

CRC 42/90

**GENDER AND SENTENCING IN THE VICTORIAN
MAGISTRATES' COURTS:
A PILOT PROJECT**

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This is a project supported by a grant from the Criminology Research Council.
The views expressed are the responsibility of the author and are not necessarily those
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Acknowledgments

I am grateful for the support of the Criminology Research Council in funding this research on the influence of gender in the Magistrates' Court.

The many days spent in court observation were greatly assisted by the readiness of the clerks at the three Magistrates' Courts to help with court lists and with locating cases; I also appreciated the helpful comments and support of the Chief Magistrate during the planning of the research.

Dr Roger Douglas of La Trobe University provided invaluable assistance and advice in the research design and data analysis, as did Associate Professor Glenn Rowley, of Monash University's Education Faculty.

I am also most grateful for the comments and suggestions of Ms Kathy Laster and Associate Professor Ken Polk of Melbourne University's Criminology Department, Professor Terry Carney, now of Sydney University, Professor Richard Fox and Professor Anne Edwards of Monash University.

The project would of course not have been possible without the conscientious work of my research assistants, Kate Auty, Brendan Stackpole, Helen Sawczak, Anna Plotkin, Jeff Giddings, and Claire Quinn, and the support and coding of Simon Smith.

EXECUTIVE SUMMARY

The Study

This study was a pilot project for an examination of the significance of the gender of the defendant on sentencing by Victorian magistrates.

It was hypothesised that men and women are treated differently by the criminal justice system, and that differences in treatment are due primarily to the operation of gender stereotypes. It was hypothesised that gender may affect sentence in a range of ways, not necessarily explicitly, and that any such effect may or may not be to any particular woman offender's apparent advantage. It was also thought that women and men may enter the criminal justice system in different ways, and have different characteristics, which might also affect their treatment in the system.

It was proposed that some understanding of sentencing decision making can be achieved by means of statistical analysis. Observations were to be recorded of as many potentially relevant features of the case and the hearing as possible. It was then proposed to test correlations to ascertain the effect of gender, and gender-related variables, on sentencing. In addition, narratives of offence circumstances, pleas in mitigation, and magistrates' comments on sentencing were to be recorded to permit qualitative examination of the process.

The Findings

Gender and the Magistrates' Courts: This study of 1301 cases observed in three Victorian Magistrates' Courts provides an important gender profile of defendants and of criminal proceedings in our lower courts. It also reveals differences in the ways in which male and female defendants experienced the criminal justice process, and were dealt with by it. These findings have a number of implications for future research and policy.

Women defendants were generally poorer than men appearing in court. They were more likely to be financially dependent, either on another person or on the State, and to have childcare responsibilities. They were more likely to be a first offender, acting alone, and charged with an economic crime - against property or public order (usually prostitution) - or a traffic offence. They were very unlikely to be charged with an offence involving personal violence. They tended to be somewhat less involved in the court proceedings than did men; more women than men failed to appear at all, and fewer women actively participated in the hearing. The implications of these findings are discussed further below.

Women's pleas in mitigation of sentence were more likely than men's to emphasise first offender status, personal factors and family responsibilities. Women on the whole were more also likely to obtain a bond than a man, less likely to be fined, and if fined, tended to receive a lower fine.

Nonetheless, preliminary multivariate analysis suggests that gender *per se* has little influence on sentencing, except in relation to the size of fine. After controlling for measures of offence seriousness and prior record, gender ceased to have any relation to the likelihood of bonds and loss of licence (in traffic cases) and to bonds and custodial sentences (in traditional crime cases). But even after controlling for these factors, women received lighter fines for both traffic and traditional crime cases.

Methodology: An observation study of this type permits the gathering and organising of information about a part of the legal system which has most impact on the community as a whole. The operation and decision making of the Magistrates' Courts have been difficult to study, as much is undocumented. A quantitative study therefore permits analysis of the large volume of information collected by observation for patterns and themes which may suggest directions for further research, and for policy development.

However there are limitations in carrying out a quantitative study of sentencing, particularly to test the effect of so complex a concept as gender.

The literature on archival studies makes it clear that an observation-type study is necessary; it is not sufficient simply to examine three or four indicators obtained after the event from the court file. In particular, Victorian court files contain no information on prior convictions, which are important factors in the sentencing process. However, to obtain sufficient comparable cases would require a much larger data base than was obtained here.

The high-volume nature of the summary jurisdiction also means that many cases are heard quickly, and dealt with routinely with minimal information provided. Over two-thirds of the Victorian Magistrates' Courts disposals are by way of mentions. More information, and presumably more detailed sentencing decisions, would be obtained by examining only contested matters.

Some problems could be overcome if court proceedings were taped and/or transcribed; it might then be possible to select cases by offence, by sex of offender, by magistrate and so on. The researcher would not be subject to the constraints of collecting data during court sitting periods, and could usefully limit the types of cases examined. Some data would however be lost, relating to the interaction in the court.

Research into the significance of gender could alternatively be focused on serious indictable offences heard in the higher courts. These are more easily located in the court lists; proceedings are usually recorded or transcribed; and far more information will be provided both during the

hearing and at sentencing. They occur less frequently than offences heard in the summary jurisdiction, of course, and the numbers of women offenders would be proportionately smaller; it would therefore take longer to collect a comparable sample of cases.

It must be questioned, however, whether a quantitative study, including multivariate analysis, can adequately explain sentencing decision making. It can show correlations between a range of factors and the sentence imposed, and can provide evidence as to the factors which were taken into account, and the weight placed on those matters. However it does not provide insights into attitudes or motivations of decision makers.

Some of the factors influencing magistrates' dispositions (at least those operating at a conscious level) could usefully be sorted out in interviews with the decision makers, rather than by trying to infer the answers from statistical correlations. Qualitative research should therefore be undertaken, either in addition to quantitative research (given the reservations expressed above) or instead of it.

Further research on the relevance of gender to sentencing should include examining magistrates' understandings of their role, of the causes of crime in men and in women, and of their philosophies of punishment. Differences *between* magistrates need to be more fully examined, but it is also important to look at the impact on magistrates of the factors being recorded, and their opinions on the matters being presented to them. Research should also be directed to analysing the court processes, from the decision to charge and the choice of charge laid, to the presentation of the plea in mitigation as a form of 'packaging' the defendant.

1. INTRODUCTION

This study was designed to pilot a more extensive examination of the significance of the gender of the defendant to his or her experience of the criminal justice system, and specifically to the sentencing decision. It was proposed in this instance to examine sentencing by Victorian magistrates for summary offences and for indictable offences triable summarily.

It was hypothesised that men and women are treated differently by the criminal justice system, and that these differences result primarily from gender stereotypes, based on characteristics associated by custom with one sex or the other. It was assumed that gender affects sentence in a range of ways, not necessarily explicitly, and that any such effect will sometimes be to the woman offender's apparent advantage and sometimes not. The study was also undertaken with the view (endorsed by the Australian Law Reform Commission, *inter alia*) that more research is needed to ascertain just how gender is operating in sentencing decisions.

An important aspect of the pilot study was testing the methodology. It was proposed to collect a wide range of data by recording observations in court and to analyse the data statistically. Observers would also record narratives of offence circumstances, pleas in mitigation, and magistrates' comments on sentencing to enable a more qualitative examination of the process.

The aims of the research were therefore broadly:

1. to pilot a systematic gender analysis of defendants in the Magistrates' Courts which would
 - (a) provide comparative data to that already available in overseas studies; and
 - (b) provide a baseline for further research and policy programs in Australia;
2. to pilot an observation study of whether, and in what ways, gender is relevant to decisions on sentence; and
3. to test the usefulness of the proposed research methodology for examining so complex a behaviour as human decision making.

Subject to results of the pilot study, it was proposed to develop a full-scale study of magistrates' courts dispositions. A more wide-ranging study could then examine other stages of decision making in the criminal process where gender might be expected to be influential, such as arrest, charge, and trial.

Gender and sentencing

Comparison of sentences of male and female offenders for similar offences generally shows that female offenders tend to get lower sentences than men (for example, Farrington and Morris, 1983).

This kind of comparison has been easily made (given relative ease of access in most jurisdictions - although not Victoria - to sentencing statistics with a raw gender breakdown).¹ It also seems to be part of the 'folklore' or common understanding of practitioners, from watching cases, conversation with other lawyers and so on. It is generally seen as bearing out the so-called 'chivalry thesis'.

More sophisticated analyses point out that female offenders are far more likely to be first-time offenders, and to have committed a less serious form of the relevant offence; that they stole smaller or fewer items, used less violence, and so on. Prior history of offending, and seriousness of offence, are central factors in determining severity of sentence, for any offender. Once these variables are entered into the equation, it is possible to conclude that female offenders are not being treated any differently from males in equivalent circumstances.

However it has also been argued that gender still affects decision-making, but in more complex ways. Farrington and Morris, 1983, for instance, concluded from an English study of magistrates' actual decisions that the sex of the defendant did not have any direct influence on severity of sentence or probability of reconviction. Women tended to receive lower sentences insofar as they had generally committed less serious offences and were less likely to have prior convictions. However when the sentencing of men and of women was examined separately, different factors were found to be significant. Looking at the factors which were important for women (but not for men), it was observed that women convicted with other offenders were more likely to receive a more severe sentence than those convicted alone. Further, women in the 'other' marital status category (generally divorced or separated) received heavier sentences, as did women from a deviant family background (usually broken home).

It was suggested by Farrington and Morris that magistrates may have disapproved of these categories of women offenders. An alternative interpretation can be drawn from the work of Kruttschnitt, 1982, who investigated the link between economic independence, informal social control, and heavier sentences for women. In a study of convictions in a Californian population in the 1970s Kruttschnitt found that sentence may differ with the extent to which a woman is economically dependent upon someone else for her day-to-day existence: the more dependent she

¹ For example, New South Wales sentencing statistics show that women are less likely than men to be imprisoned (36.6% of women compared with 57.3% of men received some sort of custodial sentence in 1990 in the higher courts), and that a higher proportion of women than men have fine or recognizance imposed: NSW Bureau of Crime Statistics and Research.

is, the less severe her disposition. She concluded that the degree to which a female offender can be shown to be under informal social control may produce a lighter formal sentence.

A number of studies have found gender-stereotypes in sentencing when they have looked *within* the category of 'woman offender'. Several writers have observed that women may be treated more leniently than men when they act in an approved feminine role, but that they seem to receive no advantage, and may in fact be treated more severely, if engaging in 'unfeminine' crimes (such as crimes of violence) or in untraditional roles.

For example, Visher, 1983, in a study of police arrest decisions in the United States found that chivalry was demonstrated at arrest stage if the woman displayed appropriate gender behaviour and characteristics, but that there was no advantage to a female offender if she deviated from stereotype. So older, white female suspects were less likely to be arrested than younger, black or hostile women. The fact that the offence is against property seemed to be weighted more heavily for female defendants for males. Different factors were also found to influence arrest decisions for male and for female suspects.

Class and race may be linked with gender in prosecution decisions, as suggested by Visher's study. Kruttschnitt, 1984, in Minnesota looked at the question whether sex per se, or social statuses associated with sex, affect sanctions. She found that significantly different variables affect sentence for males and for female offenders, and that women were more likely to remain free, both before and after adjudication. However she also concluded that differences in the social locations of male and female offenders may confound assessments of gender effect, such as single-parenthood and poverty. The relevance of class was also noted by Wundersitz et al, 1988, who concluded that class factors may be interacting with gender factors to benefit the young women in their study.

Mary Eaton, 1983, observed that English magistrates in the court she studied were influenced by child care responsibilities and social problems, such as financial stresses, or the care of an invalid. This was so regardless of gender of the defendant - although in fact women tended to be in such circumstances more frequently.

Eaton went on in her research to look at the images of society which are constructed in the plea in mitigation - pictures which communicate attitudes about the social order. She observed that both male and female defendants relied on arguments based on their familial place when pleading. But the type of family invoked was one which, while so familiar, reinforced the subordination of women. For instance, a husband could argue that he should be treated more leniently because he was now trying to make the marriage work; there was a tendency to privilege the maintenance of the marriage relationship, even in the face of evidence that the wife did not want him back.

