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Public Humiliation as a Mitigator in Criminal Sentencing

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ABSTRACT

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M.Sc., University of Tel Aviv, 1988
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This study examined the relationship between the public humiliation and shaming of offenders in the sentencing portion of a criminal trial and the subsequent severity of the sentence the offender receives. Judicial moral shaming of offenders is returning to popularity in the courts, influencing the final sentence outcome as an under-identified mitigator, that substitutes for judges' other punitive sanctions. Support for this shaming is found in Heider's attribution theory and in Homans' theory of social exchange; however Braithwaite found this form of shaming is overly punitive and ineffective. This four phase study used a sequential, mixed method, exploratory research design. A purposeful sample of 80 Provincial Court case transcripts of judges' reasons for sentencing were first examined qualitatively for the presence of public humiliation using linguistic content analysis; this yielded a taxonomy and classifications of incidents of public humiliation. Using this taxonomy and classification, the data were then analyzed quantitatively, together with the subsequent severity of offenders' sentences, in a series of bivariate and regression analyses. Other influences on sentencing were considered in the analyses, including the age and gender of the offender, the kind of offense and the plea. Findings of the content analysis indicated that humiliation is multifaceted, with two primary forms: judge imposed and self imposed. Results of the regression analyses that accounted for both forms of shaming indicated that presence of public humiliation is associated with lesser sentences. This study contributes to social change by identifying the practice of public humiliation in the courts and challenging its practice, in keeping with Margalit's thesis that a decent society is one that does not use social institutions to humiliate its citizens.

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Introduction

> And first I will speak of the nature and origin of justice according to the common view of them. Secondly, I will show that all men who practice justice do so against their will, of necessity, but not as a good. *(From* The Collected Dialogues of Plato. *In Hamilton & Cairns, Eds., 1989, p. 357)*

The relationship between the processes of implementing society's ideas of justice, social morality, and the rule of law has troubled scholars and philosophers for centuries. Hart's (1963) essays on *Law, Liberty and Morality* drew attention to the dilemmas that have arisen in their inherent connection. Hart asked if some reference must not be made to morality in any definition of law or the legal system. He questioned if it is significant that morality and the law share similar responses to offenses such as violence and dishonesty and they have a common lexicon of rights, obligations, and duties (p. 2)

The processes of criminal justice administration, including trial and sentencing, have historically bound those who manage justice to the adjunct role of moral authority, identifying and sanctioning not only illegal but also immoral behavior. Judges and the judicial system are the designated tools for enforcing the law as well as expressing the current social standards of morality (Ashworth & Wasik, 1998; Massaro, 1991).

Judges' assessment of offenders' moral responsibility is a factor in the sentence determination made explicit in their sentencing statements. Judges are determining moral guilt (Devlin as cited in Fitzmaurice & Pease, 1986, p.116.) and subsequently responding with moral sanctions, such as shaming and public humiliation of offenders. Shame punishments, public humiliation and befit sentences have, in an atavistic manner,

returned to favor in the criminal justice system over the past thirty years (Misner, 2000). Society's dissatisfaction with the outcomes of criminal sentencing practices have moved the judicial system politically and philosophically away from a utilitarian model of crime management, in order to, in the words of Nussbaum, "revive the blush of shame" (2004, p.227). The results of these changes are shame sentences and punishments that range from the "mundane to the Byzantine" (Book, 1999). Some judges, in their efforts to fulfill both the legal and moral obligations of their social role, have created their own punishments, which are deliberately and punitively humiliating to the offender.

Statement of the Problem

Some judges are including forms of humiliation and the deliberate public shaming of offenders as part of their sentencing direction (Book, 1999). This practice, a moral response, goes beyond the Criminal Code (2005) purpose of denunciation of the offense and is not explicitly addressed within the framework of sentencing guidelines. There has been little exploration of the practice, no previous research about the potential impact or efficacy of publicly humiliating offenders as a judicial strategy, or exploration of whose interests are being served.

