Revising Images of Public Punitiveness: Sentencing by Lay and Professional English Magistrates

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England grants unusually broad responsibility for sentencing of criminal offenders to voluntary part-time lay magistrates who, like their legally trained professional colleagues, sentence a wide range of offenders. Using simulated cases, archival analyses, and observational techniques, this article compares the sentencing decisions of the lay and professional magistrates in London. The study reveals no evidence of the lay preference for more severe sentencing that is typically shown in public opinion polls. The extent to which legal training, court experience, panel decisionmaking, and role within the court system can explain the relative leniency of the lay magistrates are considered. Consistent with results from other studies, these findings suggests that when laypersons assign sentences to particular offenders rather than express generalized satisfaction or dissatisfaction with current sentencing practices, laypersons are no more punitive than professional judges.

Sentencing in the United States is entrusted almost exclusively to le-

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gally trained professional judges.[1] In contrast, English law and tradition assign substantial sentencing power to both laypersons and professional judges. In this article I compare how lay and professional magistrates in England exercise their sentencing power. This natural experiment offers an opportunity to test the claim that members of the lay public tend to favor more severe sentences than those currently given by the professionals.

Lay views regarding appropriate levels of sentencing have assumed a new relevance with the recent shift in the United States and England from strictly utilitarian goals of sentencing to a greater focus on just deserts.[2] Sentences designed to meet utilitarian goals like rehabilitation and deterrence can be evaluated without reference to social consensus and public reaction; their effectiveness is judged by their ability to reduce recidivism and lower crime rates. The task of selecting an appropriate sentence can be treated as a professional decision, reasonably placed in the hands of the experts. When these objective standards are seen as irrelevant or unachievable, however, subjective measures of social consensus and public opinion receive greater attention. While sentencing systems have always recognized an expressive role for punishment,[3] recent developments have fueled that interest. In the wake of evidence that efforts to rehabilitate offenders have achieved disappointingly little success[4] and that policies based on deterrence have only a modest impact on crime rates,[5] modern sentencing schemes have increasingly applied a standard of just deserts in deciding what sentence is appropriate.[6] Here the measure of success is no longer a reduction in recidivism or crime rate, but a perceptual measure of the match of the sentence with culpability or blameworthiness. The yard-

1. In most U.S. states, lay sentencing is limited to jury decisions in capital cases on whether the death penalty should be imposed. Six states also give juries some authority to sentence in noncapital cases (Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia).

2. See, e.g., for the United States, Alfred Blumstein & Jacqueline Cohen, "Sentencing of Convicted Offenders: An Analysis of the Public's View," 14 *Law & Soc'y Rev.* 223 (1980); for England, Nigel D. Walker & Mike Hough, "Introduction: Developments in Methods and Perspectives," in Nigel D. Walker & Mike Hough, eds., *Public Attitudes to Sentencing* (Gower: Aldershot, 1988).

3. See, e.g., American Law Institute, *Model Penal Code* (Philadelphia: American Law Institute, 1961).

4. See, e.g., Douglas Lipton, Robert Martinson, & Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York: Praeger, 1975). For a somewhat less pessimistic view of possibilities of rehabilitation, see Lee Sechrest, Susan O. White, & Elizabeth D. Brown, eds., *The Rehabilitation of Criminal Offenders: Problems and Prospects* (Washington, D.C.: National Academy of Sciences, 1979).

5. Alfred Blumstein, Jacqueline Cohen, & Daniel Nagin, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, D.C.: National Academy of Sciences, 1978).

6. See, e.g., Andrew von Hirsch, *Doing Justice: The Choice of Punishment* (New York: Hill & Wang, 1976) ("Von Hirsch, *Doing Justice*"); Kay Knapp, "Impact of the Minnesota Sentencing Guidelines on Sentencing Practices," 5 *Hamline L. Rev.* 237 (1982).

stick of how much is enough has no obvious external referent. No single decisionmaker, expert or otherwise, can definitively identify the "correct" penalty. Community standards become one acceptable benchmark in evaluating a sentence.

What sentences do laypersons favor? According to public opinion polls in the United States and in England, the public believes that courts currently give out sentences that are not severe enough.[7] Yet when laypersons are called on to recommend sentences in response to simulated cases, the public does not appear nearly as punitive as the polls would suggest.[8] In this study, I examine the actual sentencing behavior of one of the most active sentencing tribunals composed of laypersons: the English magistry. I compare the sentences given by the voluntary part-time lay justices and full-time legally trained magistrates who daily mete out the vast majority of criminal sentences in the courts of London. The comparison reveals that when these laypersons are entrusted with sentencing responsibility, they do not appear to favor more severe sentences than those favored by their professional colleagues. This pattern of behavior calls into question the U.S. practice of excluding laypersons from a formal role in sentencing offenders convicted of serious crimes.

I begin in Part I by examining the justifications offered for giving laypersons adjudicatory powers. Part II describes the English magistrate and what is known about the magistrate's sentencing behavior. In Part III, I describe the results of three experimental, archival, and observational studies used to compare the sentencing judgments of the lay and professional London magistrates; the comparisons show none of the lay punitiveness suggested by public opinion polls. I consider possible explanations for these results in Part IV and discuss the potential implications of these findings for sentencing policy in Part V.

7. For England, 64% said that the courts give out sentences that are too short to persons convicted of committing crimes; Gallup, *Gallup Political Index, No. 252, August, 1981* (London: Social Surveys (Gallup Poll) Ltd., 1981). For the United States, 83% said that judges do not deal harshly enough with criminals; Timothy J. Flanagan & Maureen McLeod, *Sourcebook of Criminal Justice Statistics—1982* (Washington, D.C.: U.S. Department of Justice, 1983).

8. See, e.g., Mike Hough & Pat Mayhew, *Taking Account of Crime: Key Findings from the Second British Crime Survey* (London: HMSO, 1985) ("Hough & Mayhew, *Taking Account of Crime*"); Shari Seidman Diamond & Loretta J. Stalans, "The Myth of Judicial Leniency," 7 *Behav. Sci. & Law* 73 (1989); Douglas R. Thomson & Anthony J. Ragona, "Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions," 33 *Crime & Delinquency* 337 (1987). For evidence from simulated cases that the public prefers more severe sentences than are given by the courts, see Blumstein & Cohen, 14 *Law & Soc'y Rev.* 223.

I. JUSTIFICATIONS FOR LAY ADJUDICATORS

Sweden,[9] West Germany,[10] England,[11] Hungary,[12] Czechoslovakia,[13] and Poland[14] all use lay judges to reach sentencing decisions. Even in the United States, 43 of the 50 states permit the use of lay judges, although lay judges in the United States rarely have power to sentence offenders to prison.[15] On the continent, lay judges often sit as part of a panel of decisionmakers that includes at least one professional judge;[16] in England, lay judges who try cases and set penalties do not share that authority with a professional judge.[17]

Many justifications are offered for this widespread use of lay decisionmakers in the courts. Some have nothing to do with the nature of the decisions themselves. Certain forms of lay tribunals may be attractive simply because they are inexpensive. The use of voluntary judges who are not paid a salary by the court (England) or of part-time nonlawyers (New York State) offers potential savings for the public payroll.[18]

A number of governments in both democratic and socialist countries also view the fact of lay participation as beneficial in itself on the assumption that greater legitimacy may flow from decisions handed down by judges who appear to represent the community rather than by those who are viewed as instruments of the formal authority structure. Thus, even if the actual decisions of laypersons do not differ from those of professionals, the perception that they are different—more responsive to community norms—may make those decisions more acceptable. While no direct empirical evidence demonstrates that greater legitimacy does result from use of lay tribunals for sentencing,[19] this justification has been offered for us-

9. See Lars Molin, "Some Information About the Role of Lay Assessors in Swedish Courts," in Nigel Walker, ed., *The British Jury System* (Cambridge: Institute of Criminology, 1975).

10. See Gerhard Casper & Hans Zeisel, "Lay Judges in the German Criminal Courts," 1 *J. Legal Studies* 135 (1972).

11. See Frank Milton, *The English Magistry* (London: Oxford, 1967) ("Milton, *The English Magistry*").

12. See William Felstiner & Ann Drew, *European Alternatives to Criminal Trials and Their Applicability in the United States* (Washington, D.C.: U.S. Department of Justice, 1978) ("Felstiner & Drew, *European Alternatives*").