Differences between courts, and legal systems, have to be taken into account when interpreting such studies. English magistrates, for instance, are usually non-legal members of the local community who sit, without fee, about once a fortnight.² It is assumed they will have other employment or duties, and a significant proportion are women. There has been concern in the United Kingdom at very obvious disparities in sentencing between panels of magistrates, and a recent attempt to constrain magisterial discretion and introduce some consistency has included the provision of sentencing guidelines. In contrast, Victorian magistrates are professional judicial officers with legal training and (since 1985) several years' experience in legal practice. This is not to say that they are therefore unaffected by personal values and prejudices, but that they are more likely to have formal training in, and commitment to, principles of consistency and legal correctness. Victorian magistrates have, until 1985, been exclusively male.

Overseas studies provide important directions for research, and suggest lines of analysis, but the jurisdictional differences make it important to look at Victorian, and Australian, studies of sentencing for comparable information.

Roger Douglas examined data on sentencing in Victorian Magistrates' Courts collected in 1978, 1979 and 1983. He looked at (a) reasons given by magistrates when sentencing; (b) the relationship between gender and sentence; and (c) this relationship after controlling for legally relevant variables (seriousness, priors) and participation (representation, plea in mitigation). He found that magistrates' reasons for sentence were generally 'legally'-oriented, emphasising seriousness of the offence, and defendant's prior record, with few references to personal circumstances or to treatment. He found no evidence suggesting the latter factors were given more weight in relation to women offenders than for men.

The one area in which he found a gender difference was in the amount of fines, for traffic cases and for traditional crimes, female defendants being fined significantly less, even after controlling for the other variables. Douglas suggests that this may indicate a *generalised* assumption about women's lower capacity to pay a fine, rather than a reaction to the individual defendant's resources, which were rarely provided in court. In any event, Douglas also concluded that, looking at magistrates' stated reasons for decision, sentences were largely unaffected by the input of social information (see above). The lower fines imposed on women might therefore reflect 'benign stereotyping, based on a realistic assessment of women defendants' poorer economic circumstances' (p.355). He conceded however that his data did not preclude the possibility that

female defendants may have been sentenced according to different criteria to those used to sentence males... the possibility that those whose domestic arrangements approximated most closely to traditional roles would have been dealt with more leniently than those whose arrangements differed from traditional

² See Emmins, 1985, at 38. And see Douglas and Laster, 1992.

roles . . . Nor do they enable an investigation of whether different magistrates reacted in different ways to gender (p.355).

Several Australian studies have in fact found individual differences between magistrates to be important indicators of sentencing differences (eg Lawrence and Homel, 1987; Grabosky and Rizzo, 1983; Polk and Tait, 1988). Lawrence, 1988, and Lawrence and Homel, 1987, found distinct patterns of decision making by magistrates, based on different magistrates' perceptions of their role and of the function of sentencing. The observations in this study included magistrate details (name and sex). Some analysis of their sentencing was made, which is discussed below. A more detailed qualitative study of magistrates' attitudes and values could be undertaken, for example by interviewing a sample of magistrates.

The methodology

I proposed to collect both quantitative and qualitative information about the process of decisionmaking in the Magistrates' Courts by observing cases in court and recording and analysing the information obtained, including narrative information.

A central issue in studying sentencing decision-making, especially using quantitative methods, is the virtually infinite range of factors which might theoretically affect the sentence. Even within the universe of formally relevant variables, the sentencer will be taking account of such matters as the nature of the offence, the seriousness of the offence(s), the role of the defendant, the defendant's prior criminal history, and often his or her age. The limitations of the methodology are discussed further below.

It is generally accepted in jurisprudential writing that judges bring their personal values and perceptions to their decision making.³ A study of sentencing might also therefore be required to account for the different views of the sentencer on the purpose of punishment, the seriousness of that type of offence, how they evaluate the defendant's comportment towards the court, how they weigh up the defendant's family commitments (or lack of them) and so on. Multivariate analysis can be used (see for example, Douglas). It may be doubted, however, how far a purely quantitative study can reflect actual decision-making processes; it can show correlations between factors and decisions, but cannot show causation, or test attitudes. Lawrence and Homel, 1987, carried out studies on judicial decision-making from the perspective of cognitive psychology. They identify the problems of analysing the interaction of offender, offence and magistrate factors in this way and conclude that sentencing research requires both statistical analysis and in-depth interviews with decision-makers.

³ See Lawrence and Homel, 1987; Hogarth, 1972; Hood, 1962 and 1972. But see Douglas and Laster, 1992 on enculturation and shared values.

Many early studies of sentencing focused on quantitative measures based on archival material. What was proposed in this study however was an examination of sentencing as an active process, as it occurs in the courtroom.⁴ The study takes account not only of the readily quantifiable factors such as nature of charge, prior criminal history and seriousness of the crime, and offender characteristics such as age, sex, marital status and presence of co-offenders, but also where possible, the manner in which the case was presented, any legal representation, the demeanour of the defendant, the responses of the magistrate and the matters raised and discussed by the participants in the course of the hearing. This provides a different type of study, incorporating the rich qualitative data to be obtained from analysis of the language used, for example, in pleas of mitigation and in sentencing.

Why Magistrates' Courts? The 'lower courts' hear the vast majority of all criminal matters, and represent the most public (and most accountable) face of the justice system for most people who will come into contact with that system. They handle the minor offences which perform a 'control' role in society, but magistrates are also seeing more of the 'serious' end of the criminal spectrum, as their jurisdictional limits are regularly increased. The Magistracy itself has been professionalised over the past few years, with changes to the required qualifications and to recruitment. It is also the only Victorian court at present with women members, all of whom have been appointed since 1985.⁵ In 1990 there were around 94 magistrates in Victoria, 13 of whom were women, including the Chief Magistrate. It therefore provided a high-volume, wide-ranging and accessible body of cases for observation, with a fairly varied range of decision makers.

The methodology employed is outlined in Appendix A. The methodological and substantive and methodological findings are discussed separately in the following chapters.

⁴ Previous studies which attempted this, using observation methods, have been carried out in Victoria by Douglas, and Polk and Tait, 1988.

⁵ See Douglas and Laster's examination of the recent changes in Victoria, 1992.

2. THE FINDINGS: GENDER AND SENTENCING⁶

This study provides a detailed gender profile of defendants, their offences, the Magistrates' court proceedings, and their dispositions. This chapter sets out the results of the analysis of gender and sentence. It then reviews the findings on the process, and the processed, and discusses the connections between these factors and sentencing. The quantitative analysis does not indicate that gender, on its own, has a strong influence on sentence, when other variables are controlled. The differences which did appear are discussed below. However women appearing in the Magistrates' Courts were found to be in significantly different social and economic circumstances to men, and to appear for different types of behaviour.

Sentencing

Magistrates can impose a range of dispositions. In ascending order of severity (as set out in the *Sentencing Act 1991*), the major options are an adjournment (bond), fine, Community-Based Order (CBO), suspended sentence of imprisonment, and immediate custodial sentence. Magistrates have jurisdiction to imprison an offender for up to two years for a single offence. Custodial sentences are intended to be a sentence of last resort (*Penalties and Sentences Act; Sentencing Act 1991 s.5(4)*), and are relatively rare.⁷

Very few offenders in this study received custodial sentences; the fine, on the other hand, was commonly used. Looking at penalties imposed for the first offence charged, most (60%) of offenders received a fine; around 4% received a suspended sentence, and 4% a custodial sentence. Community-Based Orders were rarely used (4.6%); bonds on the other hand were granted in one-quarter of cases.⁸ Driving licences were suspended or cancelled in 18% of cases.⁹

⁶ Details of the main findings appear in Appendix B.

⁷ See Polk and Tait, 1988.

⁸ As a matter of interest, these proportions were not dissimilar from the overall picture of penalties imposed in Victoria's Magistrates' Courts in 1991: Attorney-General's Department *Sentencing Statistics Magistrates' Courts Victoria 1991* Table CR 4.3. For 87,163 principal offences, 43.8% resulted in fines, 17% in a bond, 20.9% in licence cancellation, disqualification or suspension, 4.3% in CBO, 4.7% suspended sentence, and 4.5% in a custodial sentence. In this study there were slightly more fines and bonds, probably a function of inter-court differences and/or the higher proportion of mentions observed.

⁹ This penalty is available for over 200 offences; the most common include drink-driving offences, speeding offences, dangerous or careless driving, driving whilst unlicensed or disqualified, and car theft.

Women and men were equally as likely as each other to receive a suspended or custodial sentence, or a CBO. However there was a significant difference at the lower end of the sentencing scale. Male offenders were significantly more likely than a female offender to have a fine imposed (61.2% of males; 49.3% of females), whilst female offenders more frequently obtained a bond (35% of females; 23% of males). This finding supports the commonly stated belief that women receive lighter penalties than men. However it takes no account of (for example) the types of offences for which women are being sentenced, the seriousness of the offence, or their history of prior convictions (let alone any specifically gender-related circumstances).

Analysis carried out by Dr Roger Douglas confirmed his earlier findings of lower fines for women than for men. Gender was relevant to fines, independently of priors, number of charges, type of offence, and offence seriousness. However multivariate analyses of the likelihood of a bond or imprisonment showed little or no gender effect. Looking at traditional crime - assault, property, drug and public order offences - and separately at traffic offences, the main factors influencing whether or not a bond would be imposed, or whether the defendant would be imprisoned, were prior convictions and measures of charge seriousness. Legal representation seems to have influenced bonds in traffic cases and was related to avoiding custodial sentences in traditional crime cases.

Fewer women than men lost their licences (19.5% of men; 11.3% of women). However this seems to have been a function of the offences charged. As noted earlier, women were less likely to be charged with a traffic offence, and fewer women were charged with alcohol-related offences. Whilst equal numbers of women and men hold driving licences, women also tend to obtain their licence at a later age. After controlling for legally relevant variables (type of charge, excess speed, type of licence, priors and offence seriousness) gender ceased to be related to loss of licence.

The defendants

As would be anticipated from the criminological literature, defendants tended to be young, with relatively low incomes. Most were also males. The single most consistent 'gender' aspect of crime is the predominance of male offenders. The ratio of male to female offenders varies with the type of offence charged, but over the five month period of this study 16.5% of cases involved female offenders (n = 214).

There were significant differences in the specific charges laid against male and female defendants, discussed further below. Men and women also differed in a range of other circumstances.

Socioeconomic factors: Defendants' socioeconomic status tended to be low. Far more were unemployed than in the general population, and those who were in paid employment were clustered in the least skilled and least autonomous occupations. The average income, where this

was known, was considerably less than average weekly earnings.¹⁰ Defendants were most likely not to have completed their secondary schooling.¹¹

Women were generally worse situated financially than men. They were less likely than male defendants to be in paid work, and more likely to be unemployed. Whilst 11.9% were stated to be engaged in home duties (a virtually non-existent category for men), and might therefore theoretically have had access to a partner's substantial earnings, considerably more women than men were said to be receiving pensions or WorkCare (10.7% compared to 5.8%) and only 15.3% of women whose income was known earned \$300 per week or more, compared with 39.2% of men. The poverty of women in the criminal justice system has been noted in other studies, and may be connected to the smaller number of women who have fines imposed as penalty.

Occupational groupings¹² showed well-recognised gender differences. Over two-thirds of male defendants in paid work were in skilled manual,¹³ or semi-skilled and unskilled manual work.¹⁴ Women, however, were almost equally represented in the 'lower professional'¹⁵ (21.4%), clerical¹⁶

¹⁰ Table 2, Appendix B. Almost two-thirds of the defendants whose income was known received less than \$300 per week. By way of comparison, average weekly earnings in February 1992 for a full-time adult were \$584.90: Australian Bureau of Statistics. Only 6.7% (n=29) earned \$500 or more per week.