There is questionable legal basis for the right of the justice system to use shaming. Provisions and protection of human dignity and other rights in the Human Rights Code, the Canadian Charter of Rights, the American Constitution, and other decrees of civil societies to protect citizens from humiliation, are in conflict with allowing the justice

system to impose shame and humiliation as a strategic initiative. Markel commented on the role, if any, that justice administration should play in using this strategy. He stated that the choice is not between locking people up and putting their pictures on billboards, that there are other appropriate sanctions that do not involve humiliation and degradation (Markel as cited in Stryker, 2005). Judicial, public humiliation of any individual used or required as part of the resolution of the offense is in contradiction with the goal of rehabilitation and restoration of the offender to the community (Braithwaite, 2000), as well as a potentially violent assault on the offender that is beyond reasonable punishment (Miller, 1993). In addition, in some jurisdictions' sentencing guidelines, offenders are permitted sentence reduction for participating in their own denunciation by offering apologies and remorse (Etienne, 2004). The increasing practice of humiliating offenders in the courts brings with it a need for both caution and closer examination.

The Purpose of this Study

The purpose of this sequential, mixed method study was to explore the use of deliberate public shaming and humiliation in criminal sentencing for which there are no explicit sentencing guidelines, and which exceed criminal codes to broaden the knowledge of how extra-legal, morally founded judicial processes are related to offenders' outcomes.

Background of the Problem

The criminal justice process in the West requires convicted offenders to stand in front of judges who pass sentence on them that are based in law (Ashworth & Wasik,

1998). Sentencing a criminal is one of the degradation ceremonies deemed significant in society as a part of the pursuit of justice and in the management of social behavior and social control. Degradation ceremonies act as moral instruction to segregate offensive from accepted behaviors (Braithwaite, 2000; Garfinkel, 1956),

Sentencing is also society's designated response to criminal behavior and as such, it is important to society's faith in the integrity of the justice system, that sentencing, like the entire prosecution and trial process, be seen as an impartial, fair, and a reasonable response to criminal behavior. Sentences have been used as both punishment and deterrent, although neither one particularly successfully (Frase, 1994). One of the key objectives of sentencing has been defined by the Canadian Criminal Code to be the denunciation of the offense. The denunciatory aspect of a criminal sanction has been described as, "The communication of society's condemnation of the offender's conduct" (*R. v. C.A.M.* [1996] 1 S.C.R. 500 [S.C.C.]), para. 81. Denunciation has been interpreted by judges in some cases to be public exposure and humiliation of the offender (Braithwaite, 2000).

There is a rise in the call for alternatives to traditional incarceration, resulting in the recent judicial direction to assign more sentences to be served in the community, when the judge determines there is no risk to the public. This practice, known as conditional or community sentencing, requires judges to play a different role. Offenders are now being assessed for how well they can serve a non custodial sentence. Part of the assessment is based on the offenders' own self humiliation, through demonstrations of remorse and apology. "The defense noted since the decision of the Supreme Court of

Canada in *R. v. Gladue* (1999) 133 CCC (3d) 385 and *R. v. Proulx* (2000) 140 CCC (3d) 449 sentencing practices in Alberta and in particular in cases involving drug trafficking have changed considerably particularly to the benefit of a penitent accused" (*R. v . Le,* 2005).

The problem imbedded in this practice is the potential incremental encroaching on offenders' human rights, because public humiliation is a violation of human dignity, which is a universal right under the United Nations' Universal Declaration of Human Rights of 1948 (Margalit, 1996; Miller, 1993,). Humiliation can also be challenged as an abuse of an offender's constitutional and charter rights, because it is cruel punishment (Miller, 1993). The offender's participation in his or her own prosecution, offering remorse and apology in exchange for lighter sentences, is in conflict with the right and opportunity to defend themselves vigorously against charges by the state (Etienne, 2004; Weisman, 2004).

While criminal offenders are the selected targeted group, the door is open to the use of humiliation in dealing with any other individual or group that is currently considered deviant. Normalizing humiliation of people as a systemic response to unacceptable behavior is a dangerous practice to social well being. Systemic, judicially mandated humiliation was significant in the Nazi strategy to identify, isolate, and dehumanize selected target groups and contributed to communal breakdown of human rights on a broad basis.