13. See Zdenek Krystufck, "The Function of the Lay Judge in Czechoslovakia," in Lawrence M. Friedman & Manfred Rehbinder, eds., *Zur Socziologie des Gerichtsverfahren* (Opladen: Westdeutscher Verlag, 1976).

14. See Stanislaw Promorski, "Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description," 7 *Case W. Res. J. Int'l L.* 198 (1975).

15. See Doris Marie Provine, *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* xii (Chicago: University of Chicago, 1986) ("Provine, *Judging Credentials*").

16. See, e.g., Casper & Zeisel, 1 *J. Legal Studies* 135.

17. R. M. Jackson, *The Machinery of Justice in England* 285 (7th ed. Cambridge: Cambridge University, 1977) ("Jackson, *Machinery of Justice*").

18. Other lay tribunals may be more expensive. Jury trials are more costly than bench trials primarily because a professional judge must preside at both.

19. But see Tom R. Tyler & Robert J. MacCoun, "The Basis of Citizens' Perceptions

ing lay judges in Africa, Switzerland, and Italy and for using juries in Australia.[20] F.W. Maitland wrote of the English reaction: "It is indeed very difficult to tell how much of the English respect for law . . . is centered in the amateur justice of the peace . . . Englishmen have trusted the law; it were hardly too much to say they have loved the law; but they have not loved and do not love lawyers, and the law that they have loved they did not think of as lawyers' law."[21] Lay participation may also directly socialize the lay adjudicators themselves. Alexis de Tocqueville claimed that the jury's primary virtue was as "one of the most effective means of popular education at society's disposal."[22] These educative and legitimating influences may explain the widespread use of lay decisionmakers in the criminal courts of socialist states where courts are seen as major instruments of socialization for both participants and audience.

Finally, the decisions of the lay adjudicators may differ from those reached by their professional colleagues. If the professional judges are a regular part of the state machinery and the lay adjudicators are not, a lay panel may represent an institutional safeguard against potential tyranny by the government. It was a jury that refused to convict William Penn and William Mead of unlawful assembly in London in 1670, although in the Crown's effort to obtain a conviction, the jurors were denied food and drink for two days.[23] That trial was not forgotten when the colonists established their own legal system and established the principle that a jury acquittal was final.

Lay tribunals may provide a distinctive response even when political tyranny does not pose a direct threat. As members of the community, laypersons are not subject to the isolation and routinization that full-time professional judges are. To the extent that lay decisionmakers incorporate community standards or logic in their decisions, they may provide a community perspective that the full-time professional lacks.

There is no direct evidence that lay adjudicators deliver any or all of these claimed benefits.[24] The claims, however, at least offer a counterpoint

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of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency," 12 *Law & Hum. Behav.* 333 (1988), which provides evidence that citizens generally perceive juries to be fairer than judges, and that their preference for juries is strongest when the trial involves a serious crime. This result is consistent with the U.S. practice of letting juries decide whether the offender in a capital case should receive the death penalty in states (e.g., Illinois) in which sentencing is otherwise left to the court.

20. See John Reichert, "Lay Judges and Assessors: A Comparative Perspective," in L. Silberman, *Non-Attorney Justice in the United States: An Empirical Study* 353 (New York: Institute of Judicial Administration, 1979).

21. "The Shadows and Silences of Real Life," 1 *Collected Papers* 476–77 (1911).

22. *Democracy in America*, trans. G. Lawrence 275 (Garden City, N.Y.: Doubleday, 1969).

23. See Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* 83–86 (Cincinnati: Anderson, 1973).

24. With the exception of reduced costs.

to the allure of professionalization that would place authority solely in the hands of professional judges.

II. THE ENGLISH MAGISTRATE

Lay magistrates, or Justices of the Peace (J.P.'s) preside over most trials in English criminal courts and sentence the great majority of all convicted offenders.[25] The lay magistracy received a statutory grant of adjudicative power in England in the middle of the 14th century[26] when Chaucer was a J.P.[27] Although it has often been the subject of debate and the target of reform, the lay magistry holds a firm position in the legal system today. In 1948 there were some 16,800 justices on the active list; in 1977 the number had risen by 50% to approximately 23,000.[28] Lay magistrates serve on a part-time voluntary basis. To stay on the active lists, they must spend 26 half-day sessions in court per year.[29]

Jurisdiction over crime in England is divided between the magistrates' court and the crown court. There are three types of offenses, corresponding to three levels of seriousness.[30] The most serious offenses are triable only on indictment. They must go to the crown court where trials are by jury. Indictable offenses are only the most serious: rape, murder, treason. These cases pass through the magistrates' courts only for bail hearings and a preliminary screening that almost inevitably results in committal to crown court. At the other extreme are the summary offenses, mostly minor offenses, which can only be tried in magistrates' court. The middle offense category, the so-called hybrid offense, is triable either in magistrates' court or in crown court. This category includes the bulk of ordinary crime: most theft, criminal damage, assault, and much burglary. The defendant accused of a hybrid offense can request that his case go to the crown court or the magistrates may insist that the case be sent there; in practice, the magistrates' courts deal with 85% of the triable-either-way cases.[31] Thus the jurisdiction of the lay magistrate is wide in both theory and actual operation.

Critics have charged that the English lay magistry is a primarily middle and upper class honor available only to males relatively advanced in

25. Thomas Skyrme, *The Changing Image of the Magistry* 220 (London: Macmillan, 1979) ("Skyrme, *Changing Image*").
26. Milton *The English Magistry* at 4 (cited at note 11).
27. *Id.* at 10.
28. Skyrme *Changing Image* at 16.
29. *Id.* at 48.
30. Jackson, *Machinery of Justice* 184–85 (cited in note 17).
31. *Id.* at 187.

years with the appropriate political connections.[32] This criticism is at least partially accurate. In 1977, for example, 34% of appointed magistrates identified themselves politically as Conservatives, 31% as Labour, 14% as Liberals, and 21% as independent or not revealed.[33] Efforts in recent years have attempted to make the magistry more representative of the larger community, with some apparent success.[34] A study by the Royal Commission in 1948 revealed that only 22% of all lay magistrates were females, and 61% were over 60 years of age, with more than a quarter 70 or older.[35] Of a sample of lay magistrates appointed in 1971 and 1972, 36% were females and only 25% were over 50 years of age.[36] The age figures in the two studies cannot be directly compared because the 1948 sample included all lay magistrates and the 1971–72 sample included only new appointees. Nonetheless, the average age probably did drop significantly, if only because the maximum age was reduced in 1968 from 75 to 70. A comparison of the social class distributions showed less of a change. There was a higher proportion of salaried workers in the 1971–72 sample, but working-class representation on the bench showed no increase at all. Because the lay magistry is voluntary and magistrates can receive only expenses and a modest travel allowance if they live more than three miles from court, lay magistrates are likely to continue to come predominantly from the middle and upper classes. Less representative of the community than the jury, the lay magistry is significantly more representative than the judiciary.[37]

The major previous studies of sentencing by the English magistrates, conducted by Roger Hood, focused on variations among the lay magistrates. In *Sentencing in Magistrates' Courts*[38] Hood investigated variations in overall rates of imprisonment in 12 courts across England for offenders convicted of property offense. Hood found that the variations could not be explained by differences in the types of offenders appearing for sentence in the different courts. There did, however, seem to be some relation between the imprisonment policies of the magistrates and the social characteristics of the areas they served, the composition of the bench, and its particular view of the crime problem. The most severe sentencers were middle-class magistrates dealing with working-class offenders in relatively small, stable middle-class communities.

32. See, e.g., Elizabeth Burney, *J.P.: Magistrate, Court, and Community* 56–72 (London: Hutchinson, 1979).

33. Skyrme, *Changing Image* at 54 (cited in note 25).

34. *Id.* at 56–63.

35. *Royal Commission on Justices of the Peace 1946–1948* (1948).