¹¹ Table 3, Appendix B. Education was only referred to in 38.6% of cases. It would usually only arise in the plea (although it might also have come up in the facts, for instance a brawl following an end-of-year party for university students). Where it is used it may be to show that the defendant was disadvantaged (by limited schooling) or is trying to improve his or her circumstances, or in the context of a plea that a conviction not be recorded in the defendant's (future) professional interests. There were no major differences between male and female defendants. More males had completed apprenticeships (12.1% compared to 1.4% - one female defendant); rather more women than men had done some tertiary studies (26% compared with 20%).

¹² Table 4, Appendix B. Occupation was coded using the 9-point scale of Anderson et al, 1975. Additional categories were used for people not in paid employment, including home duties, pensioner, student and so on. It is recognised that allocating classifications, and differing status, to occupations is at times problematic.

¹³ Category 7: the category includes for example fitters and turners, electricians, bakers, tailors.

¹⁴ Category 8: included for example process workers, drivers, and service workers such as gardeners, cleaners, cooks, and hospital attendants.

¹⁵ Category 2: includes for example pharmacist, qualified nurse, teacher, journalist, librarian, accountant.

¹⁶ Category 6: includes for example secretaries, non-supervisory public servants, shop assistants, postal officers.

(27.1%) and 'semi-skilled and unskilled manual work' (28.6%) categories. On the other hand, 2.4% of defendants (n = 14; 12 men and 2 women) were in the 'upper professional' category.¹⁷

For details of employment, income and occupation see Appendix B.

Family situations: It was considered important to record the way in which the defendant was described, or described him or herself, in relation to family and other 'controlling' relationships. This included the idea of 'marital status' but was broader, covering house-sharing arrangements and so on. It was also more descriptive than marital status, given the youthfulness of the population under study.

'Family location' was referred to in the hearing in quite a large proportion of cases.¹⁸ It can arise as part of a routine description - 'my client is a 30 year-old married man . . .' It may also be raised to show the degree of connection to the community, or that there are informal controls already operating, or alternatively to reinforce a claim that the defendant is a 'sad case' rather than bad.¹⁹

This can be seen, for example, in the following cases:

Case No. 501: The defendant was caught shoplifting in Safeway and K-Mart. The prosecution case was that the Defendant took an eyeliner in Safeway to the value of \$5.35 and a bottle of Oil of Ulan worth \$4.15 and put it in her handbag. She left the store without paying and was stopped by store detectives. In K-Mart the defendant put two sets of girls' underwear under her baby's quilt in her pram and left the store without paying; they were to the value of \$28.

A CBO was proposed in the plea. It was put forward that the defendant was addicted to heroin but has now opted for the rehabilitation programme; she has five children, was separated from her husband but is reunited now with her family since giving up heroin. Her husband has a successful business and she will not have to steal again to support a heroin habit; 'The defendant is worthy of a second chance; she is trying for a stable family life.'

The magistrate was concerned about the consequences of imprisoning the defendant. He observed that if the defendant was imprisoned her rehabilitation would be interrupted and in Fairlea she would probably go back onto heroin; the Court had used many unsuccessful deterrents but should balance this with the self-motivated steps towards rehabilitation which the Defendant has opted for. A CBO is not a real deterrent but gaol is inappropriate; a suspended sentence is required to ensure the seriousness of her rehabilitation.

¹⁷ Category 1: professions requiring a university degree, such as doctor, lawyer, geologist, architect.

¹⁸ See Table 5, Appendix B. It was referred to in 60.9% of cases involving a male defendant, and 57% of women's cases.

¹⁹ See Eaton, 1986, for a discussion of the use of family in pleas in mitigation and social inquiry reports.

Case No. 747: The defendant with 3 co-defendants entered Oak Park Pool after it closed to damage property. The defendant had consumed beer; he was taken to the police station by his father after co-defendants were charged.

It was urged in the plea that the defendant was remorseful and had been punished by his parents; he was prepared to make restitution and is now strictly supervised by parents. defendant does not have an alcohol problem; his teachers have supported the defendant and the offence was out of character.

The magistrate accepted that the defendant had never been in trouble before and was remorseful. It really was a stupid and pointless act. Defendant is only 17 years of age; he is still young and the act was out of character. The Court is prepared to give the defendant a chance. Defendant has embarrassed his parents, and his father went to much trouble for him. The magistrate adjourned the case 'to see how defendant goes over the next year'.

The largest categories of family location, where it was known, were single (24.2%; n = 188); married/de facto (33.1%; n = 257) and young person or adult living with parents (28.7%; n = 223). There is obviously an overlap between categories; what was recorded for this study was the family description presented to court.

There were some significant differences between males and females in this sample. Many more males were classified as (or at least presented to the court as) 'young person/adult living with parents'. Fewer females were said to be living with their parents (19.2% females; 30.4% males). More males were presented as being single (25.1% males; 19.2% females). Somewhat more young women were married or in de facto relationships, or separated or divorced.

These differences may be correlated with the social and economic factors already noted. Further, if one looks at the descriptions as images, rather than as objective facts, it may be that fewer women referred to themselves as 'single', in preference to 'living with friends' or separated/divorced, descriptions showing a degree of social connection or relationship.

Almost one-third (30.4%) of women defendants were known to have children compared with only 17.7% of male defendants.²⁰ The impact of family location and of having children on the sentencing decision is likely to be significant, especially taken with the generally poor economic circumstances of the female defendants. For example, if someone cannot pay their fine, they can have it translated into a CBO. However there is little provision for child care when an offender is doing the work component of the CBO, and women often fail to complete the requirements if they have children to care for. The courts are also aware of the hardship which will be caused if a mother is imprisoned. Where it seems to be assumed that a father who is imprisoned will have a wife to look after the children, this assumption often is not, or cannot be, made for mothers.

²⁰ Table 6, Appendix B. The 'not knows' were very similar for males and females (approximately 35%), suggesting that the *issue* of children was not addressed more often for women. So the higher proportion of women known to have children reflects a real difference.

The relevance of having responsibility for children is illustrated by case number 831:

The defendant entered Forges store in Footscray and was observed by security to steal manchester hidden in her bag. She was questioned by security where she admitted the offence. Secondly, in an Ascot Vale pub the defendant bought \$1,500 worth of stolen clothing for \$200. Thirdly, the defendant brought 30 Valium tablets to a friend she was visiting at Fairlea.

Regarding the theft, it was urged in the plea that the defendant had been in custody for one month then bailed. She pleaded guilty; she was not a professional thief. Her prior convictions indicate the vulnerability of youth; she had a drug problem but does not any more, and she has no burglary priors. She has a tragic background - she did not know her father, she lived with her mother; shoplifting was demanded by drug habit in her past; the defendant's sister was murdered and her husband died. The defendant has two children, and has sought drug rehabilitation since her husband died. Threats were made to force her to send the Valium to the prison. The defendant knows that she must decide whether to be a criminal or a mother; she is on the methadone programme currently.

The magistrate pointed out that trafficking with prison inmates is viewed as quite serious. The defendant has a flippant attitude towards her CBO; she would lose her two children if imprisoned. She is 31 years of age, and is currently on the methadone programme with the support of her boyfriend. The magistrate said the defendant should wake up to herself; she will be in jail for 9 months straight if she reoffends. If she wants to keep her sons she should stay out of trouble; she was to 'make the most of it and clean yourself up'.

The impact on the family where a father was facing prison was also influential in case 1470:

The defendant was driving in Glenroy; when stopped by the police he had a blood alcohol reading of 0.095%. He had a number of prior driving convictions.

The defendant told the magistrate he had a wife and three children, and was the main provider. He was 31 years old; the children were aged 14 months, 8 and 10 years. He had casual work in security as a hotel bouncer earning \$250 per week on average. His wife had casual work. It would be hard for his wife if he went to gaol. In relation to the circumstances of offence, he had been looking for a pizza shop; he did not think he was over the limit and can't remember how much he had drunk.

The magistrate was concerned about who would look after the baby if the defendant went to gaol. A CBO was possible in view of the relatively low reading, and because it was nine years since the last conviction, and because of the difficulties for family if the defendant went to gaol. However he was not really convinced this was the right thing to do, and said the defendant was lucky to get the one year disqualification. He eventually imposed a CBO.

Prior criminal convictions

In two-thirds of the cases in this study, no prior criminal history was raised.²¹ Fewer women had a criminal record (although this was barely at a statistically significant level); 71.6% of women had no prior convictions compared with 60.3% males.

Among those with priors, there was little difference in the *number* of priors between male and female offenders. Where there were prior convictions, the most common were for dishonesty, and then for traffic offences. More women than men had prior convictions for dishonesty, whilst men were more likely than women to have priors for offences against the person, traffic and drink-driving.²²

2. The Prosecution

Offences: Half of all offenders was charged with one offence; 27.2% were charged with three or more offences. It is assumed that the existence of other charges may influence the decision-maker in sentencing, and this should therefore be taken into account when evaluating the sentencing decisions.²³ This expectation was borne out in decisions on loss of licence in traffic cases, on custody in traditional crime cases, and on fines in both categories of case. However bonds were not related to the number of convictions.

More subtle distinctions are probably made by magistrates. For instance, a combination of charges may represent a pattern of behaviour, or it may illustrate a constellation of charges surrounding one particular event (and in either case some charges may be withdrawn by the police on the morning of the hearing, possibly following a plea bargaining process).

Illustrating the first category, case number 1202 involved 39 charges of theft, covering offences over a period of some months, apparently drug-related. The prison terms imposed for each offence (mostly 3 or 6 months) were made concurrent. Presumably at some point the presence of additional charges makes no further difference to the total penalty. Case no. 1162 involved a man facing three charges arising out of a fight with his estranged partner which began in her home and moved out into the street. He was charged with recklessly causing injury, unlawful assault and

²¹ See Table 10, Appendix B. There were three categories of 'no prior offences': 'none stated'; 'none relevant' and 'none'. It is up to the prosecutor to raise the matter of prior convictions; these must then either be accepted by the defendant, or proved by the prosecutor, before the magistrate can take them into account. Prosecutors may indicate that the defendant has priors, but that none are relevant to the matter; one intention may be to put the magistrate on notice that the defendant is not a first offender but he or she has been to court before (and not been deterred).

²² See discussion below on gender differences in offences charged.

²³ See LaTrobe, 1980, 56-7.

indecent assault. The unlawful assault charge was withdrawn in court, although this would not be interpreted to mean that no assault took place. The defendant pleaded guilty and was fined \$750 on each remaining charge.

Case number 1200 illustrates the second category. The defendant was stopped by the police, refused to give his name and address, and was then found to be currently disqualified from driving, and to have been driving an unregistered vehicle. He was fined a total of \$1300 for these three offences. It was also not uncommon to have a defendant charged with a substantive offence and then with failing to appear at an earlier hearing about that offence.

It would be helpful to discuss with magistrates what they see to be the influence of other charges on sentence, given the variety of contexts in which this may come up.

Nature of offences charged: Assuming (for the sake of simplicity) that the first charge will usually be the most serious, we can set out a picture of the main types of summary prosecutions coming before the Victorian courts.²⁴

Traffic and property offences combined comprised over half of the workload studied. Traffic offences alone constituted one quarter of first charges, the most common being careless driving and failure to display a 'P plate'. (Traffic offences were a much larger proportion of the magistrates' work until the recent reforms by which minor traffic matters are dealt with administratively.) Property offences were a similarly substantial group, constituting 27% of all first charges. Theft was the major offence in this group (48.1%; 168 cases out of 349 property offences). The theft prosecutions will be looked at in more detail later, being a group which included a number of female offenders. The other substantial category was alcohol-related offences. 15% of first charges (n=194) were in this class, most of these being 'drink-driving' or '0.05' offences. Drug offences made up 9.7% of first charges (n=125), the most common being possession of cannabis, usually only enough for the defendant's own use. Offences against the person were relatively rarely charged; they represented 6.9% of first charges (n=89).