The Research Questions

The research questions of this study ask first, if public humiliation of offenders is evident in the judges' reasons for sentencing, and secondly, is there a relationship between public humiliation of an offender and the severity of the sentence outcome? Is public humiliation being exchanged in the judicial process for reduced sentences, and in effect acting in the role of a mitigator in sentencing? If there is a relationship, is it the same for different categories of offender: male or female, young or old, those pleading guilty or innocent, and different kinds of offense? These are sub questions that arise. There are implications if shaming, as a moral sanction, is being used for legal purposes. These questions are important in understanding the role of justice in human rights and the human dignity of members of society.

Humiliation in Criminal Sentencing

Criminal sentencing is an area of justice administration where its functioning and operations are based on normative institutional behavior as opposed to codified statute, policy, and procedure (Karp, 1998). The recognized and permitted purposes of sentencing are clearly defined in most penal codes, and frequently quoted in a judge's reasons for sentencing. Within the sentencing rules ample opportunities exist for judges to express their own moral opinions and impose additional sanctions that are not 'by the book' or more precisely stated, "By the Statute" (Ashworth & Wasik, 1998).

Judges may engage in moral denunciation of both the offense and the offender as part of sentencing. This can include expressions, both oral and written, to cause the offender to feel socially diminished, ashamed, embarrassed, and humiliated. Similarly,

there are actions that judges require of the offender or that may be self imposed by the offender that are meant to exact shame and embarrassment, including expressing public apologies and public remorse. Collectively, these activities and behaviors form what is being proposed here as a construct of *public humiliation*. The first phase of this study is the preliminary research that further outlines the taxonomy of this construct.

For any individual, the experience of public humiliation is emotionally distressing, even painful and is, by itself, punishing (Acorn, 2005; Miller, 1993). Judges' use of public humiliation adds an additional moral dimension to the process of justice administration. The practices of shaming have not been explored to determine their effect on the offender, nor their impact on justice administration. Recognizing that these are discretionary actions, it is important to examine them to ensure sentencing will consistently reflect legal, moral, and ethical standards representative of social policy.

The admission of mitigating factors into the sentencing process has been established as part of reasonable consideration for influencing judges' decisions on reducing sentence length (Tonry & Frase, 2001). There are a variety of possible influences on judges' sentencing decisions. Some are broadly accepted mitigating and aggravating factors, and some are unexpected and unacceptable subjective influences, creating numerous cases that result in appeals. According to Misner (2000), offenders' spontaneously expressed apology and remorse are recognized and accepted mitigators included in American Federal sentencing guidelines. However, judge imposed public humiliation has yet to be researched and documented as a recognized and accepted mitigating strategy.

The Relevance of this Study for Social Change

This study has significant implications for justice practices and social change. Does public humiliation of offenders fulfill some purpose for the judge, justice, the common good, or provide a value to the offender? If there is some social value, is perceived social good usurping individual's right? It is important that humiliation in judicial sentencing not be institutionalized without a close examination of the impact on individuals, social standards, and society's value of human rights. It is important that vulnerable members of society not be potentially exposed to systemic abuse. Judicial denunciation of the offense, an accepted norm of sentencing, differs from denunciation of the offender as a human being. While the denunciation of the offense is accepted, the imposition of added conditions that increase the humiliation of the offender must have substantive value in managing crime beyond possible moral education. If not, then these conditions may be arbitrary abuses of human dignity targeted at a population within judicial control. Ignatieff pointed out, "The administrative good conscience of our time seems to consist in respecting individuals' rights while demeaning them as persons" (Ignatieff, 1984, p. 13). The results of this study inform policy and practices in justice administration for the future.

To put the issues and variables of humiliation in judicial sentencing in perspective, a review of the literature is needed in a number of relevant areas: (1) the nature of a quantitative measure of law and punishment (Black, 1976; Fletcher, 2000), and (2) the concept of social exchange (Gergan, 1980), applied to justice, will explain how criminal offenses can be exchanged for some form of punishment, which results in a

social equation applied in the sentencing decision that allows an offender to eventually return to society.