36. John Baldwin, "The Social Composition of the Magistry," 16 *Brit. J. Criminol.* 171 (1976).

37. For example, in 1977 of the almost 50 stipendiary (professional) magistrates, only one was a woman. Skyrme, *Changing Image* 47 (cited in note 25).

38. Roger Hood, *Sentencing in Magistrates' Courts* (London: Stevens, 1962).

Hood's follow-up study concentrated on the sentencing of motoring offenders.[39] Instead of relying on court records and interviews in this research, he examined the sentence recommendations of magistrates who responded to selected sets of identical case descriptions developed from the files of actual cases. While the results showed substantial disparity among the respondents, Hood found that "disparity could not be accounted for simply by differences in [the magistrates'] personal background."[40]

Research on English magistrates has focused primarily on the lay magistrates. England has in addition a relatively small group of legally trained full-time paid magistrates who sit in the larger cities. The so-called stipendiary magistrate must be a barrister or solicitor of at least seven years' standing.[41] These full-time professionals have essentially the same powers and preside in the same kind of cases as the voluntary lay magistrates. The major difference between the two is that the stipendiary magistrate can sit alone while the lay magistrates must sit in panels of two or three.[42] Forty of the approximately 50 stipendiary magistrates on the bench in England preside in London courts, down the corridor from their lay colleagues. This arrangement created a unique opportunity to compare the sentencing behavior of lay and professional adjudicators. By selecting courts in which lay and stipendiary magistrates were assigned similar cases, I was able to use actual sentencing decisions as well as reactions to simulated cases to test the comparability of lay and professional sentencing patterns.

There were two reasons to predict that the lay magistrates would be inclined to give more severe sentences than their professional colleagues. First, as members of the public the voluntary part-time lay magistrates might be expected to share the view expressed in public opinion polls that general sentencing practices are too lenient.[43] Second, while the lay magistrates are not a random sample of the general public, they are drawn from the part of the general public that tends to be most associated with a "law and order" perspective: older, more conservative, from the middle and upper classes.[44] On the other hand, as some research has demonstrated, when asked to respond to concrete cases, laypersons do not show marked punitiveness.[45]

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39. Roger Hood, *Sentencing the Motoring Offender* (London: Heinemann, 1972).

40. *Id.* at 140.

41. Jackson, *Machinery of Justice* at 313 (cited in note 17).

42. Although three magistrates are always assigned to a court session, among the 910 cases observed before lay magistrates in London as part of this research, 212 (23%) were dealt with by panels of two magistrates.

43. See note 7.

44. See text at notes 32–37.

45. See note 8.

III. THE SENTENCING BEHAVIOR OF LAY AND PROFESSIONAL MAGISTRATES

An Overview of the Data

The comparison of lay and professional magistrates in London is based on three methods of data collection. To check that any results were attributable to the underlying behavior and not to the idiosyncrasies of the method, I obtained magistrates' decisions on a set of controlled simulated cases and also measured magistrates' behavior in the cases they sentenced in court.

1. *Interviews.* I conducted structured interviews with 52 London magistrates, 36 lay magistrates and 16 of the approximately 40 London stipendiary magistrates.[46] The interviews included questions about their attitudes toward crime, the courts, and their work as magistrates. In addition, I presented each magistrate with six simulated cases and asked what decision he or she would reach if presented with that case. Four of the cases required a sentencing decision and two required a decision on bail.

2. *Courtroom observations.* With two research assistants, I examined bail and sentencing decisions at three of London's busiest courts. I selected these three courts because each had at least three stipendiary magistrates, and the chief clerks at the three courts appeared to divide the full mix of cases between lay and stipendiary courtrooms.[47] We observed and coded hearings involving a total of 1,984 defendants, 910 defendants appearing before lay magistrates and 1,074 before the 10 stipendiary magistrates who sit at those courthouses.[48]

3. *Archival data on theft and burglary.* To trace the decisions on a relatively homogeneous set of cases from start to finish, we sampled 505 consecutive cases of theft and 350 cases of burglary from the record books of the three courts where observations were being conducted.[49]

46. Forty London lay magistrates were randomly selected from the list of active magistrates, 30 without and 10 with legal qualifications. Thanks to the endorsement of the project by the Lord Chancellor's Office and the generosity of the magistrates, 36 (90%) of the lay magistrates and 16 of the 18 stipendiary magistrates I contacted agreed to be interviewed. Interviews lasted between 1 and 3 hours.

47. In some London courts, like Bow Street where the Chief Metropolitan Stipendiary sits, the lay magistrates hear more than their share of the traffic offenses.

48. All observations were conducted between February and June 1981. Observers had received three weeks of training in the courtroom before observations began.

49. All theft and burglary cases with a first hearing date between 1 July 1979 and 30 May 1981 were selected. Among these 855 cases, 85 could not be followed to completion because the paper trail ended before disposition (38) or the defendant failed to appear for a hearing (47).

Measuring Sentence Severity

To compare the severity of sentences given by lay and stipendiary magistrates, I used a scale of sentence severity based on the work of Kapardis and Farrington,[50] who created their severity scale by having magistrates rate the severity of various types of sentences. Table 1 shows the

TABLE 1
Scale of Sentence Severity

Scale Value	Characteristic
1	Absolute or conditional discharge
2	Fine £10 or less
3	Fine £11 to £30
4	Fine £31 to £65
5	Probation or probation with a fine £65 or less
6	Fine £70 to £200
7	Community service order or attendance centre
8	Suspended sentence
9	Fine £201 to £750
10	Detention centre or prison
11	Committal to crown court for sentence

severity value for each sentence. This sentencing scale is used in most of the tables in this article to compare the sentences of the lay and stipendiary magistrates (see, for example, table 2).

Sentencing Simulations in the Interviews

In the simulations, each magistrate was asked to look at a court register sheet like the one the magistrate would see in court before a hearing. The register listed the name, age, and occupation of the defendant and the general nature of the offense. Then the magistrate listened to a short description of what the magistrate would be likely to hear in court about the case and was given a copy of the criminal history information that would be presented in court. For each case, the magistrate was asked what sentence he or she would favor.

The four cases were designed after a period of observing court hearings and consulting with a stipendiary magistrate who did not serve as a respondent in the research. I selected four relatively common offenses

50. Andreas Kapardis & David P. Farrington, "An Experimental Study of Sentencing by Magistrates," 5 *Law & Hum. Behav.* 114 (1981).

(shoplifting, indecent assault, burglary from a dwelling, and assault occasioning actual bodily harm) to capture the range of offenses dealt with in London Magistrates' Court.

Case 1. Shoplifting is a very common offense in central London, and most courts have a known "tariff" that determines the likely penalty. Thus, no differences between lay and stipendiary magistrates were anticipated because magistrates generally follow the court guideline.

The offender was a 22-year-old married woman with a young child who pleaded guilty to shoplifting. She had been arrested by a store detective as she was leaving a department store without paying for the sweater she had placed in her shopping bag. In the case presented to half the magistrates, the offender had no previous criminal record; in the case for the remainder she had one prior shoplifting offense two years earlier for which she had been fined £15. Nearly all the magistrates favored a moderate fine of about £30; as expected, the lay and stipendiary magistrates did not differ.

Case 2. Indecent assault is an offense against the person in which the perceived behavior of the victim may affect the magistrate's assessment of the culpability of the offender. Moreover, by varying the offender's use of alcohol, I could examine whether the magistrates' sentences reflected any greater empathy for an offender who committed his offense while drunk. While U.S. juries appear at times to be less likely to convict a defendant who was drunk at the time of his offense,[51] not all lay responses to alcohol use are sympathetic.[52]

This case involved a 28-year-old machine operator who pleaded guilty to the charge of indecent assault. He had been drinking at a pub and was returning home on the bus. When he got off the bus, a girl unknown to him also got off. He offered to walk her home and she accepted. On the way, he pushed her down and attempted to pull her dress up. She resisted and was rescued by a passing cyclist. The offender's only previous conviction was for a driving offense and his lawyer argued that this offense was out of character and due to his client's depression. One set of magistrates learned that the offender had been drinking heavily and that the arresting police officer reported that he appeared to be very drunk. The remaining magistrates learned that he had been drinking but was not drunk.