There were important differences in charges between male and female offenders. Considerably fewer women than men were charged with offences of violence ('offences against the person').²⁵ Indeed, women were rarely prosecuted for behaviour which injured either people or property. A smaller percentage of women was charged with traffic offences.²⁶ Although similar numbers of males and females hold a licence, women tend to obtain theirs at a later age. In addition, men, or

²⁴ See Table 14, Appendix B.

²⁵ 7.9% of males, n=85, compared with 1.9% of females, n=4.

²⁶ 15.4% of women; 26.4% of men.

younger men, are probably more likely than women to use a car socially, in the context of alcohol consumption, and to associate their car usage with status and machismo.

On the other hand, a significantly higher percentage of women than men were charged in relation to 'public order' offences (8.8% males; 20.6% of females). That is, nearly one-quarter of all charges against women were for breaches of public order; further, 61.4% of the female public order offences were prostitution-related. Males, however, had a fair spread of public order offences, the main ones being indecent language, offensive behaviour and prostitution offences.²⁷ People charged with soliciting rarely appeared, and were usually dealt with in 'batches' and received a standard fine, most commonly \$300.

But, as shown by the graph overleaf, for women the most common category of offence is clearly the property offence, usually theft. Property offences represent 30.8% of first charges against women.

These findings are very significant, and support a number of possible interpretations. First, women commit *considerably less* crime than men. Secondly, it appears that women and men have different patterns of offending. Women tend to commit economic crimes such as theft and prostitution. In some of these cases it is clear that the primary motivation is economic need. Whilst 20% of women's offences were 'against public order', women were less likely than men to commit the other types of 'anti-social' crimes such as traffic and alcohol-related offences. It is also possible that in certain respects the criminal law is applied differently to men and to women. Greater notice may be taken (for instance) of women's sexual behaviour than of men's sexual harassment and gutter crawling.

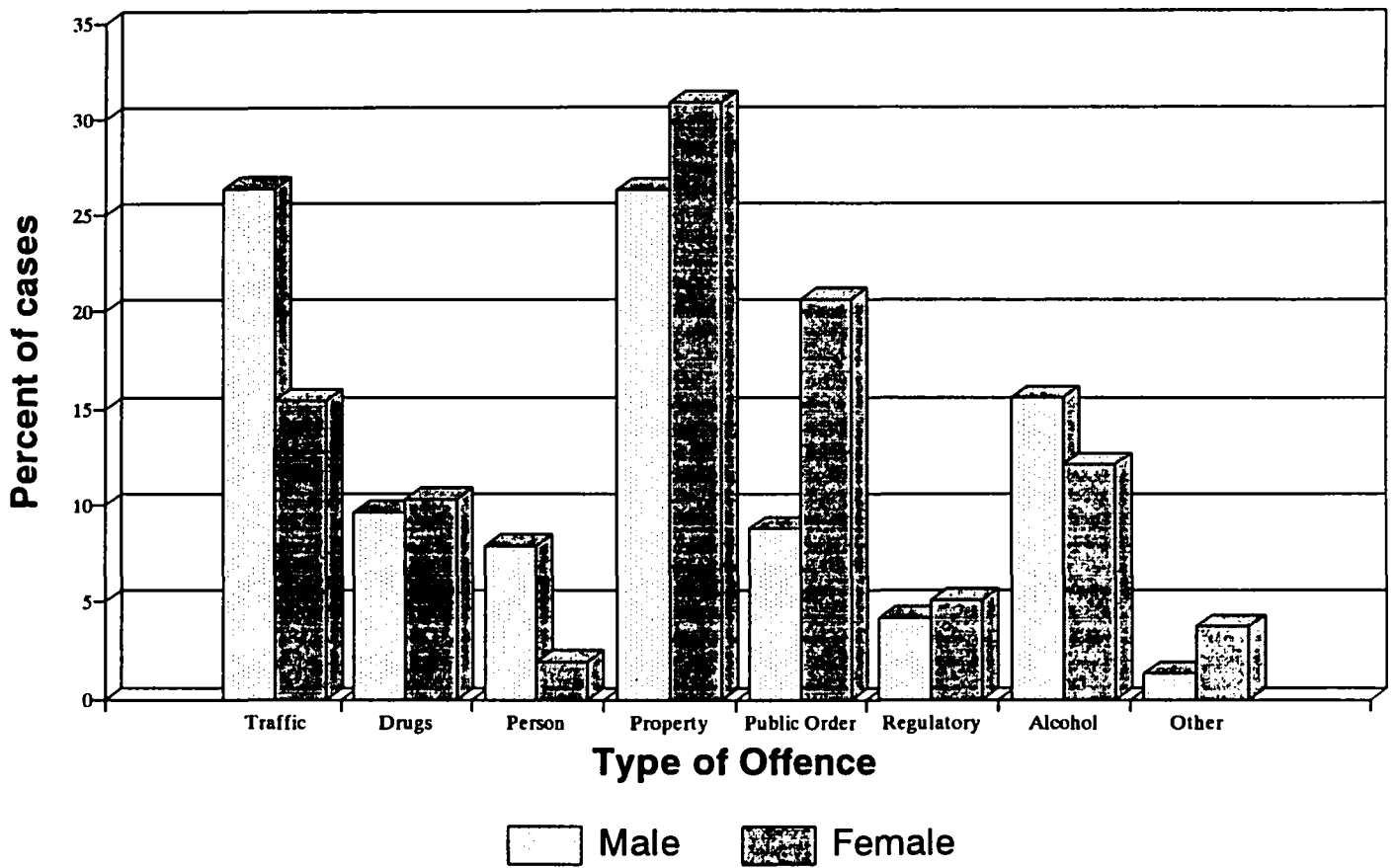
Differences in the profile of male and female offenders have been outlined. But it can also be instructive to look at areas of similarity.

Age: As found in other studies of 'criminal populations' the majority of defendants was young.²⁸ Where the age was known, 53% of defendants was between 17 and 25. There was no statistically significant difference in age breakdown between male and female offenders, although slightly more men were under 20 and slightly more women were in the 20-25 age group. Taken with the different patterns of offending discussed above, with much of women's crime having arguably an economic basis, this finding reinforces the importance of policies aimed at assisting young women

²⁷ The largest single category of offences against public order was soliciting for prostitution (30.2%; 42 out of 139 cases), around two-thirds involving female defendants. This probably includes the various offences of 'loitering for' and 'inviting' prostitution in a public place: *Prostitution Regulation Act 1986* s.5(1)(a)(b), 5(2)(a)(b)(c). The median fine for these offences, as appears in the 1991 *Sentencing Statistics*, was generally around \$300, as also found in this study.

²⁸ Table 1, Appendix B. Age was specifically referred to in something over half the cases.

Type of Offence by Gender



facing economic difficulties, a group which is undoubtedly growing in these days of high youth unemployment.

Defendants' Roles: We recorded whether the defendant was the sole offender, a principal with others, a co-offender, or an aider/abettor. Very few offences involved more than one defendant. On the basis of the first charge, 86.3% of defendants were sole offenders, with very little difference between males and females. Although some studies have suggested that women are more likely than men to appear in court as a co-offender rather than 'in her own right' in this study the proportions were again similar; 14.4% of women and 12.9% of men were charged as co-offenders. This is probably not, however, proof of the liberation of women into 'masculine' forms of crime, as suggested by Adler in the 1970s. What we are seeing is women committing crimes based in economic need - not necessarily economic *desperation* but economic pressure, which may be related to drug addiction.

How the defendant 'presents' in court

'I must admit to a very high degree of bias on this. I am affected at all times by people's appearance and demeanour. I am influenced by a person who takes the proceedings of the court sufficiently seriously that they dress in an appropriate way and they behave in an appropriate way, and they regard it as a serious matter . . . someone who appears to take it seriously I would tend to be more lenient towards.' (Quote from magistrate, Eaton, 1986, 80)

Eaton's magistrates, as mentioned earlier, come from a different background and system to those in Victoria, without their legal training. Their comments, however, indicate the possible impact of prejudice and stereotype on decisionmaking, and it was decided to try to measure this effect (if any). Two matters which were seen as potentially useful in recording this aspect of the process were demeanour and dress. They are both factors which other studies - and common experience - suggest may affect decision-making. They are also likely to reflect gender expectations and stereotypes, as well as being indicators of socio-economic status.

These were difficult matters to record, and even more difficult to code for quantitative analysis. Demeanour is of course a subjective matter. It involves the way the subject sits and stands, their tone of voice, disposition of hands and feet, as well as the facial expression, responses to the proceedings, and the actual words spoken; all of these must then be interpreted by the observer. A male observer might describe a male defendant - knees apart, hands on thighs, eyes fixed on the magistrates' face - as simply looking attentive, where a female observer (including perhaps a female magistrate) might identify (for instance) the hint of a threat, or challenge to her authority. The personality of the individual observer may of course affect this assessment too.

Demeanour was given two codes; one essentially a scale from very polite to rude/disrespectful, the second a number of emotional characteristics which could be added if called for. Not surprisingly,

perhaps, most defendants were recorded as being quiet, polite, and/or attentive (80.9%). Some were also nervous or tense (13.3%). A few presented as demoralised or humiliated (3.2%).²⁹

There seemed to be very little gender difference on the 'politeness' scale. However (although the numbers were very small) rather more women than men were regarded as being anxious or distressed.³⁰ This may reflect either an actual difference in female defendants, or a greater readiness in the observers to read these emotional states in women.

Dress was, if anything, an even more subjective variable to record. Two measures were used, the first recording level of formality of dress (suit, smart casual, casual) and the second the 'appropriateness' of the dress to the courtroom. So a sparkling disco suit, for instance, would rank high on formality and low on appropriateness; old jeans and a windcheater are 'casual' but could be 'appropriate' if they looked clean and neat. The assumption being made here was that a decision-maker infers from dress (intentionally or otherwise) messages relating to social class and also to the defendant's perceived attitude to the court. Perhaps not surprisingly, over half of the defendants observed fell into the middle category on each scale.³¹

This was an entertaining code to devise and test. However its use in relation to sentencing is yet to be analysed.

3. The Process

As noted earlier, most cases were uncontested; mentions (54.6%) or pleas (21.8%), some heard *ex parte* (15.0%). Only 8.6% of cases (n=112) was contested. This seems to reflect the workload of the Victorian Magistrates' Courts.³² It means that most cases observed were relatively brief, with the facts only peripherally disputed. Indeed, 'the facts' are usually presented by way of a short police summary, which may be a 'sanitised version of events', agreed on beforehand in the course of plea-bargaining, which magistrates reportedly recognise as often being both limited and inaccurate.³³ Most cases were *very* brief: around one-third of cases took five minutes or less;

²⁹ Not many were described as bored/disinterested/nonchalant (4.9%) or rude/disrespectful (0.9%), and very few were identified as angry (0.8%).

³⁰ Anxious: 12.3% men; 18.7% women. Distressed: 0.7% men; 3.3% women.

³¹ 52.2% were identified as 'smart casual' (compared with 20.8% suit, and 17.4% casual) and 55.8% were regarded as presenting 'reasonably appropriately'.

³² For 1990-91, 68% of cases were mentions, with 32% being 'fixed hearing disposals'; Courts Management Division, Attorney-General's Department.

³³ Douglas and Laster, 1992, 55.

almost two-thirds were completed in 10 minutes or less. Most defendants (82.1%) appeared at their hearing; 77.6% of women charged appeared, and 83.3% of men.³⁴

Women and men were almost equally likely to contest: 97 males (9% of all men) and 15 females (7% of all the women) contested. This is an interesting finding, in view of the different offence patterns of men and of women. The numbers are small, but women seemed most likely to contest drug, property or public order offences.

Participation in the process

Defendants participate in their court case by speaking in person, or by their legal representative. They have input by presenting a plea in mitigation, including calling character and other witnesses.

Legal representation: The effect of having legal representation on sentence is unclear. There is no evidence that it ensures a consistently lighter sentence in the lower courts.³⁵ In the present study, for instance, it appeared to have little influence on licence decisions, bonds in traditional crime cases, or size of fine. It was, however, weakly related to bonds in traffic cases and to non-custodial sentences in traditional crime cases.