The balance scale is the most well known symbol of justice in the Western world; the scale generates the image of justice as an equalizer. The reputation of the justice system is sustained by the perception that the scales of justice remain in balance. Examining the literature for theories that address the maintenance of balance in the system through sentencing is important to understanding how criminal sentencing contributes to perceptions of the justice system (Chadwick-Jones, 1976; Gergen, 1980; Homans, 1974).

Sentencing must also be included in the literature review to establish a basis for the role and practice of determining sentence severity, length, location, and sentence mitigation. The scope of the role of judges in sentencing is also important to understanding the sentencing process (Ashworth, 1994; Bazemore, 1994; Zimring, Hawkins, & Kamin, 2003). Criminal sentencing as part of the justice system is constantly being challenged and reviewed by all stakeholders: the offenders and their defenders, members of society who are impacted by crime, politicians who represent public interests and jurists. Criminal sentencing, as determined by criminal law, represents the unwanted and unsightly side of society, a hidden servant we would rather not acknowledge. “If the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella’s illegitimate baby,” as Nigel Walker (1969, p. 1) described the potential anathematic, philosophical discussion of sentencing.

"Our criminal justice system is beleaguered, and though it has few defenders, it has many apologists," according to Abel and Marsh (1984, p. vii):

> Their apology is that we have no just and practical alternatives; no alternatives true to our principles, ideals, and policies; no alternatives that really solve the problem of what to do about our crime and with our criminals. So we go along with what we have, not really sure of why it is this way or where it is taking us and not really sure if this is really what we should be doing or if we can do anything else. Still, the system is there, undeniable and defacto, and while its attackers are virulent, energetic, and relentless, its apologists are well dug in and well attuned to the advantages of inertia. (p. vii)

The literature includes discussions of shaming, humiliation, and moral behavior in society (Acorn, 2005; Massaro, 1991). Shame is one of the emotional responses that have been associated with moral development, along with guilt and embarrassment. The review of the literature in this area focuses on examining the role of shame and humiliation, in moral development and as an influence on moral behavior.

Understanding the relationship between shame and moral behavior is particularly important when immoral or deviant behavior is involved. In the criminal justice system, the inclusion of shame as both a possible cause of, or as an expected result of antisocial behavior is the topic of much discussion (Alpert & Spiegel, 2000; Braithwaite, 2000; Eisenberg, 2000). A better understanding is needed of the role of shame might play as an important part in responding to such behavior in official ways. With the trend for reinstating shame punishments as an alternative to traditional court sentences, especially with younger offenders, it is important to examine shame and how it can influence behavior.

The literature on sentencing will also be reviewed from the viewpoint of the sentencer, the Justice (Fitzmaurice & Pease, 1986). The human thought and reasoning of a Justice's sentence determination is included in the written disposition of a case and is public record. What considerations or controls, if any, should be put on justices in their disposition of cases? What influences are at play in sentence determination? Albonetti argued that judicial discretion is influenced, rightly or wrongly by a number of factors that impact on case disposition. In her study of judicial discretion in white collar crime she found direct and indirect effects for: the complexity of the case, the offender's race and gender, and the offender's guilty plea, as factors that impacted on sentencing decisions and the sentence severity (Albonetti, 1998). Some of these factors are also considered in this study. There are sentencing guidelines that frame sentence severity in relation to criminal offenses, and directions to judges in where sentence should be served, but little guidance is given to the judgment process, that part of the offender's court experience where the justice disposes of the case, with an explanation of the decision.

The actions of individual judges, under an institutional umbrella, such as the justice system, are more than abstract characteristics in a theoretical environment; they remain the actions of individuals, who in turn influence social practices far beyond their personal span of control (Karp, 1998). What enters into practice can stay in practice and is often institutionalized as characteristic of standard organizational operating procedure. An example of this phenomenon is the weighting of the time served by offenders in incarceration as double or even triple to time served in the community both before and

after conviction in some jurisdictions (Ferenc, 2004; National Union of Public and General Employees, 2003).