The lay and stipendiary magistrates were equally severe with the offender who had been drinking but was not drunk, suggesting that the laypersons did not tend to blame the victim more than did the stipendiaries (see table 2). Stipendiary magistrates, however, were marginally

51. Harry Kalven, Jr., & Hans Zeisel, *The American Jury* 334–38 (Boston: Little, Brown, 1966) ("Kalven & Zeisel, *American Jury*").

52. See, e.g., Fred Heinzelmann, "Mandatory Confinement as a Response to Community Concerns about Drunk Driving," 10 *Just. System J.* 265 (1985), for a description of the current public pressure for mandatory confinement as a penalty for drunk driving.

TABLE 2
Sentence Severity in the Case of Indecent Assault

	Lay	Stipendiary
Drinking, but not drunk	6.87	6.88
Drunk	5.69	8.71

more severe than lay magistrates when the offender was drunk (interaction between type of magistrate and drinking condition, F (1, 41)=3.46; $p<.07$). The lay magistrates were more willing to excuse the out-of-character occurrence; the stipendiary magistrates focused less on this offender and, in their comments during the interview, voiced concerns about the problems of alcohol and crime and the need to deter others from engaging in such activities.

Case 3. Burglary, perhaps the most common serious offense regularly dealt with in magistrates' courts, is also of growing concern to the courts and the public. Burrows reports that household burglaries more than doubled between 1974 and 1984,[53] and my discussions with the magistrates were peppered with their concerns about professional burglars. By using two offenders, I was able to vary the prior record of one of them and test the extent to which magistrates subscribed to a strict just deserts scheme in which only the offense determines the penalty, or treated a prior record for one of the offenders as an aggravating factor. While a prior record is generally an important predictor of sentence severity, I anticipated that the stipendiary magistrates might be more influenced by such a record than would their lay colleagues if the lay magistrates were less responsive to traditional sentencing criteria.

In case 3, two unemployed single men in their early 20s pleaded guilty to a residential burglary in which they took a television and stereo equipment valued together at £400. In both scenarios, the first offender, Jeffries, had a single prior offense for drunk and disorderly. In the first scenario, the other offender, Freeman, had a single prior offense of insulting words and behavior; in the second scenario, he had a theft and two prior burglaries that had resulted in borstal[54] and in community service. The previous burglaries increased the sentences that Freeman received (F (1, 47)=16.94; $p<.001$), but the stipendiary magistrates consistently gave more severe sentences to both offenders (for Jeffries, F (1, 47)=7.92;

53. John Burrows, "Burglary Investigations: Victims' Views of Police Activity," 2 *Policing* 172 (1986).

54. Borstal training is a sentence of incarceration for offenders between 15 and 21 years of age. Its purpose is remedial and educative, and it is an indeterminate sentence of between six months and two years.

$p<.01$; for Freeman, F (1, 47)=6.90; $p<.05$). The absence of an interaction indicates that criminal record did not differentially affect the lay and stipendiary magistrates' sentences (table 3).

TABLE 3
Sentence Severity in the Case of Burglary

	Jeffries		Freeman	
	Lay	Stipendiary	Lay	Stipendiary
Freeman with minor record	7.00	8.50	6.94	8.50
Freeman with 2 burglaries	7.06	8.80	9.06	10.25

Case 4. At the time of this study, police officers played a crucial role in the magistrates' courts. In addition to appearing as witnesses, they often prosecuted on behalf of the Crown. The lay magistrates are often accused of being too deferential to the police officers who appear before them, too willing, for example, to accept police recommendations on bail decisions. In this case, a police officer was the victim of an assault while carrying out his duties, and lay magistrates, if particularly law-and-order oriented, might be expected to take a particularly harsh view of the offense. On the other hand, the interdependence of courtroom personnel might also produce heavier sentences from the stipendiaries who, as full-time courtroom personnel, come to depend on the cooperation of the police.

An assault may or may not produce severe damage, and the severity of the injury was varied in this case. While the efforts of the offender may be the same even though the damage varies, we tend to blame an offender more for a severe outcome.[55] If professionals are better able to separate the effects of damage and culpability, we would predict that severity of consequences would have less of an effect on them than on the lay magistrates.

In case 4, the offender was an 18-year-old shop assistant who lived with his parents. He pleaded guilty to the charges of drunk and disorderly and assault causing actual bodily harm. After having been arrested for swearing and shouting in the pub where he had gotten drunk, defendant Bradley hit a police officer in the eye as he was being searched. This was his first offense. Half the magistrates were told that the police officer got a black eye and was off work for two days; the remainder were told that the

55. Elaine Walster, "Assignment of Responsibility for an Accident," 3 *J. Personality & Soc. Psychology* 73 (1966); see also E. J. Phares & K. G. Wilson, "Responsibility Attribution: Role of Outcome Severity, Situational Ambiguity and Internal-External Control," 40 *J. Personality* 392 (1972).

officer was off duty for two weeks because of the eye injury and there was a high probability of some permanent damage to the eye. The magistrates gave more severe sentences when the eye was permanently injured (F (1, 48)=15.43; $p<.001$). In each condition, stipendiary magistrates gave more severe sentences than did their lay colleagues (F (1, 48)=4.27; $p<.05$). There was no interaction between type of magistrate and severity of injury (table 4).

TABLE 4
Sentence Severity in the Case of Assault

	Lay	Stipendiary
No permanent injury	4.78	6.62
Permanent injury	7.50	8.44

The results from the simulated cases indicate that the London lay magistrates generally gave more lenient sentences than did the stipendiary magistrates. Although the two groups did not offer different sentences for the shoplifting offender, the lay magistrates were marginally more lenient with the drunk offender who pleaded guilty to indecent assult, and were more lenient with both the burglary co-defendants and the young man who assaulted the police officer. A simulated sentencing situation, of course, may not fully represent the way a magistrate behaves when faced with a real offender.[56] Before considering explanations for this overall leniency effect, we first examine the pattern for actual sentences of the lay and stipendiary magistrates.

Sentencing in Hearings Observed in Court

The average sentence severity for the 658 cases observed in court involving sentencing was 3.94. For lay magistrates the average was 3.65; for stipendiaries the average was 4.27. While this difference suggests that the lay magistrates are substantially more lenient than their professional colleagues ($p<.01$), a closer look reveals that the cases brought before the two groups were not identical in seriousness. The offenders sentenced by the stipendiary magistrates have significantly more extensive criminal histo-

56. E.g., E. B. Ebbesen and V. J. Konecni found that the simulated bail decisions of judges reflected greater use of community ties and less use of prosecutorial recommendations than did archival evidence from bail decisions in real cases. "Decision Making and Information Integration in the Courts: The Setting of Bail," 32 *J. Personality & Soc. Psychology* 805 (1975); "An Analysis of the Bail System," in *id.*, *The Criminal Justice System: A Social-psychological Analysis* (San Francisco: W. H. Freeman, 1982).

ries, and criminal history generally has a major influence on sentencing decisions (see appendix table A1).

A multivariate analysis was performed to see if the apparently greater severity of sentences by stipendiary magistrates was likely to be the product of differences in criminal history or other case characteristics. When the 22 case-characteristic variables were entered in a stepwise regression analysis to predict level of sentence severity, the most powerful model used 10 independent variables and was able to account for 34% of the variation in sentence severity (table 5).[57] The addition to this model of type of magis-

TABLE 5
Regression of Sentence Severity on Case Characteristics (Observed Cases)

Independent Variable	*b*	S.E.	β
Offense severity	.065	.012	.192
No. of counts	1.036	.177	.192
Driving offense (1=yes, 0=no)	2.599	.474	.177
Ever in custody? (1=yes, 0=no)	1.699	.287	.236
Time since last sentence (logged)	−.352	.078	−.184
Additional charges? (1=yes, 0=no)	.757	.207	.121
Offense spontaneous or on impulse (1=yes, 0=no)	.699	.291	.077
No. of other offenses taken into consideration	1.481	.482	.101
Age of offender	.050	.007	−.067
Occupation? (1=yes, 0=no)	−.376	.180	−.067
Magistrate (1=stipendiary, 0=lay)	1.327	.480	.241
Intercept	−4.026		
R^2 (adjusted)	35.4%		
N	658		

trate, a dummy variable comparing lay and stipendiary sentencing decisions, produced a small but statistically significant increase in predictability. Thus, when variation due to criminal record and the other

57. The case characteristics used in evaluating sentence severity were as follows:

(a) *This offense*: measures of offense severity, whether case involved a driving offense, whether case involved a violent offense, number of counts, whether other charges were taken into consideration, and whether other charges were pending.