Almost two-thirds of defendants (60.4%) had legal representation. Of the remainder, 23.8% appeared for themselves, while 15.8% made no appearance and had no representative at court. Women were slightly more likely than men to have legal representation, and less likely to appear for themselves. Women also had a higher non-appearance rate, possibly accounted for partly by the number of women who did not appear for prostitution charges.

The availability of Legal Aid Duty Lawyers at each of the courts studied probably explains the high proportion of representation, at what were mostly pleas.

Involvement in the hearing: As might be anticipated, given the predominance of uncontested hearings (and of legal representation), the majority of defendants had very little active involvement in the hearing. Well over half of those who appeared simply stood to receive the sentence (62.3%). 18.3% had some interaction, answering questions from the magistrate, while 11.4% ran their own defence or made their plea.

³⁴ 25 of the 48 non-appearances (52.1%) by female defendants were on soliciting charges. Legal representatives were present in five of the 48 non-appearance cases involving a female defendant.

³⁵ See R. Douglas, 'Do lawyers make a difference?' (1987a) 22 Aust. Jn. Social Issues 384; but see T. Vinson and R. Homel 'Legal Representation and Outcome' (1973) 47 ALJ 132.

Female defendants appeared to participate significantly less in their case. They were more likely to take no active part (at most, standing to be sentenced) (79.9% of the cases where they appeared at court); men also tended to be in this category, but more men actively gave evidence than women (41% compared with 20.1%).

Pleas in mitigation: As mentioned above, most defendants either appeared themselves or had a representative in court; 71% of those who appeared had legal representation. A few defendants had a representative in court but did not appear themselves. As most cases were uncontested, the role of the representative, or the defendant in person, was essentially to present a plea in mitigation of sentence.

Factors raised in a plea usually include the seriousness (or otherwise) of the offending behaviour, and the defendant's background including (hopefully) the lack of any, or any significant, or any recent, prior convictions. Other matters will include the defendant's general good character, exculpatory factors regarding the circumstances of the offence, and matters relevant to the choice of penalty, for instance the importance of the defendant's licence for his or her work, or the defendant's impecuniosity where a fine seems likely. It should be noted, however, that although a plea was made in most cases, the majority of these were brief: around 70% were completed in five minutes or less. The magistrate was therefore being presented with relatively little information, or what may be seen as a fairly formalised package of information.

In this study a number of common plea factors were coded, to permit quantitative analysis; we also recorded the gist of the plea as presented, as a narrative. The latter material provides a richer picture of the plea; a selection of narratives are extracted below.

Not surprisingly, the most common matter urged at a plea was the circumstances of the offence (presumably to mitigate) - how the offence occurred, why it should be regarded as an aberration, or as excusable. The next most-used factors were the defendant's remorse, and the effect of alcohol or drugs on the commission of the crime. Pleas also referred to the absence of prior convictions, good character, the offender's difficult background, the existence of family support for the offender, and the offender's family responsibilities. Where family support was referred to, this was often evidenced by the presence of other family members in court. 'Family responsibilities' might be used as evidence of good character, as well as indicating that hardship would be caused to others if the offender was dealt with harshly.

There were some gender differences in choice of material included in the plea. Women were more likely to address the absence of prior criminality (raised in 29.8% of women's pleas, compared with 17.9% of men's pleas). This would be expected since it will be recalled that they were actually less likely to have a criminal history. Women were also marginally more likely to raise personal factors, such as their good character, difficult background, influence of alcohol or drugs, family

responsibilities, and the existence of family support. Slightly more men than women addressed the circumstances of the offence itself (53.4% of men; 49.7% of women) and put forward the risk of job loss in relation to the choice of penalty (10.2% of men; 6.4% of women).

Case No. 739: Female offender charged with burglary: 'No trouble for last seven years. Has fallen back into drug use. Pregnant at age 15. Married. 11 Year old child. Husband fell back into drug use. Marriage broke up. Has gone to Moreland Hall/Pleasant View; has a methadone problem. Skillshare - has done a horticultural course and a gym course. Child reared by grandmother. Spent time in prison. Only ever got one bond.'

Case No. 755: Male offender charged with assault on his son: 'Defendant has an entrenched domestic violence disposition problem; wife is committed to helping husband in court today. Only one of his priors relates to his family. Defendant has attempted suicide; he is fragile and has no control. Only superficial wounds were caused on the day. The behaviour was reckless, which is less serious than intentional.'

Magisterial Considerations: Son is okay and they should get on with their lives and make amends; no point in sending the defendant to jail.'

Case No. 1045: Male offender charged with possession of a stolen VCR: Defendant's priors were when he was very young. Defendant ran into thief and was tempted to buy cheap VCR. Defendant was stupid. Defendant supports his mother, his father left for WA. He is pleading guilty and cooperated with police. Defendant needs the opportunity to prove himself. He contributes to the community by supporting his mother at only nineteen years of age.'

Case No. 1052: Male defendant charged with loitering, and possession of cannabis: 'Defendant was depressed as he had broken up with his girlfriend and associated with friends of bad influence with whom he did not usually associate. His mother is very concerned for him. Father left when Defendant was four years old. Defendant is involved as youth leader with Church group. Casual work. Defendant attempted suicide.' [Defendant's mother weeping in court.]

Case No. 1057: Male defendant charged with burglary and theft: 'Defendant's parents are very upset and he has been grounded and not allowed to go out at night. Family is very religious. Unfortunately defendant was eighteen at the time and could have been cautioned, as was his co-defendant. Defendant is somewhat of a follower, not a leader. Items stolen were useless items, only stolen as a joke. Defendant profusely apologised as very embarrassed and ashamed - Chilean family consider it a disgrace. Magistrate urged to impose a bond. Defendant has joined Navy and they do not take security risk people.'

Case No. 1140: Female charged with theft from employer's cash register: 'She was influenced by others and had problems at home. Problems managing money. She is re-employed; has reference from employer. Wants to resume education. She needs to keep her record clear. She is remorseful; won't offend again and is willing to make restitution.'

The making of pleas as such appeared to make no difference to sentence.³⁶ Indeed this study failed to yield even the tenuous evidence of plea effects noted in earlier studies of Magistrates' Court sentencing.

Character evidence: Very few people called witnesses as to their good character - around 40, or 4%, in all. Most were friends or family, or an employer or social worker. Written references were submitted in 22.5% of cases, most being character evidence but some going to medical matters. Men seemed to be more likely to put forward character evidence from an employer. Women were slightly more likely than men to call medical evidence. Character references were in fact associated with bonds in traffic cases, and this may reflect the effect of providing employer references when there is a risk of the defendant losing his or her licence.

The magistrates

Many studies have noted the relevance of differences in magistrates (see for instance Grabosky and Rizzo, 1983; Polk and Tait, 1988). Polk and Tait, for instance, identified two attitudinal groupings of magistrate when examining the likelihood of an offender being imprisoned, one group reluctant to imprison, believing prison served no positive purpose, and the other seeing prison as a positive choice, with some rehabilitative potential. There was significant difference in the treatment of offenders with no prior prison sentence, the former group being far more reluctant than the latter to imprison. It would have been interesting to have tested the significance to these decisions of the gender of the magistrate, and the gender of the offender. Lawrence and Homel, 1987, observe that a 'barrier to clear understanding of sentencing outcomes arises from the general tendency to analyse the sentencing process while ignoring the key factor of the influence of the sentencing judge or magistrate' (at 152).

There are 81 male magistrates and 13 female magistrates sitting in Victoria. Forty-five magistrates sat on the observed cases; of these 38 were male and 7 were female.³⁷

The female magistrates were more likely to give bonds in traffic and traditional crime cases. This is a finding which would give support to the 'feminization' theory of decision making, that women make legal decisions differently from men, and may be more 'humane'. In fact this was probably a function of the magistrate's background and training; the gender effect disappeared when age was

³⁶ The La Trobe study concluded that '[I]n general, the plea in mitigation appears to be a ritual, rather than a crucial stage in the sentencing process.' (at 66) It found a correlation between pleas highlighting absence of priors, remorse and restitution and adjournments (bonds), and to a lesser extent with imprisonment, but concluded that pleas were on the whole not very influential.

³⁷ As a percentage of cases heard, male magistrates heard 86.1% of cases and female magistrates 13.9%.

taken into account, probably reflecting the differences in the newer intake of magistrates (male and female) mentioned earlier. Interviews with magistrates could be useful in finding out more about differences in attitudes, role perceptions, and views of punishment.³⁸

Sentencing

In line with the high volume of magisterial work already described, little time was spent on sentencing: around half the cases were dealt with in less than one minute. Where magisterial considerations were indicated they were usually addressed to circumstances of the offence, and the seriousness of the offence. This is consistent with Douglas's findings, that magistrates in their stated reasons are primarily concerned with 'legally relevant' factors. Other considerations referred to in a reasonable number of cases included family circumstances of the offender; the fact of this being a first offence; and special and general deterrence (often of the 'this should teach you a lesson', and 'make sure we don't see you back here again' variety).

The following examples illustrate this process.

Case No. 863: The defendant was drunk; he pushed an attendant and blew smoke in her face at Flinders Street Station. In his plea it was pointed out that the defendant was at the football; he had consumed alcohol; it was uncharacteristic behaviour. The defendant plays football and cricket; he is engaged to be married soon; it was a minor assault, and there was not much visible harm.

The Magistrate said that the defendant was fortunate there was no injury. He noted that the defendant was only 19, had no priors and was recently engaged. The magistrate said he was giving the defendant a chance 'so make most of the opportunity'.

Case No. 613: Defendant was intercepted by Federal Police and escorted to the police station where she surrendered heroin she had hidden in her underwear.

Factors urged at plea: The defendant committed the offence during a rough period of her life; she was recently divorced and cares for 2 children. Defendant was associated with a bad crowd; her arrest has nipped her problem in the bud. She has parental financial assistance, but needs counselling as she has sought to address her problem. Defendant was co-operative with the police; in any event, the drug was for personal use only.

The Magistrate said that Parliament intends this crime to be treated seriously but a bond will suffice provided the defendant continues with drug counselling. The defendant was warned that if she breached the bond she could be further sentenced on this matter.

³⁸ See Douglas and Laster, 1992.

Case No. 444: The Defendant was low on cash so he went to a city car park to siphon petrol to the value of \$10 from another car; the driver of the other car came along and took the registration number of the defendant; told police who subsequently charged the defendant.

It was pleaded that the defendant resorted to a foolish and inexcusable action; he admitted everything to the police and was generally remorseful. The defendant's background includes a private school education and an apprenticeship; he has informed his employer and family of the offence which he regards as a one-off situation; he has offered restitution to the driver of the other car; he lives with his employer and works overtime to pay for his board. The defendant fears conviction might affect his future employment; he would like a clean slate.

The Magistrate observed that 'the defendant helped police and has no priors although theft is a serious offence'. He was concerned about the defendant's future and that he not reappear in court.

The factors recorded for statistical analysis (whilst relatively meagre) do not show any significant differences for male and female offenders. Being a first offence was referred to more often in relation to women,³⁹ as was remorse; recidivism was mentioned rather more often in relation to men than women. This is consistent with the finding that women were in fact slightly more likely to be a first offender. Family circumstances were mentioned in 13.6% of female cases, and 11.3% of males.

Polk and Tait, 1988, found that factors increasing the likelihood of a prison sentence were the nature of the offence,⁴⁰ having a previous prison sentence, the number of charges involved in the hearing, prior convictions, and the value of property the subject of the offence. Employment was also relevant; students and housewives (2%) and white collar workers (3%) were least likely to be imprisoned, unlike the unemployed (14%) and those currently in prison (100%). They observed small differences in relation to age and sex, with older people and women being less likely to receive a prison sentence, but concluded that this was largely due to the different offence distributions of these groups.

Broad findings on sentences were discussed earlier. The following section examines prosecutions and sentencing for theft.