Individual reasoning in judicial practice becomes case precedent:

> We need to reattach these abstract characteristics to living people and to interpret what they mean in context. In emphasizing that social characteristics or institutions cannot be properly understood without reference to the people who exhibit the characteristics and enact the institutional structures.
> (Feagin, Orum, & Sjoberg, 1991, p. 186)

The courts are then used as a forum both for implementing law and for challenging that implementation. We are sensitized that judicial decisions are in fact legally binding and accepted unless they are further challenged in an appeal process. It is common for the appeal of a single judicial decision to be the basis for an amendment in law.

The Nature and Hypotheses of this Study

The study is exploratory in nature and used a sequential, mixed, qualitative/quantitative research method to examine a purposive sample of case narratives of judges' sentencing decisions. The study was developed in four phases. The first phase was a preliminary qualitative exploration and analysis of a small sample of court sentencing transcripts with the objective to develop a taxonomy of public humiliation and using Linguistic Content Analysis (LCA) (Roberts, 1989) as a method of categorizing qualitative data. This preliminary pilot study (Benoliel, 2005) was conducted as a Knowledge Area Module, under the supervision of Dr. Harold (Hal) Pepinsky, at Walden University in November 2005. The results of that preliminary study provided a tentative identification and categorization of the construct of public humiliation to be further

developed and identified in a larger sample. The full description of the preliminary study is in Chapter 3 and the results are reported as part of the findings in Chapter 4.

In the second phase of the study, the taxonomy was used to examine a sample of 80 cases for the presence of public humiliation of offenders among the judges' reasons for sentencing, and to determine the type and severity of the offenders' sentences. The objective of this phase was to extract, categorize, and convert the qualitative data from the sentencing transcripts into quantitative measures of public humiliation and sentence severity. Additional demographic and case data related to categories of offender were also extracted from the sample case transcripts. The outcome of this phase was the generation of operational definitions of the variables: public humiliation, and sentence severity, sentence location, kind of offense, gender, and plea, and age. . A table of variables appears in Chapter 3.

Phase 3 of the study addressed the main research problem which hypothesized a relationship between public humiliation as the independent variable and sentence severity as the dependent variable. The main null hypothesis was that there would be no significant relation between the presence of public humiliation in the judges' reasons for sentencing and the subsequent severity of the sentence. The alternative to the main hypothesis was that there would be a relationship between these two components.

> Ho #1: There is no relationship between the presence of public humiliation, measured and categorized by content analysis, in the judge's reasons for sentencing and sentence severity as measured in years, by the formula of time in years and location where the sentence is served. Time served incarcerated is weighted twice to time served in the community.

> H_a#1 The presence of public humiliation, measured and categorized by content analysis, in the judge's reasons for sentencing will be accompanied by mitigated sentence severity, as measured in years, by the formula of time in years and location where the sentence is served: time served incarcerated is weighted twice to time served in the community

The main problem was expanded, into sub problems that asked if the location where the sentence is served is influenced by the presence of humiliation. The sub problem hypotheses included sentence location: either incarcerated in a correctional institution or community served, known colloquially as "house arrest".

> H_0 #2 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.
>
> Ha #2 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.

Similarly, the study explored sentences served in the community

> H_0 #3 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.
>
> Ha #3 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.

Following Albonetti's (1998) study of other factors that might have an influence in sentence decisions, the sub problem considered there might be possible differences in how different categories of offenders are treated. Additional hypotheses were developed to determine if there was a relationship between presence of humiliation and the resulting sentence severity for different categories of crime, and offender age.

H_0 #4 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the kind of offense, categorized into three distinct categories: fraud under 5 thousand dollars, drug trafficking, and sexual assault.

Ha #4 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the kind of offense, categorized into three distinct categories: fraud under 5 thousand dollars, drug trafficking, and sexual assault.

H_0 #5 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and age of the offender as measured in years.

Ha #5 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and age of the offender as measured in years.

The variable of public humiliation was further sub divided into two categories to mean a) the form that is imposed by the judge in shaming, or b) self imposed by the offender with expressions of apology and remorse. These categories were examined as independent variables separately, in hypotheses for co linearity, with sentence severity as the dependant variable:

H_0 #6 There is no relationship between the presence of judge's imposed humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

Ha #6 There is a relationship between the presence of judge's imposed humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

H_0 #7 There is no relationship between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

> Ha #7 There is a relationship between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

Cultural values may suggest the sub problem that there would be different standards of how judges would use public humiliation with male and female offenders and this possibility was forwarded in an additional hypothesis:

> H_0 # 8 There is no relationship between the offenders categorized by gender, and the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing..
>
> Ha# 8 There is a relationship between offenders categorized by gender, and the presence of public humiliation measured and categorized by content analysis in the judges' reason for sentencing.