(b) *Prior offense history*: whether the offender had previously been in custody, number of prior convictions, whether the offender had a prior conviction for the same offense, whether the offender was under a prior conditional sentence, and months since last conviction.

(c) *Offender characteristics*: age, whether offender had an occupation, stability of living arrangements, number of dependent children, gender, race, whether Irish, Welsh, or Scottish, rating of appearance and behavior, whether offender expressed remorse, drug or alcohol involvement, and whether offender claimed offense was unplanned, done on impulse, or a one-time occurrence.

For distribution of the characteristics for the cases sentenced by the lay and stipendiary magistrates, see appendix table A1.

measured predictors of sentence are controlled, the sentences of the stipendiaries are still slightly more severe than those of the lay magistrates.

The sentencing cases observed in court produced a heterogeneous mix of offenses: summary offenses involving drinking, driving, or common assault, as well as more serious offenses, such as assault causing actual bodily harm and burglary. To compare lay and stipendiary sentencing in a more homogeneous set of cases, we selected samples of theft and burglary offenses from the court files.

Archival Study of Sentencing in Theft and Burglary Cases

The 505 cases of theft and 350 cases of burglary selected from the court records were followed from the first day the defendant was scheduled to appear in court. We followed the defendant's case in court records until it ended in a final decision (or the defendant failed to appear and the trail in the records stopped). Information was collected from three sources: (1) the magistrate or clerk's entry in the record book listing the offense, the defendant's name, age and, somewhat irregularly, occupation or employment, the name of victim, and the value and nature of what was taken, (2) bail books listing the bail decisions for each case along with the magistrates' reasons, (3) criminal history information from case court files supplemented by a search by the Home Office in the central files. We obtained complete data for 366 cases of theft and 214 cases of burglary.

The average sentence severity was 4.42 for the thefts and 6.89 for the burglaries. Appendix table A2 shows the average sentence severity for lay and stipendiary magistrates in the theft and burglary cases. The sentences of lay and stipendiary magistrates did not differ significantly for theft, but the stipendiaries gave significantly higher sentences in burglary cases (6.34 for lay magistrates; 7.14 for stipendiaries; $p < .05$).

With a few exceptions, the offenders sentenced by the lay magistrates were similar to those sentenced by the stipendiaries.[58] Stipendiaries were more likely to sentence offenders who were listed as unemployed. In cases before stipendiaries, the listed value of stolen merchandise was higher for burglary but not for theft. Burglary cases before stipendiaries were also more likely to list a person as the victim than were those before lay magistrates.

58. The case characteristics we used in evaluating sentence severity were (a) *this offense*: number of counts, value of what was taken, whether a person was listed as the victim, and whether food was taken; (b) *prior offense history*: number of prior convictions, whether the offender had a prior conviction for the same offense, whether the offender was under a conditional sentence, and months since last conviction; (c) *offender characteristics*: age, whether unemployed, and gender.

For the distribution of characteristics for cases sentenced by the lay and stipendiary magistrates, see appendix table A2.

Separate stepwise regression analyses were conducted on the theft and burglary cases to see if an independent effect of type of magistrate would emerge when the 11 potential influences on sentence severity given in appendix table A2 were controlled. The most powerful model for the theft cases used 3 of the variables to explain 21% of the variation in sentence severity (see table 6). Type of magistrate did not increase predictability: There is no evidence from this analysis that lay and stipendiary magistrates differ in their sentencing of theft offenders.

The sentencing model for the burglary cases again shows a small but signficant effect of type of magistrate on sentence. Four of the variables explain 20% of the variation in sentence severity. Type of magistrate added a further 1% (F (1, 171)=5.40; $p<.05$) (table 7). Thus, stipendiaries give slightly more severe sentences to burglars than do their lay colleagues.

TABLE 6
Regression of Sentence Severity on Case Characteristics for Theft Cases (Archive Sample)

Independent Variable	*b*	S.E.	β
Value of what was taken (logged)	.602	.098	.321
No. of previous convictions (logged)	.635	.176	.215
Previously committed same offense? (1=yes, 0=no)	1.05	.382	.163
Intercept	4.111		
R^2 (adjusted)	20.6%		
N	295		

TABLE 7
Regression of Sentence Severity on Case Characteristics for Burglary Cases (Archive Sample)

Independent Variable	*b*	S.E.	β
No. of previous convictions (logged)	1.351	.258	.354
Value of what was taken (logged)	.321	.085	.252
Unemployed? (1=yes, 0=no)	1.114	.457	.164
Under conditional sentence now? (1=yes, 0=no)	−1.299	.699	−.126
Magistrate (1=stipendiary, 0=lay)	.625	.324	.129
Intercept	2.487		
R^2 (adjusted)	21.4%		
N	176		

Summary of Sentencing Results

The cases observed in court and the burglary cases traced in the archives show consistent evidence that the lay magistrates are slightly more lenient in sentencing than are their professional colleagues. In interviews lay magistrates also gave more lenient sentences on the simulated cases that involved burglary and assault on police and were more inclined to give a sentence discount when the offender had been drunk before the indecent assault. This examination of sentencing practices thus counters the image of lay decisionmakers who are more severe than their professional counterparts and provides evidence that they may even be more lenient. The contrast with the picture of the punitive citizen portrayed in the public opinion polls is particularly impressive because lay magistrates tend to be older and more conservative than the general public, characteristics generally associated with greater punitiveness. What explains the tendency for leniency among lay magistrates? Why is it that they are so measured in their exercise of power when they are actually confronted with the job of making sentencing judgments?

IV. EXPLAINING THE SENTENCING LENIENCY OF LAY MAGISTRATES

This research and empirical studies of lay judicial decisionmaking in other settings offer some possible explanations for lay magistrates' lenient sentencing responses. These magistrates differ from their professional counterparts in a number of ways: legal training, level of court experience, panel as opposed to individual decisions, and professional position within the court system.

Legal Qualifications

The most obvious difference between the lay and professional judges in modern Western countries is definitional: The professionals are lawyers and the lay judges are not. If legal training leaves its mark by inducing judges to adhere more strictly to a principled sentencing formula and discouraging them from making exceptions in light of extenuating circumstances, the result may be greater severity by the legally trained.[59]

While most English lay magistrates are nonlawyers, 1.4% of them are

59. More predictable sentencing outcomes should also result. To test for greater predictability across judges, I ran separate regression models for the lay and stipendiary judges on the theft and burglary cases. While the stipendiaries were more predictable for the theft cases (20% of the variance accounted for versus 10% for the lay judges), they were less predictable for the burglary cases (14% versus 22%).

legally qualified. Stipendiary magistrates must be barristers or solicitors of at least seven years' standing.[60] To explore the effect of legal education on sentencing decisions, I interviewed eight legally qualified lay magistrates and compared their sentences with those of the other lay and stipendiary magistrates. As table 8 indicates, there were six situations in which the lay

TABLE 8
Sentences of Legally Qualified Lay and Stipendiary Magistrates

	Lay Magistrates					
	Without Legal Qualifications		With Legal Qualifications		Stipendiary Magistrates	
	Mean Sentence Severity	(N)	Mean Sentence Severity	(N)	Mean Sentence Severity	(N)
Indecent assault drunk	4.92	(14)	8.00	(4)	8.71	(8)
Burglary						
Defendant Jeffries						
With minor record	6.91	(28)	7.44	(8)	8.65	(16)
Defendant Freeman						
With minor record	6.68	(14)	7.88	(4)	8.50	(8)
With burglary record	9.38	(14)	8.00	(4)	10.25	(8)
Assault on police officer						
No permanent injury	4.07	(14)	7.00	(4)	6.62	(8)
Permanent injury	7.57	(14)	7.25	(4)	8.44	(8)

magistrates were more lenient than the stipendiaries; in five of the six, the legally qualified magistrates were also more lenient than the stipendiaries.[61] The sentences of the legally qualified lay magistrates were generally more severe than those of the other lay magistrates. Thus part, but not all, of the greater severity of sentences given by stipendiary magistrates is associated with the difference in formal legal education.