Case study: prosecutions for theft

Non-motor vehicle theft was one offence with which male and female offenders were charged in fairly substantial numbers. These prosecutions were therefore examined as a separate group, to look at the possibility of making comparisons. There were 168 first charges of theft, with 162

³⁹ Being a first offence was mentioned in 21% of women's cases, and 13.8% of men's.

⁴⁰ Burglary was most 'imprisonable', followed by driving whilst disqualified, theft and assault; p.33-4.

convictions. 116 of the defendants convicted were male (71.6%) and 46 (28.4%) female, a higher proportion of women than for the study as a whole.

Sentencing: At the 'low' end of the sentencing range, women seem to have been treated more leniently than men. Significantly fewer women than men received a fine: 33.6% compared with 17.4%. Women more commonly received a bond (58.7% women; 42.2% men). They were however also somewhat more likely than men to be given a suspended sentence (females 6.5%; males 3.5%), and to be required to make a contribution to the court fund (formerly known as the Poor Box) (females 28.3%; males 22.4%).

These findings require further analysis. It is not clear whether the women who were given suspended sentences were avoiding a prison term, or being 'upgraded' from a lesser non-custodial sentence.

Seriousness of charge: This was identified by reference to the value of the item stolen. More than one-third of the offences (38.1%) fell into the first category of seriousness (that is, less than \$50 in value). There was no statistically significant difference in seriousness of offence between male and female offenders as a group.

Number of prior convictions: As with the general population sample, the largest category had no relevant priors. 67.4% of women and 54% of men were first offenders.

Female first offenders were treated more leniently than male first offenders; 80.7% of these women received a bond and 9.7% a fine, compared with men, of whom 67.2% received a bond and 27.9% a fine. Slightly more first-offender women received a CBO than men (9.7% women; 6.6% men) and there were no custodial (or suspended) sentences given. Similar proportions of men and women were required to make restitution (around 41%); around 10% were required to make a payment into court (5 men and 4 women).

On the other hand, as far as can be seen from the small group involved, women with prior convictions were more harshly dealt with than men with priors, with greater use of suspended and immediate terms of imprisonment for women than for men.⁴¹ Fines and bonds were fairly evenly distributed, but no women in this group received a CBO, compared with six men (11.5% of the men with priors).

The greater severity of sentencing of the women in this group probably reflects the relative seriousness of their offence, and/or a more serious criminal history. There were seven women and

⁴¹ Suspended sentences: 3 women (20%); 4 men (7.7%). Custodial sentences: 3 women (20%); 8 men (15.4%). The small numbers limit the scope for interpretation.

15 men with a number of prior convictions.⁴² The women appeared overall to have more charges against them on the day,⁴³ and their offence (charge no. 1) involved items of greater value.⁴⁴ These differences may be enough on their own to factor out any apparent differences in the treatment of the men and the women. A much larger sample, with more comparable cases, could help determine whether any stronger statement on this point were possible.

Age: Where age was known, the main age bracket was 17-20 years; 41% of men convicted of theft were in this age range, and 29.7% of women. 70% of males and 68% of women were 30 or under. The age distribution was different for men and for women; there were considerably more females than males in the 26-30 age group (females 19%; males 4.8%), and in the 41-45 age group (females 10.8%; males 2.4%). However there were no women over the age of 55, whilst several men were in this older age group.

Family location: Around three-quarters of defendants raised their family situation in the course of the hearing; it was not mentioned more often for women. Many more women than men were stated to be in or out of an established relationship; 39% married or in de facto relationships (26% men), 15% divorced or separated (5% men). The men were much more likely to be single (29%) or living with parents or friends (52%). One-quarter of female defendants was said to be a 'young person living with her parents'. This pattern may reflect in part the slight differences in age groupings of males and females.

Children: This pattern was also reflected in the references to children. Significantly more women than men were known to have children (58.3% of women; 23.7% of men). This is consistent with the age groupings and family location results discussed above.⁴⁵ The higher proportion of women with children, and presumably responsibility for their care, may be relevant to both the motivation for the offence, and also, in sentencing, to the choice of disposition.

Employment: There were even fewer defendants, male or female, in this group who were in the paid workforce, suggesting an economic motivation for the crime. Further, women were substantially more likely than men to be without independent means. Only 13.6% of women were in paid work, compared with 33% of men, a statistically significant difference. There was little

⁴² Four or more known priors, or two or more pages of priors.

⁴³ 4 out of the 7 women had 4 or more charges; only 2 of the 15 men had 4 or more charges for hearing on the day of observation.

⁴⁴ Half the males (n=8) were charged in relation to theft of items under \$200; only one female was in that range, whilst three females (and two males) were charged in relation to items valued from \$1000 to over \$5000.

⁴⁵ The proportion of men and of women for whom the 'children' question was not known was virtually the same (19.8% of men; 21.7% of women).

difference in the proportions of men and women who were unemployed, and who were on pensions.

The implications of these findings in relation to defendants appearing in the Magistrates' Courts will be considered further in Chapter 4.

3. THE FINDINGS: METHODOLOGY

'They're treated more lightly, aren't they?' (A range of people made this comment when told of this research topic.)

Analysing sentencing differentials is a traditional but limited way of addressing the issue of the equality of men and women defendants. Much of the work is limited by a failure to control effectively for the relevant factors. However, even those studies which are rigorous in their methodology are unable to explain the findings, relating to marital status, which they discover. The limitation arises because of the focus on the sentence, i.e. the end product of the judicial process. To appreciate fully the significance of this process it is necessary to give attention to the interactions by which it is constructed. (Eaton, 1986, 31)

The primary methodology used in this study was a statistical analysis of a range of factors which it was hypothesised might affect a magistrate's sentencing decision. As noted above, the data has shown significant gender differences in defendants appearing in the courts, but preliminary quantitative analysis of the observed cases has not indicated a strong gender influence on sentencing decisions.

This may be because gender is irrelevant in the criminal process, or at least is irrelevant in the largely routine decision making observed here. Interestingly, however, it is generally perceived by the people working in the courts day to day as being quite significant. This may simply reflect the apparently lighter sentences resulting from less serious female offending. But other interpretations relating to methodology should also be considered. The sample may not have been large enough to allow proper comparisons; or attitudes to gender may be significant to the decision maker but not necessarily affect the sentence.⁴⁶ Or gender may be interconnected to social and economic characteristics, making it difficult to isolate which is operating on the decision making.

Statistical generalisation: It is very difficult to find a large enough sample to allow comparisons of like cases (or even to be sure that cases with similar facts can be regarded as 'like'). Simply identifying sufficient prosecutions for one type of offence is difficult. In the summary jurisdiction around one thousand different offences are dealt with; in the present study, for instance, 1301 cases were observed, involving around 240 different principal charges. Of these 1301 cases, 168 cases were for thefts (162 convictions, comprising 116 males and 46 females). If theft was the offence to be studied - as one offence for which women are prosecuted in statistically useful numbers - it is apparent that a very large number of unselected prosecutions would have to be observed to collect a useful sample of thefts.

⁴⁶ See Lawrence, 1988; different magistrates revealed varying attitudes to their role as sentencer, and emphasised different aspects of cases, but on occasions reached similar sentences.

Indictable offences heard in the higher courts would be more readily identified in advance, and provide more detailed information, and more individualized treatment, but cases involving any particular offence would arise less often than in the summary jurisdiction and would take longer to be completed.⁴⁷ Offences differ in seriousness and in circumstances; defendants' family circumstances and disposable incomes are rarely similar; there will still be difficulties in keeping sufficient variables constant.

This is enormously labour-intensive research. In this study over 160 researcher-days were spent in court (without taking into account the extensive work involving in coding the data and so on).

Problems with collecting the data: Magistrates' courts are high-volume courts; it is difficult to record all the detail mentioned to the magistrate, or by the magistrate, in the time it takes to complete the case and commence the next. This might be dealt with by going back to complete the data collection, from the computer record (of charges and sentences, for instance) or from the police, but this would be extremely time-consuming.

Some of these problems could be overcome if court proceedings were taped and/or transcribed; it might then be possible to select cases by offence, by sex of offender, by magistrate and so on. The researcher would not be subject to the constraints of collecting data during court sitting periods, and could usefully limit the types of cases examined. Some data would however be lost, relating to the interaction in the court. It was not possible in this study, for instance, to show statistically how the defendant's demeanour and general presentation impacted on the sentencer, and it may be that this cannot be shown quantitatively, but it is likely that it is in fact relevant.⁴⁸

The high volume of Magistrates' Court work also reduces the amount of information actually going to the decision maker, and may lessen the significance of a defendant's gender to the decision maker, at least in cases which are perceived as routine. Indeed, many minor matters appear to be treated in a very routine manner - drink-driving offences, common traffic offences, minor shoplifting. The hearing is short, the summary of facts is minimal, there is a guilty plea and a brief plea in mitigation followed immediately by the sentence. Variations in sentence in many such cases may be largely explicable by reference to such matters as seriousness and prior convictions.

Relationship to actual decision making: Linked to the earlier points is the importance of including in the model of sentencing all the factors which could be relevant to the decision. This means considering both the 'objective' facts relating to the offence and the offender, and how these are 'packaged' for the court by the police and the defence. It means examining the matters presented

⁴⁷ In 1989, 1091 offenders were sentenced in the higher courts in Victoria, compared with 87,163 in 1991 in the Magistrates' Court.

⁴⁸ See Eaton, 1986; Lawrence and Homel, 1987.

to the court - income, family situation, education, employment, family responsibilities, together with the manner in which the defendant participates in court - by legal representative, interpreter, by demeanour and appearance - and by the attendance at court of family, employer and so on.

Many of these factors will be interconnected and may well be evaluated differently for different offences. However the more factors there are to be taken into account, the harder it will be to find a sample of comparable cases, and the harder it will be to determine which factors are in fact operating. On the other hand, the necessity of taking this range of factors into account virtually excludes purely archival research, and points to observational research, in the courts, as essential, if not sufficient.

Limitations of the statistical method to explain behaviour: Quantitative analysis produces correlations; it does not, in the end, demonstrate causation, although it can give an indication of the weight attributed to a particular factor by the decision maker. It cannot therefore say a great deal about *why* any particular factor might influence a sentence. Polk and Tait, 1988, comment that 'It is our belief that that nature of judicial decision making is highly interactive in the statistical sense, so that standard methods such as multiple regression which assume a linearity of effect are not appropriate.' (35)

Qualitative research, such as interviews with magistrates and other participants in the process, must also be undertaken to probe the interaction of the various elements.⁴⁹

Assumptions of statistical analysis: Statistical analysis aimed at discerning whether gender (for instance) produces lighter or heavier sentences requires assumptions to be made about a number of factors which are not always unproblematic, for instance the relative harshness of penalty options. The *Sentencing Act* (Vic) now sets out the hierarchy of sentencing dispositions, from bond as the lightest, followed by fine, with an immediate custodial sentence as the most severe, to be imposed only if nothing else is appropriate. It cannot be assumed, however, that all magistrates weight penalties in the same way. It may also be noted that *defendants* may disagree on the weight of the penalty. A monetary penalty may be oppressive or irrelevant; a requirement of so many hours community work may be easy to achieve, or impossible due to childcare and household responsibilities. A suspended sentence, which carries no conditions, may be viewed by a defendant as a light penalty, preferable to a CBO, despite its official status as second only to a custodial disposition.

The researcher always has to interpret the results. The fact that a woman received a fine may reflect harsh treatment, in not granting a bond, or lenient treatment (if the magistrate perhaps

⁴⁹ Hogarth, 1971, for instance, made a detailed examination of magistrates' attitudes, background and so on, by interviews and administration of tests, as well as studying their handling of a selected range of cases in court.

thought she would have difficulty carrying out the conditions of a CBO). A heavy fine might similarly be a severe sentence, or a sympathetic recognition that a CBO is unrealistic. If women receive similar numbers of suspended sentences to men, it may be lenient - protecting the woman from custody - or harsh - using a technically more serious penalty to avoid imposing a CBO which the magistrate thinks will be breached. Or it may reflect real parity between male and female offenders in similar circumstances.