The final Phase 4 of the study established a model, based on regression analyses, of how public humiliation and sentence severity interact. This phase addressed the question if the probability of either of these two components of sentencing contingent on each other. Is the probability of sentence severity influenced by the presence of humiliation or vice versa? All of the phases, the hypotheses, and the research methods for defining the variables and seeking out the possible existence of these relationships are detailed fully in Chapter 3.

The Theoretical Basis for the Study

The theoretical underpinning of the hypotheses of this study is George Homans's (1974, 1984) theory of social exchange which posited that social interactions are exchanges for the satisfaction of both sides. That theory is extended here to frame there is

a social exchange taking place between the public humiliation of an offender, as a form of punishment, and the subsequent reduced sentence imposed by a judge. This exchange acts in a manner for each to balance the other, and thereby create a rebalanced state of social control on one side and individual liberty on the other. This position draws not only on the theory of social exchange, but also the theories of equilibrium of both Homans and Talcott Parsons (as discussed in Lopreato, 1971). Balancing the equation in social interactions, just as in mathematical equations, involves adding and subtracting value, moving quantities from one side to the other and, in the case of two parties in a social relationship, an exchange of values. Gergen (1980) highlighted the tendency for other theorists in the field to use observations as their evidence to support the various related theories: equity theory (Walster, Walster, & Berscheid, 1978), and indebtedness theory, (Gergen, 1980).

The emotions of embarrassment, shame, and guilt play a role in expressing or revealing our moral values to ourselves, and others (Ben Ze'ev, 1997). Eisenberg (2000) points out that shame stands out as the difference between beliefs about oneself and one's behavior in comparison to one's beliefs about what the self ought to be. This difference is illustrated when the beliefs are brought into question in a social context: one can participate in deviant behavior and experience guilt without shame if one feels sheltered from the social spectacle. Likewise, one can feel shame without having participated in any deviant behavior, based solely on the difference between actual performance and self driven expectations of performance and the sense of exposure of that gap. "When shamed, an individual's focal concern is with the entire self. A negative behavior or

failure is experienced as a reflection of a more global and enduring defect of the self. The shamed person feels worthless and powerless" (Konstam, Chernoff, & Deveney, 2001, p. 26).

In this, shame, as a moral emotion, stands out also as a "social" emotion, requiring an audience either present or in perception, and is in fact the fulfillment of a social contract (Braithwaite, 2000). Braithwaite differentiated punitive shaming from what he termed, reintegrative shaming: shaming that is related to being shamed by loved ones. His theory was that only reintegrative shaming has a potential to positively impact on the future behavior of offenders, and punitive shaming, by reinforcing negative self-image, acts to alienate the offender from society (Braithwaite, 1999). It is no doubt confusing that both shame and guilt can be related responses to an occurrence where social expectations have been unmet.

Yet shame is proposed as a way of encouraging the offender in a more moral direction. In order to discuss the relationship between shame and moral behavior, a definition of what is moral development and behavior is needed. Definitions of mature moral development can be found in the cognitive theories of moral development, of Heider, Kohlberg, and Piaget, (as discussed in Thomas, 1997). These theories have outlined variations on the development of cognitive ability that have included internalized social standards of right and wrong and social consequences.

Heider's attribution theory (1958) particularly addressed the role of an individual's self perceptions in influencing moral development. Heider's theory in relating to moral behavior stated that as the growing child develops, the attributes that

they have accepted are internalized, and begin to govern their behavior, even when there is not an outside influence to reinforce that behavior.