Experience in Court

A second potential source of the lay leniency effect is the lesser crime and courtroom experience of the lay magistrates who sit on an average of two to three half days a month. In contrast, the stipendiaries are usually

60. Skyrme, *Changing Image* 60 (cited in note 25).

61. No statistical tests are performed because of the small number of legally qualified magistrates in the sample. The evidence that legal qualification moves the lay magistrate closer to the stipendiary in sentencing behavior is provided by the intermediate sentencing response observed for legally qualified lay magistrates *across* the several sentencing judgments recorded in table 8. Note, however, that the same eight legally qualified magistrates were involved in all of these comparisons.

on the bench four full days per week. According to this explanation, the stipendiary who has heard one story too many about job prospects or pregnant girl friends or wives will be less willing to accept the defendant's story and give a lenient sentence.

Some critics of the jury have suggested that the jury is inclined to acquit some guilty offenders because it can simply be misled due to its lack of courtroom and criminal experience. In 1973, Sir Robert Mark, then Commissioner of the Metropolitan Police Force in London, argued in a well-publicized lecture that juries too often acquit those whom experienced police officers believe to be guilty.[62] He claimed that the acquittals are rarely the result of common sense and humanity but rather occur in cases "in which the defects and uncertainties of the system are ruthlessly exploited by the knowledgeable criminal and by his advisers."[63] These remarks stimulated attempts to determine empirically whether professional criminals were more likely than others to obtain jury acquittals.

Zander questioned the lawyers in a series of jury acquittals in London courts and concluded that less than 10% of those cases produced perverse acquittals.[64] His definition of cases involving professional criminals was criticized by Baldwin and McConville, who also questioned his conclusions because he obtained evaluations of the verdict from both prosecuting and defense barristers in only one-third of the cases in his sample.[65] Baldwin and McConville attempted to conduct a more comprehensive study of jury decisions in which they persuaded the judiciary, the police, and prosecution and defense solicitors to evaluate jury verdicts in the cases they studied.[66] They considered an acquittal to be unjustified if three respondents explicitly disagreed with it; one-fourth of the acquittals met this criterion.[67] Using a less stringent standard for unjustified convictions (when at least two respondents expressed doubts about the outcome), they concluded that 6% of the convictions were unjustified.[68] The Baldwin-McConville study did not include the evaluations of the defense bar because the organization of defense barristers was unwilling to participate in the study. As a result, the group of respondents who evaluated the verdicts was skewed to favor conviction. Nonetheless, the overall pattern of results does suggest jury leniency relative to other decisionmakers in the criminal justice system,[69] at least with respect to the decision on guilt.

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62. *Minority Verdict* (1973).

63. *Id.* at 10.

64. Michael Zander, "Are Too Many Professional Criminals Avoiding Conviction? A Study in Britain's Two Busiest Courts," 37 *Mod. L. Rev.* 28 (1974).

65. John Baldwin & Michael McConville, "The Acquittal Rate of Professional Criminals: A Critical Note," 37 *Mod. L. Rev.* 439 (1974).

66. *Jury Trials* (New York: Oxford University Press, 1979).

67. *Id.* at 47–48.

68. *Id.* at 51.

69. In their classic study of the American criminal jury, Kalven and Zeisel also found

Some evidence does suggest that laypersons may become more severe with experience on the bench, at least initially. Bond and Lemon, studying changes in lay magistrates during their first year of service, found that after that first year, the magistrates were more punitive.[70] It is unclear from that finding whether further increases in severity occur after the initial period. The magistrates I interviewed for this study had been on the bench from 2 to 22 years. For each of the five offenders they sentenced during the interview, there was no significant relationship between years as a magistrate and the severity of the sentence recommendation.[71] Moreover, there is other evidence that the lay magistrates' leniency cannot be explained by a greater willingness to naively trust that the offender would not reoffend if given a moderate sentence. After giving a sentence recommendation, each magistrate was asked, "From what you know about this offender, what is the probability that he will commit further offenses in the future?" Table 9 shows that the probability estimates (0 = surely won't offend, 1 = surely will reoffend) of the lay and stipendiary magistrates were nearly identical for all four cases, even when the two groups' magistrates differed in the sentences they gave.

A prior criminal record affected the probability estimates of both lay

TABLE 9
Lay and Stipendiary Magistrates Estimate of Probability of Further Offenses

	Lay	Stipendiary
Shoplifting		
No prior conviction	.15	.11
One prior conviction	.47	.44
Indecent assault		
Drunk	.18	.17
Drinking, not drunk	.24	.32
Burglary		
Defendant Jeffries with minor record	.44	.43
Defendant Freeman		
With minor record	.47	.40
With burglary record	.73	.71
Assault on police		
No permanent injury	.17	.15
Permanent injury	.23	.20

that juries were more likely to favor acquittal than were judges. They hypothesized that most of the disagreement was due to issues of evidence and the jury's greater tolerance for reasonable doubt. *American Jury* (cited at note 51).

70. Rod A. Bond & Nigel F. Lemon, "Training, Experience, and Magistrates' Sentencing Philosophies," 5 *Law & Hum. Behav.* 123 (1981).

71. For the shoplifting case, $r=.01$; for indecent assault, $r=-.17$; for burglary defendants, $r=-.01$ and $r=.02$; for assault occasioning actual bodily harm, $r=.02$.

and stipendiary magistrates in the shoplifting and burglary cases (for shoplifting, F (1, 46)=29.71; $p<.001$; for burglary, F (1,46)=30.06; $p<.001$), but it had the same effect on both groups of sentencers. Similarly, drunkenness in the indecent assault case marginally reduced probability estimates by both lay and stipendiary magistrates (F (1, 37)=3.17; $p<.083$), but the reductions were not significantly different for the two types of magistrates. The evidence indicates that the lay magistrates did not naively lower their recommended sentences because they held unrealistic expectations for the offenders' future behavior. Or if their expectations were unrealistic, they were shared by their professional colleagues.

The cases observed in court provide further evidence that the lay magistrates are no more influenced by attempts to play on their emotions than are the stipendiaries. One offender in five expressed remorse before being sentenced. This expression of remorse was not associated with lower sentences from either stipendiaries or lay magistrates.

Panel Decisions

While the stipendiary magistrates sit alone and need not consult with colleagues to arrive at a sentence, the lay magistrates sit in rotating groups of three. The group decisionmaking of the lay panels provides an opportunity for the group process to temper the sentencing decisions of the panel. Although the panel decisionmaking may moderate extreme sentencing, there is no evidence that the panel decisions produce greater leniency.[72] The lay magistrates gave more lenient sentences both during the interviews when each magistrate sentenced independently and in the cases observed when the lay magistrates sentenced in panels. Thus, group polarization[73] cannot explain the more lenient individual sentencing preferences.

Role in the Court System

The lay and stipendiary magistrates have different positions in the

72. Greater leniency does appear to result when laypersons serve on mixed tribunals with professional judges. In a study of 257 cases before Polish mixed tribunals, the lay judges influenced the penalties in 85% of the cases in which sentences were given. They were more lenient in 70% of the cases and were more concerned with the personal circumstances of the offender and his family than were the professional judges. Pomorski, 7 *Case W. Res. J. Int'l L.* 201–6 (cited in note 14). Casper and Zeisel observed a more modest effect of lay participation on the mixed bench in West Germany. In 1,093 sentencing decisions, the lay judges initially disagreed with the professional judge 20% of the time and the lay judges affected the sentence that the offender received in one-third of those cases. 1 *J. Legal Studies* at 190 table 40 (cited in note 10).

