentences are always subject to review by the Court of Appeal.

In discussing the selection of judges, we may agree that knowledge of the behavioural sciences is helpful in performing the judicial role; but with the appointment of a judicial council in Ontario, appointments to the bench have been made largely from lawyers who have practised at the criminal bar. This experience brings with it a knowledge of human behaviour which cannot be derived in any academic way. The best training for the bench is the training that the criminal lawyer received when learning his craft. In Ontario for the past ten years, sentencing seminars and educational seminars

have been regularly undertaken by the judges themselves, with the support and encouragement of the Minister of Justice. This ongoing self-instruction is very valuable, and is probably the best source of help the judge can receive in the sentencing area.

In front of the Old Bailey in London is the statue of justice, blindfolded, holding in her hands, the scales of justice so that she can render an impartial decision. The idea of justice being blind goes back to the Egyptians who applied it literally. Their courts of law met in a darkened chamber which made it impossible for a judge to see and recognize the accused, the defendant, and the witnesses. In our day, when the difficult task of sentencing is undertaken, the judge must see the offender aided by as many eyes as possible, including those of the probation officer, the social worker, the psychologist, the psychiatrist, etc. It is agreed that the more information that is available to the court the better. However, care must be taken to see that the sentencing process remains a personal one. Alvin Toffler, in his well-known book *Future Shock,* when dealing with a suggested strategy to deal with a world nervous breakdown, which he suggests may be imminent, calls for a humanization of the planner, and individual participation to a greater degree than heretofore in decisions that have to be made. This is true in sentencing. Despite the advent of computers, charts and pushbutton analysis, despite all the reports and opinions that the judge may receive, in the last analysis, he functions as an individual imposing a sentence on another individual. This, of course, John Hogarth recognizes, since he has titled his book, *Sentencing As A Human Process.*

A REPLY

By JOHN HOGARTH*

It is with difficulty that I respond to the invitation to reply to the comments contained in this volume. I am somewhat embarrassed with the painstaking attention given to the book by such leading figures in the field as Glendon Schubert and Leslie Wilkins. Both these men have been a source of

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intellectual stimulation and personal encouragement, and I am in their debt more than I care to admit. Judges Groom and Murrah are among those members of the bench from whom I have learned much about the judicial task in sentencing. Graham Parker is a long time colleague, and John Finnis is a scholar with whom I hope to have further exchanges, particularly in light of the fact that I almost agree with his reformulation of the retributive doctrine as it applies to sentencing.

The greatest difficulty, however, arises from the fact that seven years have passed since the basic ideas for this book began to form. In empirical research of this kind, it takes about a year to move from original conception to having access to funds and data. Two years are taken in data collection and analysis. Another year is spent in interpretation and comment. Editing and polishing the original manuscript in the light of comments received from friends and colleagues usually consumes several months, particularly if the author is engaged in other work. Finding a publisher and waiting for their readers to approve the manuscript may take another full year, if experience at University of Toronto Press is any guide. At least nine months (in this case fifteen) is devoted to editing and proofreading galleys and page proofs and a final three months is spent in printing, binding, and distribution. Once the book is out one has to wait at least a year before the reviewers get into action, and by that time the author may have forgotten what he had written. His interests will have shifted and if he is now not completely bored with his own work he certainly will not be prepared to defend it with much vigour. Something must be done to collapse this time-frame or few will be tempted to write books based on empirical research.

Turning to the reviews themselves, let me straightaway acknowledge certain errors and weaknesses in the way in which some of the material is presented. Apart from the inexcusable number of typographical errors which arose anew at each stage of the corrected galleys and page proofs (U. of T. Press take notice), I must admit that there is lack of clarity in the presentation of some of the findings, and in particular, that the content of scales used to measure judicial attitudes allows for alternative interpretations. Be that as it may, it might be useful to comment on some of the more general statements made. I shall try to avoid involvement in a technical argument at this time, concentrating instead on substantive issues.

Schubert's comments are the most detailed and instructive. He properly points to a number of problems in scale construction and presentation. He picks out a number of inconsistencies in the words used to identify variables, and he shows that any scale purporting to represent *a dimension,* along which peoples' attitudes may vary, may be designated in either the positive or negative form; i.e., tolerance - intolerance, treatment - antitreatment and so on. He demands consistency in presentation and this author will grant him those criticisms.

But when Schubert goes beyond methodological criticisms to the larger questions involved, some of his statements cannot pass without comment.

First of all, Schubert finds it difficult to accommodate this writer's attention to certain legal values in sentencing, in particular, that there should

be some proportion between the seriousness of the offence and the severity of the sentence imposed, and that in dealing with the liberty of the subject, the onus should be on the state to demonstrate that interference in such liberty is socially necessary. It is the view of many scholars and some judges that both elements are necessary but insufficient conditions of a just sentence.

These concerns Schubert states "went out with Woodrow Wilson" in the United States and have been under attack in the United Kingdom by what he calls "Harold Lasky's generation". While one must agree that there has been a drift away from legal values in the pursuit of the "rehabilitative ideal" leading to both longer sentences in the guise of helping the offender and massive inconsistency in the guise of individualization, one can discern a recent reaction in the best conservative tradition from at least some lawyers, philosophers and social scientists. One need only mention Herbert L. Packer's *The Limits of the Criminal Sanction,* John Finnis' comments contained in this volume and David Matza's chapter on the elements of justice in *Delinquency and Drift,* as examples from each of the disciplines. I, for one, am thankful that legal concerns in sentencing are not completely abandoned by Ontario judges, as my data shows that to the extent that they still operate, they provide the judiciary with a framework delineating the outer limits of discretion. As long as coercive power in matters of sentence lies in the hands of judges, sentencing is, as Graham Parker points out, an inherently legal question.