Measures of the seriousness of an offence are extremely subjective. 'Seriousness' will include level of violence, nature of the victim, degree of provocation, motivation for the offence and so on. Further, the assessment may itself incorporate gender differences - certain behaviour may be seen as more or less serious if done by a male or a female, or if done to a male or female.

Further research on the relevance of gender to sentencing must include magistrates' understandings of their role and of the causes of crime in men and in women, and their philosophies of punishment. Differences *between* magistrates need to be more fully examined, but it is also important to look at the impact on magistrates of the factors being recorded, and their opinions on the matters being presented to them. Research should also be directed to analysing the court processes, from the decision to charge, and the choice of charge, to the presentation of the plea in mitigation as a form of 'packaging' the defendant.

4. DISCUSSION

This project was undertaken with three aims: to develop a systematic study of women defendants in the Magistrates' Courts, to examine sentencing of men and women as a central stage in the criminal process, and also to test the chosen methodology.

The picture of defendants which emerged was one of a significantly marginalised group with many defendants unemployed or on low incomes, poorly educated, and if employed, in occupations with little autonomy or security. It was also a picture of *young* people. Young men were by far the largest group, and engaged in rebellious and aggressive public behaviour - speeding, drink-driving, abusive language - and property offences such as burglary and theft. The young women shoplifted, and were prosecuted for prostitution. There was a disturbing number of alcohol and drug-related offending by men and women. However most drug offences were of the most minor type, involving cannabis for personal use, which may say more about the current criminalisation of such behaviours, and the exercise of police powers in these areas, than about the dissipation of our young people.

The male patterns of offending suggest that research and policy should be targetted at the links between machismo and anti-authoritarian, or anti-social, behaviour. Offences of physical violence were relatively infrequent, but where they occurred they were almost always committed by men; there are clear connections between 'masculinity' and aggression which must be further examined and challenged.⁵⁰ Policy proposals should also take account of the social context in which these activities occur, and the likely impact of increasing unemployment and alienation amongst many young people.

Women's offences, centred around theft and prostitution, point to women's growing economic difficulties. This was particularly striking when the group charged with theft was looked at separately; only 13.6% of the women were in paid work, and 58.3% had children, with a proportion clearly caring for those children as single parents.

Differential family responsibilities must not be ignored. If women in fact have the principal care of children, as is still generally the case, including the onerous responsibilities of single parenthood, policies must be directed to alleviating their social and economic stresses. If they commit crimes, dispositions must be designed to recognise this reality and to minimise the cost to their children. It is inappropriate to call for 'equal treatment' for men and women where they are not equally situated to begin with.

⁵⁰ See for example, Connell, 1987, National Committee on Violence, 1990.

This study suggests that magistrates generally do make sentencing decisions based on 'legally relevant' factors. Sometimes procedural matters appeared to affect sentence. Legal representation, for instance, was weakly correlated with some decisions but not others. Lawyers may of course exert a significant effect on the perception of a case, as their role inevitably involves a definition or 'creation' of the 'facts' for the decision maker.

There were no outstanding indications, on the statistical analysis, of gender operating to benefit, or disadvantage, one group of offenders. More women (as a percentage) received bonds than men, and more men (as a percentage) received fines. But when other matters such as prior criminal history, and offence seriousness were taken into account the only difference remaining was a slightly smaller fine for women. The fact of lesser fines being imposed on women hints at a gender effect which could usefully be examined further. It may, indeed, be a reflection of the magistrates' awareness of women's generally lower economic status, and one which is not inappropriate.

Sentencing is obviously only one aspect of the criminal process, and one whose effect is inextricably linked to the processes coming before and after - policing, bail decisions, plea negotiations, and then the practical operation of the sentencing options. These need to be more fully studied if their impact, and any differential effect on women, is to be understood. It will be important to talk to the people administering the system. In the case of sentencing, it is crucial to examine more fully how magistrates see their role and options, and whether they perceive a need, or a tendency, to deal differently with men and with women.

Hogarth, 1971, proposed that the sentencing researcher has two possible models of the sentencer to work from. There is the 'irrational model of man [sic]', with 'little power of reason and reflection, a weak capacity to discriminate, the most primitive self-insight, and a very short memory. [His mental capacity] is easily overwhelmed by emotional forces of which he may be unaware'. Or the researcher may adopt a 'rational model of man', assuming that the decision maker 'possesses discriminative and reasoning powers... and that he is capable of self-criticism and insight.' (22-23) It is not, however, necessary to approach sentencing so crudely. There are obviously matters of which magistrates will be aware, including values, philosophies and so on, which can be discussed. A statistical study such as this may also show patterns or themes which hint at other values and even prejudices of which the subjects were unaware. To explain how the criminal justice system treats the men and women coming into it, and to develop policies to address some of the criminal behaviours affecting our community, we need to draw on both quantitative and qualitative approaches to more fully understand both sides of the process.

APPENDIX A

The Methodology used in this Study

Collection of data: After discussion with the Chief Magistrate, it was decided to observe three busy metropolitan courts, Melbourne (City) Court, Prahran and Broadmeadows. These were expected to provide a high volume of cases, with a range of magistrates and of offence types.

I aimed to record between 1000 and 1500 cases. Given that this was a pilot study, it was hoped that this sample would ensure that (1) sufficient cases were observed involving female offenders and (2) there was enough data to allow comparisons between male and female offenders convicted of equivalent offences. In the event, data from 1301 cases was entered for analysis.⁵¹

A 'case' represented a single defendant, whether charged with one or several offences, and whether or not there were co-defendants were charged with the same offence or offences. There were 214 cases involving female defendants (16.5%) and 1082 cases involving males (83.2%).⁵²

Observations occurred almost equally between Melbourne (42.9%) and Prahran (38.4%); fewer observations were made at Broadmeadows (18.7%). Around half as many 'researcher days' were spent at Broadmeadows as were spent at Melbourne; however Broadmeadows also has a smaller caseload than the other two.⁵³

It was not intended to produce results which would be representative of all Victorian Magistrates' Courts, nor of all offenders. This was in part because it was not the aim of the project to produce statistically generalisable results; partly because it was a pilot project with limited time and funds; and also, practically, as a result of the rather contingent character of court listing procedures.

It is not possible to ascertain in advance with any certainty the nature of summary hearings coming up in a Magistrates' Court on a particular day, nor their location. It was therefore not possible to limit the sample to (for example) prosecutions for particular types of offence, nor generally to collect a large proportion of prosecutions of women offenders. In the vast majority of criminal cases in the summary jurisdiction the defendant does not dispute the facts; the cases are either 'mentions' or pleas in mitigation of sentence. Such cases are heard, and any sentence handed

⁵¹ Excluding, for instance, bail applications, license renewal applications and so on.

⁵² In five cases either sex was not known, or the defendant was a company.

⁵³ Statistics provided by the Attorney-General's Department, Courts Management Division, for 1991 showed that Broadmeadows court completed around half the number of cases completed at either Melbourne or Prahran; Melbourne 13,145; Prahran 13,987; Broadmeadows 6,802.

down, quickly; a magistrate may finish 20 or more in a morning. As they usually involve a sentencing decision these cases are obviously relevant to this study; however as most are completed extremely quickly they offer less scope for detailed and thoughtful sentencing. In most cases observed here the magistrate spent only a few minutes on sentencing, and made largely routine comments when imposing sentence.⁵⁴

Contested cases constituted 8.6% of the total group observed and obviously give rise to far more information than do mentions. However contests were a much less productive use of the observation time than mentions. It was therefore accepted that we should try to see a mix of mentions and contests. Given the differences in time taken by the proceedings, the observer allocated to a contest court on any one day might end the day with two or three cases at best, whilst the observer allocated to the mention court would have up to 25 cases and an aching writing hand.

A team of up to seven researchers, including myself, worked as observers from February to July 1991.⁵⁵ February was treated as a piloting period; only data collected in the period March to July was entered on computer and analysed. Observers generally attended at either Melbourne, Prahran or Broadmeadows for a week at a time, and were rotated around those courts. Each morning when they arrived at court the court clerk provided a list of the cases to be heard that day and the courtrooms to which the cases were allocated. Whilst they were at a particular court researchers generally tried to alternate sitting in the mention court on one day and in a court hearing contests on the next day. The court clerks were very helpful, and were able to advise when they knew that one of the contested cases listed for a particular court involved a female defendant. The observer allocated to contests could then choose this court as 'their' court for the day's observations. This was the only gender-related selection observers made - or indeed were able to make.

For some periods two observers were present at one court; one would sit in the mention courtroom and the other in a contest courtroom. From the daily court list it was generally possible to know which court would be hearing mentions; the observer allocated to mentions for that day would simply remain in that court recording observations until the court closed. However as anyone who has had contact with the lower courts would be aware, cases are often delayed, or moved to other courtrooms; contests are adjourned for minutes or hours, or become pleas; one case listed for a particular courtroom can run hours longer than initially indicated, leading to the reallocation of

⁵⁴ 52.8% were noted as 'less than one minute' and 91.6% were dealt with in five minutes or less. See Douglas and Laster, 1992: 'Mention days can sometimes look and feel like 'conveyor-belt justice', with defendants feeling as though they've been through a 'sausage machine'". (p.55) 'The success of the mention court system is really dependent upon the skill of the magistrate in making a quick and appropriate decision upon sentence.' (p.56).

⁵⁵ Most observers worked for periods of two or three months each.

other listed cases to other courtrooms. On such occasions observers simply had to move from court to court, as cases adjourned or concluded and lists closed.

The research instrument: Having surveyed the literature, the aim was to try to capture the decision-making process in total, by examining as much as possible of the information being presented to the sentencer, as it was presented. This should include legal, factual, social and personal information, presented verbally by the offender, or representative, or welfare worker, and behaviourally, particularly by the offender. It was hypothesised that an accurate model of decision making *could* be devised provided *enough* relevant factors were identified.

The primary focus of the research design was obviously on identifying the influence of gender. However class and race factors were not ignored, given the importance of looking at 'structured inequalities of all kinds and their importance for explanations both of criminality and of the workings of the legal, judicial and correctional systems' (Edwards Hiller, 1982, p. 83). Gender, class and ethnicity were thought likely to have interlinked influences.

I considered it important to try to identify and distinguish not only the 'legally appropriate factors', found by Douglas, 1987, to be most commonly determinative, and the other factors which the magistrate may explicitly refer to as relevant to decision, but also factors which may in fact influence sentence differences, which the magistrate may not have stated, or perceived, as affecting the decision.⁵⁶

These last factors were to be identified, for example, from the matters selected for reference in plea material, from the choice of factors emphasised by the magistrate in sentencing, and from the language used by the participants. Other matters to be examined included the capacity of the offender to participate in the hearing (Douglas, 1987), the effect of legal representation, and the demeanour of the offender (see Farrington and Morris, 1983).

Data was to be collected which could be analysed both quantitatively and qualitatively. Quantitative analysis would require a substantial number of cases, out of which it was hoped there would be enough comparable cases to draw conclusions about the decision-making process. Qualitative analysis would require detailed recording of observations, including a narrative of the circumstances of the offence, and where possible verbatim notes of pleas and sentencing comments.

A research instrument was developed drawing on that designed by Dr Roger Douglas of La Trobe University for his major study of Victorian Magistrates' Courts. Dr Douglas provided much helpful comment on the design, and it was piloted and reworked by myself and two research

⁵⁶ Note Hogarth's, 1972, rational/irrational models of decisionmakers.

assistants in February. It was important to have an instrument that permitted rapid completion of details, had space for narrative, could be coded for computer analysis, and was at the same time physically small enough to be filled in in the often confined space of the courtroom. It was kept to two A4 sheets, printed side by side, and appears below.

Researcher's Initials	Day Case No.
Name of Offender:	

"Extra" Case Court Mag. M/F

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

1. Court Magistrate..... M/F Date

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Type of case: mention/contest/plea Time started finished..... total time.....