73. D. G. Myers & H. Lamm, "The Group-induced Polarization Phenomenon," 83 *Psychological Bull.* 602 (1976).

court system and the community. As a full-time professional, the stipendiary sees himself as responsible to—and held responsible by—the court system and the community.[74] In the interviews and in court the stipendiaries often referred to "what the public has a right to expect." In contrast, the lay magistrates view *themselves* as "the public," as representatives rather than delegates; although they are aware of public expectations, the lay magistrates acknowledge less of an obligation to attend to them.

When asked, "On the whole, do you think people in the community are in favor of a sterner or more lenient approach to sentencing than is currently practiced?" lay and stipendiary magistrates uniformly reported that the community favors a sterner approach. When asked, "How frequently do you take the views of the community into consideration in sentencing?" the stipendiary magistrates were more likely than the lay magistrates to report that they considered the community view. The stipendiaries were also more likely to agree with the statement, "A magistrate should represent the views of the community in his sentencing policy."

Consistent with their focus on the community, stipendiaries placed greater emphasis on the effects of the sentence on the public rather than on the individual offender. Each magistrate was shown the five traditional purposes of sentencing (individual deterrence, general deterrence, incapacitation, rehabilitation, and just deserts) along with a definition of each one. (See appendix B.) After the magistrate gave a sentence recommendation, the magistrate was asked the purpose or purposes in giving that sentence. The stipendiary magistrates more often mentioned general deterrence than did the lay magistrates, who were more likely to see individual deterrence as a major purpose of the sentence. The stipendiary magistrates were concerned with the impact of the sentence on crime in general, while the lay magistrates attended primarily to the impact of the sentence on the offender then before them. For example, the lay and stipendiary magistrates agreed that the first offender who hit a police officer in the eye during a struggle on a drunk and disorderly charge was very unlikely to commit a further offense. Yet the stipendiaries advocated significantly higher sentences, citing the need to show that the courts will not tolerate such treatment of police officers and that "hitting a police officer is a very serious offense." The stipendiaries were more likely to sentence offenders to prison. Several of the stipendiaries noted that burglary was

74. As the official representative of the court, the stipendiary magistrate in a London court is much more visible to the community in his official role than is the lay magistrate. The newspaper reporter who writes about a sentence given the stipendiary describes "the irresponsible decision made by magistrate X." The same story written about a sentence given by a lay panel is attributed, at least in London, to an anonymous group of "magistrates."

becoming a major problem in the community and that firmness by the courts was necessary to send a warning to prospective offenders.

The position of the full-time stipendiary gives that magistrate an excellent opportunity to find out about crime in the community where the magistrate sits. Faced with the steady stream of offenders who appear and reappear in the dock, the magistrate has a larger sample of cases than any lay magistrate on which to base estimates of the type of offenses that are becoming more prevalent.[75] In contrast, the stipendiary's understanding of what the public desires from sentencing may be more superficial than the lay magistrates' assessments, if that understanding derives primarily from newspaper accounts and public opinion polls. Stipendiary magistrates may thus be more influenced by citizen exhortations to hand out more severe sentences.

Both the lay and stipendiary magistrates I interviewed agreed that the public favors a sterner approach to sentencing than the one currently taken by the courts. But unlike other members of the public, the lay magistrate has direct experience with both the nature and the frequency of the offenses and offenders that appear in court. Doob and Roberts have shown that members of the Canadian public generally believe that serious crime is more common than it actually is and, for example, overestimate the probability that a first offender will be convicted of a criminal offense in the next five years.[76] Maguire reports that citizens in England perceive the typical burglary as far more serious than the reality, which rarely involves contact between victim and offender, usually results in minimal stolen property, and almost never includes serious damage or ransacking.[77]

The lay magistrate, unlike the ordinary citizen, has a direct opportunity to develop an accurate picture of crime in the courts and to assess public response in the sentencing reactions of the other members of the lay panel. Because lay magistrates sit on regularly rotating panels with other laypersons, they are exposed to a range of lay preferences that emerge as the panel members discuss sentencing decisions. The harsh sentence preferences expressed in the public opinion polls can be discounted in good conscience, because as one lay magistrate explained, "The public who aren't J.P.'s don't realize that the average defendant is generally a basically inadequate person who isn't even a competent offender." The

75. The stipendiary magistrates also process cases about three times as quickly as the lay panels.

76. Anthony R. Doob & Julian V. Roberts, "Social Psychology, Social Attitudes, and Attitudes Toward Sentencing," 16 *Can. J. Behav. Sci. Rev.* 269 (1984); *id.*, "Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys," in Nigel Walker & Mike Hough, eds., *Public Attitudes to Sentencing* (Gower: Aldershot, 1988).

77. Mike Maguire, "Meeting the Needs of Burglary Victims: Questions for the Police and the Criminal Justice System," in Ronald Clarke & Tim Hope, eds., *Coping with Burglary* (Hingham, Mass.: Kluwer-Nijhoff, 1984).

stipendiary has no similar way to test the seriousness of the public's demand for more severe sentences.

Conclusions About Lay Leniency

The lay magistrates' leniency does not appear to be simply the product of naivete or the panel format of the decisions. Although it is associated with the difference in formal legal training between the lay and stipendiary magistrates, a primary source of the lay magistrate's greater leniency appears to be the voluntary part-time role the magistrate plays in the London courts. For the professional magistrate who sees general crime control as a major responsibility, the offender is only one element in the sentencing decision. In contrast, the lay magistrate is less concerned with the general sentencing policy of the court and focuses more on the individual offender than on the community at large.

Several studies of lay justice outside England show a similar pattern of lay leniency when the lay decisionmakers are independent of the court structure. In West Germany[78] and in Poland[79] the lay members of the mixed bench, unlike their professional counterparts, are not full-time judges. In both countries, the sentencing judgments of the lay justices are more lenient than those of the professional members of their mixed tribunals.[80]

In contrast, being a lay magistrate in Canada is a full-time occupational position with the courts,[81] so that the basic difference between lay and professional magistrates is simply presence or absence of formal legal training. Hogarth studied 71 Ontario magistrates, 56 of whom were legally qualified and 15 who were not.[82] He found that the lay magistrates were more punitive than their legally trained counterparts. One explanation for this severity may be the unusual background characteristics of the Ontario lay magistrates. Of the 15 magistrates without legal training, 9 were previously justices of the peace, clerks of the court, or both, and 1 had been a chief of police.[83] Their extensive experience as functionaries of the criminal justice system may have produced the greater offense orientation of these lay magistrates.

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78. Casper & Zeisel, 1 *J. Legal Stud.* 135 (cited in note 10).

79. Pomorski, 7 *Case W. Res. J. Int'l Law* 198 (cited in note 14).

80. In Hungary there is some evidence that the elected lay justices on mixed tribunals are more severe than their professional full-time judicial colleagues. Felstiner & Drew, *European Alternatives* (cited in note 12). It is unclear why this occurs, but the Hungarian lay magistrates tend to be older and generally more conservative than the lay magistrates appointed or elected in other countries.

81. John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971).

82. *Id.* at 58–59.

83. *Id.* at 59.

One extensive study has compared decisions and attitudes of lay and professional judges who are part-time court employees.[84] Provine surveyed 1,223 nonlawyer and 316 lawyer justices in New York State and observed 13 nonlawyer justices and 13 lawyer justices in court. While Provine did not directly measure sentencing decisions, her survey included questions about sentencing goals, factors considered in sentencing, and perceptions of sentencing preferences of other court personnel (e.g., police officers and attorneys). In general, Provine found few systematic differences in attitude or behavior between the lawyers and nonlawyers.

The results from the English magistrate study may offer one explanation for the absence of a leniency effect for Canadian and New York magistrates. Both lay and lawyer magistrates in Canada hold full-time positions in the court system; both lay and lawyer justices in New York are the primary administrators for the court system, although they serve only part time. Thus, lay judges may be relatively lenient only when their relationship with the court system is attenuated, when they, unlike their professional colleagues, maintain an independent role in court activity and do not view themselves as responsible for controlling criminal activity by court action. That is, lay judges show the relative leniency observed in jurors when, like jurors, they are structurally encouraged to focus on the defendant and not more broadly on the effects of court decisions.