I am also puzzled by the apparent inconsistency in Schubert's reaction to the model of judicial behaviour derived from the analysis. Despite acknowledging the predictive and explanatory power of this model, he comments that "Any technique that can predict sentencing behaviour — even qualitatively — *without having to deal with such complications and complexities of judicial personality,* remains an intriguing and potentially useful competitor to the behavioural alternative posited by the author." Schubert finds it difficult to let go of the "black box" or "stimulus-response" model of judicial behaviour with which his earlier work is closely identified. This is a model that assumes that judges process facts, laws, ideas and people much like a computer which, if true, should lend predictability and consistency to their decisions. In an effort to support his argument he focuses on the one area of analysis in which no effort was made to compare the predictive power of this model with the one preferred in this study, namely that judges, like other human beings, attempt to make sense of the world around them by constructing realities out of the "meanings" they attach to those facts, laws, ideas and people that they deem significant to the decision at hand.

The analysis, taken as a whole, is replete with findings demonstrating that one understands very little about the sentencing process, and cannot successfully predict individual decisions without knowledge of the particular way in which each judge defines his environment for himself.

One must agree that many research approaches are "potentially" useful. Schubert's lingering faith in the black box model may be dangerous, however, in as much as it lets lawyers off the hook too easily in holding out the promise (so far unfulfilled) that judicial decision-making in sentencing may

one day be found capable of being understood in terms of shared, rational, objectively-defined principles pursued by the judges concerned.

John Finnis' comments are intriguing. He objects strongly to what he considers to be confusion in the way in which the doctrine of retribution is handled in both the analyses and the commentary. He goes on to outline his own version of this doctrine attempting to distinguish it from at least seven ways in which it has been used (See Nigel Walker, *Sentencing in a Rational Society).*

In my judgment, this is yet another attempt to modernize vengeance. The fact that we were unable to factor out negative attitudes towards crime held by judges, police officers, students and others, in ways that fit the neat analytical categories provided by philosophers, at least raises the question of whether these imposed analytical categories are really distinct and mutually exclusive. I personally find Finnis' doctrine attractive, but this may be because I refuse to admit that my basic reaction to those crimes I dislike is a mixture of hate, fear and attraction. The point is that in attempting to objectify response to crime, in order to make it socially and personally acceptable, we may be indulging in massive rationalization of underlying motives.

In any event Finnis' attempt to place retribution within the framework of a utilitarian calculus begs all the important questions, and is subject to the criticisms laid at the door of utilitarianism generally. How can one measure the advantage accruing to a criminal through the commission of an offence, particularly for inchoate crimes, crimes against the state or against public morality and crimes without specific victims? By what criteria does one determine a just proportion between crime and social response? Whose scales of judgment shall be used for the seriousness of particular crimes, or indeed as to the types of behaviour that should be proscribed in the first place? Does it make sense to talk about the criminal process as an organized effort to protect the shared interests of the community as a whole, or is it better to view it as the imposed will of a dominant group? Is agreement on these issues ever possible?

Graham Parker attempts to enhance the role of the lawyer in the criminal process. His approach seems to be that since the legal process in sentencing is in such a mess, let us have more of it. As such he joins the chorus of conservative critics of the system. These critics fall into four categories.

The first category consists of social scientists who have shown that the criminal justice system does not achieve its objectives through the classical mechanisms of rehabilitation, deterence and so on. They call for more research into the technology of corrections, thereby enhancing their role in the process. The second group consists of lawyers who are attempting to impose due process at the sentencing and correctional stages, similarly attempting to legitimize their role. Committed to the adversarial process, they fail to see its inherent weaknesses in conflict resolution. The third group consists of political radicals who view the criminal process as serving illegitimate interests. They do not object to the process as such, merely the way in which it selects its targets. The final group consists of average citizens who have become concerned about the capacity of the state to protect them. They

call for greater police protection, longer sentences and tougher correctional measures in the belief that present policies pursued more vigourously will lead to better control.

I have come to the conclusion that none of these criticisms are fundamental. None of them attack the mechanism itself. My point is that the present criminal process as a technique, is inherently unsuited to deal with many of the problems to which it presently addresses itself. Adversarial proceedings, with their concentration on due process, all or nothing outcomes, and formally defined rights and wrongs, lack the capacity to reconcile differences that exist between individuals or between individuals and the group. Improvement in correctional techniques will not achieve more than new rationalizations for essentially punitive behaviour, because corrections is based on the notion that the majority of offenders are "sick" and in need of involuntary "treatment". Stepping up the war against crime will provide employment in the anti-crime industry, but will do little to solve the underlying problems that exist in society.

In the seven years that have passed since this book began, I have reluctantly come to the conclusion that incremental approaches to the improvement of sentencing will no longer suffice. We must now search for radical alternatives to the existing process, in the admission that there are serious limits to what the state itself can achieve through formal agencies of social control. But that is the subject of another book.