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Def. in custody yes/no/nk Appearance yes/no cust app dress

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
4. Male/Female Dress (description)

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
5. Ethnicity (A/E) Length of time in Australia eth length crt inv race

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Use of interpreter: In court Y/N/NA During original investigation Y/N/NK/NA Other racial or cultural characteristics age emp inc ed

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Age (A/E) Employed/Unemployed/domestic/student/pension/other Level of education occ res fam ch dem

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Income (A/E) (per week) Occupation Current Suburb of residence Children Yes/No (number/age) Dem's Demeanour (speech etc.)

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. "Snapshot" of case
.....
.....
.....
10. Type of driver's licence D's involvement in hearing: (e.g. only at sentence).....

<input type="checkbox"/>
<input type="checkbox"/>
11. Date of offence Suburb (location) of principal crime off loc

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Represented 1. Barrister/Solicitor brought by def. 2. Duty Lawyer 3. Not Represented 4. No Appearance & No Rep. repr M/F

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
13. Prosecutor Police/other M/F

<input type="checkbox"/>
<input type="checkbox"/>

OFFENCES

Charge*	Indic. of Seriousness	D's* Role	Plea	Outcome	Sentence ^b
1.					
2.					
3.					
4.					
5.					

* Cross reference other files
^b Sentence: Custodial/Fine/Rest./Susp./CBO/Bond/Licence/+ costs/Time/Payment to court fund

15. Prosecution case (incl. actual words) Text Y/N

.....

.....

.....

16. Contested cases: Defence/exculpatory material (incl. actual words) Text Y/N

.....

.....

.....

17. Witnesses Total pros. witnesses Total defence witnesses

PLEA
18. Character Evidence by (M/F) (1) Questioned by
(2) Questioned by
(3) Questioned by

Written Evidence tendered (Yes/No) written by Ev
Purpose: Character/other Auth
..... Purpose
..... No.
19. Priors Not Stated/Not Relevant/ 0 / 1-3 / 4-9 / 9+ / < 1 page / 2 pages + Priors 1
State general nature and year Priors 2

20. Factors Urged at Plea (incl. actual words) Underline key factors Text Y/N
Time taken in plea: < 1 min.; 1-5 mins; 6-10 mins; 11-30 mins; 31 + mins time

.....

.....

.....

TICK BOXES	re off. seriousness	re choice of penalty	re off. seriousness	re choice of penalty
Remorse			Alcohol/drugs	
Poverty			D's changed circs since offence	
Difficult background			Circs of offence	
D needs family support			Job lost as circ. of offence	
Absence of prior record			Danger of loss of job - penalty	
D's good character			Recent acquisition of job	
D's family responsibilities			D has family support	

Other

SENTENCE
21. Magisterial Considerations when sentencing Key factors (incl. actual words) Text Y/N

.....

.....

.....

None stated Circs of offence Mit/Agg Family Circs Mit/Agg other
Restitution Seriousness Mit/Agg First Offence
Rehabilitation Special deterrent Recidivism
Incapacitation General deterrent Lack of remorse
Remorse

Other
Time spent passing sentence < 1 min.; 1-5 mins; 6-10 mins; > 10 mins time

Magistrate's manner (incl. degree of involvement; quote examples) Text Y/N

.....

.....

APPENDIX B

The Data

Data from 1301 cases was coded and analysed. It would however be rare for all the variables being recorded to be raised in any one case. Therefore unless otherwise stated, the following tables only refer to the cases where details of the relevant characteristic were known.

Table 1: Defendant's age by sex

	Count Col Pct	Male	Female	Row Total
AGE				
Under 20		181 30.2	27 22.7	208 28.9
21-25		141 23.5	32 26.9	173 24.1
26-34		144 24.0	34 28.6	178 24.8
35 +		134 22.3	26 21.8	160 22.3
Column Total		600 83.4	119 16.6	719 100.0

Table 2: Defendant's income by sex

INCOME	Count	Male	Female	Row
	Col Pct			Total
Less than \$100 p/w		50	16	66
		13.8	22.2	15.2
\$100-199 p/w		118	25	143
		32.5	34.7	32.9
\$200-299 p/w		53	20	73
		14.6	27.8	16.8
300-399 p/w		79	8	87
		21.8	11.1	20.0
Over \$400 p/w		63	3	66
		17.4	4.2	15.2
Column Total		363	72	435
		83.4	16.6	100.0

Chi-Square = 19.43

df = 4

p = .000

Table 3: Defendant's education by sex

Education	Count	Male	Female	Row
	Col Pct			Total
Primary		6	1	7
		1.4	1.4	1.4
Part secondary		242	41	283
		56.4	56.2	56.4
Full secondary		35	8	43
		8.2	11.0	8.6
Apprenticeship		52	1	53
		12.1	1.4	10.6
Tertiary		86	19	105
		20.0	26.0	20.9
Other		8	3	11
		1.9	4.1	2.2
Column Total		429	73	502
		85.5	14.5	100.0

Chi-Square = 9.90

df = 5

p = .078

Table 4: Defendant's occupation by sex

Count Col Pct	Male		Female	Row Total
Upper prof.	12 2.3	2 2.9		14 2.4
Lower prof.	29 5.6	15 21.4		44 7.5
Large employers	5 1.0	3 4.3		8 1.4
Small employers	63 12.1	8 11.4		71 12.1
Intermediate non-manual	21 4.0			21 3.6
Clerical and related	32 6.2	19 27.1		51 8.7
Foremen and skilled manual	140 27.0	3 4.3		143 24.3
Semi & unskilled manual	217 41.8	20 28.6		237 40.2
Column Total	519 88.1	70 11.9		589 100.0

Chi-Square = 75.78

df = 7

p = .000

Table 5: Family location by sex

	Count	Defendant		Row Total
	Col Pct	Male	Female	
Single	165	23	188	24.2
	25.1	19.2		
Married/defacto	211	46	257	33.1
	32.1	38.3		
With parents	200	23	223	28.7
	30.4	19.2		
Not with parents	31	8	39	5.0
	4.7	6.7		
Separated/ divorced	45	16	61	7.9
	6.8	13.3		
Extended family	5	4	9	1.2
	.8	3.3		
Column Total	657	120	777	100.0
	84.6	15.4		

Chi-Square = 19.16

df = 5

p = .001

Table 6: Children

	Count	Defendant		Row Total
	Col Pct	Male	Female	
Yes	191	65	256	19.8
	17.7	30.4		
No	513	71	584	45.1
	47.5	33.2		
Not known	377	78	455	35.1
	34.9	36.4		
Column Total	1081	214	1295	100.0
	83.5	16.5		

Chi-Square = 22.78

df = 2

p = .000

Table 7: Employment status by sex

	Count			
	Col Pct	Male	Female	Row Total
Employed		460	54	514
		53.7	34.0	50.6
Unemployed		246	57	303
		28.7	35.8	29.9
Domestic/Home		5	19	24
		.6	11.9	2.4
Student		81	11	92
		9.5	6.9	9.1
Pension/WorkCare		50	17	67
		5.8	10.7	6.6
Other		14	1	15
		1.6	.6	1.5
Column Total		856	159	1015
		84.3	15.7	100.0

Chi-Square = 92.53

df = 5

p = .000

Table 8: Legal representation by sex

	Count			
	Col Pct	Male	Female	Row Total
Own barriter/ solicitor		539	115	654
		50.0	53.7	50.6
Duty lawyer		101	26	127
		9.4	12.1	9.8
Appeared for self		277	30	307
		25.7	14.0	23.8
No appearance or representation		161	43	204
		14.9	20.1	15.8
Column Total		1078	214	1292
		83.4	16.6	100.0

Chi-Square = 15.15

df = 3

p = .001

Table 10: Number of prior convictions by sex

	Count			Row Total
	Col Pct	Male	Female	
None relevant	17	2	19	1.5
	1.6	1.0		
None	626	141	767	62.1
	60.3	71.6		
1	127	12	139	11.3
	12.2	6.1		
2-3	88	13	101	8.2
	8.5	6.6		
4-9	27	1	28	2.3
	2.6	.5		
Less than 1 page	62	8	70	5.7
	6.0	4.1		
10+ or 2 pages or more	91	20	111	9.0
	8.8	10.2		
Column	1038	197	1235	
Total	84.0	16.0	100.0	

Chi-Square = 14.69

df = 6

p = .022

Table 9: Involvement in hearing by sex

Count Col Pct	Sex		Row Total
	Male	Female	
No active part	532 59.0	135 79.9	667 62.3
Answered questions	178 19.8	18 10.7	196 18.3
Unsworn evidence	29 3.2	2 1.2	31 2.9
Sworn evidence	49 5.4	4 2.4	53 5.0
Own defence, unsworn	64 7.1	6 3.6	70 6.5
Own defence, sworn	23 2.6	3 1.8	26 2.4
Presented plea	26 2.9	1 .6	27 2.5
Column Total	901 84.2	169 15.8	1070 100.0

Chi-Square = 27.16

df = 6

p = .000

Ethnicity

This was only raised expressly in 29% of cases. The largest non-anglo-Australian groups (where ethnicity was known) were southern European, especially defendants with Italian (7.2%), Greek (5.8%), Turkish (2.9%) and Yugoslavian (3.7%) backgrounds. There were 5.3% defendants known to be Vietnamese.

Tables 10, 11 and 12: Prior convictions (1 and 2) by sex

We endeavoured to record the number of prior convictions referred to in court, and to indicate their nature by reference to the general category of up to two groups of priors, and their recency in time. As a matter of methodology, it was not always easy to ascertain the details of priors by observation. For example where there are several prior convictions the prosecutor may hand up the list directly to the magistrate. In such instances we recorded this as one (or more) pages of priors, and endeavoured (not always successfully) to ascertain details later.

Table 11: Prior 1 by sex

	Count			
	Col Pct	Male	Female	Row Total
Dishonesty		105	23	128
		30.1	48.9	32.3
Property damage		9	2	11
		2.6	4.3	2.8
Against person		33	1	34
		9.5	2.1	8.6
Public order		25	6	31
		7.2	12.8	7.8
Drug offences		37	10	47
		10.6	21.3	11.9
Traffic offences		73	4	77
		20.9	8.5	19.4
Drink-driving		67	1	68
		19.2	2.1	17.2
Column Total		349	47	396
		88.1	11.9	100.0

Chi-Square = 23.51

df = 6

p = .000

Table 12: Prior 2 by sex

Count Col Pct	Male		Female	Row Total
	1	2		
Dishonesty	46 25.8	14 58.3		60 29.7
Property damage	8 4.5	1 4.2		9 4.5
Against person	23 12.9	2 8.3		25 12.4
Public order	10 5.6	3 12.5		13 6.4
Drug offences	28 15.7	4 16.7		32 15.8
Traffic offences	40 22.5			40 19.8
Drink-driving	23 12.9			23 11.4
Column Total	178 88.1	24 11.9		202 100.0

Chi-Square = 17.94

df = 6

p = .006

Table 13: Number of charges by sex

Count Col Pct	Male		Female	Row Total
1	539 49.9	113 52.8		652 50.3
2	247 22.8	44 20.6		291 22.5
3 or more	295 27.3	57 26.6		352 27.2
Column Total	1081 83.5	214 16.5		1295 100.0

Table 14: Principal charge by sex

	Count			Row Total
	Col Pct	Male	Female	
		1	2	
Traffic		285	33	318
		26.4	15.4	24.6
Drugs		103	22	125
		9.6	10.3	9.7
Person		85	4	89
		7.9	1.9	6.9
Property		283	66	349
		26.3	30.8	27.0
Public order		95	44	139
		8.8	20.6	10.8
Regulatory		45	11	56
		4.2	5.1	4.3
Alcohol		168	26	194
		15.6	12.1	15.0
Other		14	8	22
		1.3	3.7	1.7
Column		1078	214	1292
Total		83.4	16.6	100.0

Chi-Square = 50.61

df = 7

p = .000

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