V. IMPLICATIONS FOR SENTENCING POLICY

Sentencing standards are the subject of much current debate. Faced with mounting evidence that sentences have not been successful in achieving the traditional utilitarian goals of rehabilitation and individual deterrence, academics and practitioners have called for punishment based on desert.[85] Few guideposts can assist a judiciary or legislative body in designing a "correct" sentence consistent with just deserts. Not surprisingly, citizens' apparent concern with crime and lenient treatment of criminals has influenced these judgments, resulting in increased penalties for some crimes and decreased judicial discretion. In Illinois, for example, residential burglary now carries a mandatory prison sentence of four years.[86]

Yet the impression of public opinion provided by public opinion polls provides only a limited view of what the lay public would choose if actually confronted with decisions on sentencing. This study of magistrate sentencing reveals that even lay magistrates of London who are drawn from a relatively conservative older segment of the population, qualities

84. Provine, *Judging Credentials* (cited in note 15).

85. See, e.g., Von Hirsch, *Doing Justice* (cited in note 6).

86. The mandatory prison sentence has been in effect since 1 January 1982 when Illinois Public Act 82-238(1) took effect and defined residential burglary as a Class I felony.

generally associated with support for harsher penalties, do not display punitive sentencing preferences when confronted with real sentencing decisions. Other research evidence reinforces this pattern. On the British Crime Survey, for example, the proportion of respondents who favored a prison sentence for a convicted burglar (62%) was nearly identical to the percentage of first offenders sent to prison for burglary (61%).[87] Thomson and Ragona assessed the reaction of Illinois residents to the mandatory prison sentence for residential burglary by asking respondents how they would prefer to sentence an unarmed first offender who entered an unoccupied home and took $400 in property.[88] Only 15% favored a prison sentence, and only 5% thought the term should be as long as the statutorily mandated term.

In a controlled test of the proposition that lay sentencing preferences are more severe than judicial sentencing choices, we showed four videotaped sentencing hearings to Illinois judges and jurors, gave each respondent the corresponding presentence report, and had each recommend sentences for four offenders. Across the cases of burglary, drug sale, assault, and robbery, the jurors were generally more lenient than the judges,[89] even though the majority of these same jurors reported that they believed courts are too lenient in their sentencing practices. This evidence suggests that when members of the public face the sentencing task, they do not maintain the punitive stance that the polls would suggest.

A survey by Ellsworth offers further evidence that concrete judgments even in capital cases may reveal less punitive sentencing preferences.[90] When asked "For the crime of X (killing a policeman, beating wife to death, premeditated murder), do you believe in capital punishment or are you opposed to it?" 50% to 66% of the survey respondents said they were in favor of it. Respondents were given complete descriptions of several cases in which the offender and the circumstances were detailed and were asked if they favored capital punishment in each case. In none of these cases did the number of respondents favoring the death penalty exceed 34%. Ellsworth suggests that a general survey question evokes the image of a homicidal maniac whose behavior is far more extreme than that of the average murderer. Once the human details of an offense and offender are described, the average offender appears far less deviant, less powerful, and less dangerous; extreme punishment appears less justified.

The greater public punitiveness evidenced in public opinion polls

87. Hough & Mayhew, *Taking Account of Crime* 45 table 10 (cited in note 8).

88. Thomson & Ragona, 33 *Crime & Delinquency* 337 (cited in note 8).

89. Diamond & Stalans, 7 *Behav. Sci. & Law* 73 (cited in note 8).

90. Phoebe Ellsworth, "Attitudes Toward Capital Punishment: From Applications to Theory" (paper presented at the 1978 Annual Meeting of the Society for Experimental Social Psychology).

may be due to inaccurate public perceptions of what the courts do,[91] greater availability of the more severe instances of crime often presented by the media,[92] a general dissatisfaction detected in the polls with the ability of the justice system to control crime, or some combination of the three. Whatever the source, the results of all this research suggest that judgments about sentence levels are weakly grounded if they derive from a casual look to public opinion. Normative judgments in a democratic society may call for public debate, but an uncritical acceptance of "what the public wants" can result in draconian sentencing schemes that merely appear to fulfill public demands.

Tocqueville observed that lay adjudicators receive a unique education by participating in court decision making.[93] His claim applies with special force to the task of sentencing. Equally important, the criminal justice system may receive a crucial education when laypersons participate in sentencing decisions: a textured case-sensitive view of public sentencing preferences.

91. Hough & Mayhew, *Taking Account of Crime*.

92. Amos Tversky & Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases," 185 *Science* 1124 (1974); Doob & Roberts, 16 *Can. J. Behav. Sci. Rev.* 269 (cited in note 75).

93. Tocqueville, *Democracy in America* (cited in note 22).

APPENDIX A

TABLE A1

Characteristics of Cases Sentenced by Lay and Stipendiary Magistrates

Case Characteristic	Average for Lay Magistrates (N=351)	Average for Stipendiary Magistrates (N=307)
This offense		
1. Offense severity[a]	8.2%	8.7%
2. Percentage driving offenses	3%	4%
3. Percentage violent offenses	6%	5%
4. No. of counts	1.09	1.13
5. Percentage with other charges taken into consideration	3%	4%
6. Percentage with other charges pending	23%	29%
Prior offense history		
1. Percentage with prior custody	17%	18%
2. No. of prior convictions	2.17	3.24*
3. Percentage with prior conviction for same offense	23%	26%
4. Percentage now under prior conditional sentence	9%	10%
5. Months since last conviction (99 if no prior conviction)	65.69	64.97
Offender characteristics		
1. Age of offender	29.73	29.40
2. Percentage with oocupation	41%	40%
3. Stability of living arrangements[b]	3.78	3.79
4. Percentage with dependent children	12%	13%
5. Percentage male	85%	80%
6. Percentage black	13%	17%
7. Percentage Irish, Welsh, or Scottish	10%	8%
8. Appearance and behavior (1=+, 2=neutral, 3=−)	2.06	1.95
9. Percentage expressing remorse	24%	21%
10. Percentage with drug or alcohol involvement	15%	18%
11. Percentage claiming offense unplanned, impulse, or a one-time occurrence	9%	12%

* $p<.05$

[a] The measure of offense seriousness was the percentage of cases sent to crown court for sentencing in that offense category during 1979 (Home Office, Criminal Statistics, table 1(a) at 202–23).

[b] Stability of living arrangements: 1 = No fixed abode, 2 = Lives alone, or question raised in court about stability of living arrangement, 3 = Lives at a hostel, or with unrelated friends, 4 = No information, 5 = Lives with family.

APPENDIX TABLE A2
Severity of Sentences and Case Characteristics in Theft and Burglary Cases of Lay and Stipendiary Magistrates

Case Characteristic	Theft		Burglary	
	Lay	Stipendiary	Lay	Stipendiary
Sentence severity	4.56	4.29	6.34	7.14
This offense				
1. No. of counts	1.12	1.08	1:08	1.25
2. Value of what was taken (logged)	2.62	2.38	3.16	3.94
3. Percentage in which victim was a person	11%	8%	38%	47%
4. Percentage in which food was taken	33%	33%	2%	5%
Prior offense history				
1. No. of prior convictions	2.89	2.50	4.28	4.11
2. Percentage with prior conviction for same offense	25%	22%	44%	47%
3. Percentage now under conditional sentence	7%	7%	18%	10%
4. Months since last conviction (99 if no prior convictions)	64.23	69.12	30.76	37.77
Offender characteristics				
1. Age of offender	35.39	33.36	21.12	21.94
2. Percentage unemployed	32%	46%	48%	55%
3. Percentage male	62%	58%	100%	97%

APPENDIX B: Purposes Of Sentencing

Incapacitation:	The attempt to protect society for a period of time by removing the offender from the community.
Rehabilitation:	The attempt to change the offender through treatment and corrective measures, so that when given the chance he will refrain from committing crime.
General deterrence:	The attempt to impose a penalty on the offender before the court sufficiently severe that potential offenders among the general public will refrain from committing crime through fear of punishment.
Just deserts:	The attempt to punish the offender in direct proportion to the seriousness of the criminal action, whether or not such a penalty is likely to prevent further crime in him or others.
Individual deterrence:	The attempt to impose a penalty on the offender sufficiently severe that he will refrain from committing further crime through fear of punishment.