Braithwaite (2000) subsequently wrote extensively on the use of shame as a strategy to influence social behavior. His thesis was that shame, when used inappropriately, does not assist in the reintegration of an offender as a reformed citizen. He posited that the improper use of shaming, in a retributive, punitive manner, would result in the target experiencing stigmatization and social ostracism, which would make it even more difficult for the offender to be prepared to return to social acceptability and reintegrate as a positive member of society. Whitman's research (2003) succeeded Braithwaite's, in studies on the effects of shame and guilt. Whitman determined that the inappropriate use of shame that results in humiliation actually stimulated aggression and rejection of the sanctioning social body. There is substantial research that recommends that shame not be used as a strategy for controlling social behavior (Massaro, 1991; Nussbaum, 2004; Whitman, 2003). The use of humiliation as a sentencing strategy is under documented and under developed in the exploration of judicial behavior. Studies to date have been on the effect of shaming and shame punishments on the offender, but have not gone on to explore the effect of the behavior on the judicial decisions in sentencing in comparison to cases where shaming is not used (Whitman, 2003).

This study draws on the theories of Heider (1958) and Braithwaite (2000), but is perhaps most inspired by Margalit's (1996) thesis and his theory that a decent society is one that does not use social institutions to humiliate its citizens. The incremental chipping away at human dignity with systemic imposition of public humiliation is

something all societies must be watchful of. The historical evidence from the Nazi regime of the twentieth century illustrated what can occur with time, when human rights are systemically deprecated in a group that has been labeled deviant or criminal.

Definitions of Terms

Conditional/Community Sentence

Conditional sentence is a sentence of punishment decreed by a judge in response to a crime, served in the offender's home, as an alternative to incarceration in jail, with significant restrictions on movement and activities. It is colloquially known as 'house arrest'.

Criminal Code

The Criminal Code is the short title for the Act respecting the criminal law, the version used in this study from the set of Revised Statues of Canada, (1985) under the Act of Parliament. It describes legal procedures, administration of justice, and kinds of offenses (2005)

Mitigator

A mitigator is a factor pertinent to the offender's personal history or circumstances related to the crime that is considered relevant by a judge toward reducing the sentence of a convicted offender. The opposite factor is an aggravator, which would influence a judge toward lengthening the sentence (Shapland, 1981).

Offender

An offender is an individual who has been convicted in a court of law of an offense that is in breach of the Criminal Code.

Public Humiliation

The term, public humiliation may be redundant, if all humiliation is by definition public. The added descriptive is to differentiate this kind of humiliation from that which occurs in day to day living. Public humiliation is the deliberate strategy or practice in the justice system of diminishing selected individuals' human dignity openly in court as a means of social control. The first phase of this study was used to develop a taxonomy of public humiliation into a social construct that could be operationalized as a variable.

A social construct is a group of behaviors that have some commonality in their meaning, and when grouped together, become useful tools in social science research (Phillips and Grattet, 2000).There are a number of judge and offender behaviors that are related and can be collected together in defining this construct as a variable for this study. Karp's excellent study identified some of the categories of shaming and the impact on the target: debasement, public exposure, and apologies (Karp, 1998).

Karp's construct of shaming does not sufficiently capture the complexity of emotional and behavioral issues involved in public humiliation. Nussbaum's study went further in expanding on human response to either self imposed or socially imposed debasement, again focusing on the target of the directed debasement (Nussbaum, 2004).

The construct of public humiliation captures the behavior of the humiliator as opposed to the target.

Sentence Severity

Sentencing of an offender is the responsibility of the judge under legislated guidelines. In the specific context of the criminal court, there is a gap in our documented identification of judicial behaviors during the sentencing portion of a trial, and their implications. The guideline for sentencing is the Criminal Code. In the Province of British Columbia, Canada's Criminal Code, section 718 is the first section under the rubric of purpose and principles of sentencing:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or the community; and
> (f) to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community. (Criminal Code, 2005)

Section 718.1 continues: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (Criminal Code, 2005). The Code delineates the proposed range of sentence length, with maximums for each offense. A Sentence is composed of a length of time and a location where the sentence is to be served. Keeping with Black's (1976) quantitative value of law, the longer the time served

and the more restricted the movement of the offender, the more severe the sentence. Sentence severity is defined in this study as a formula that combines the two components: 1) the category of sentence, which identifies location where the sentence is served and, 2) the length of sentence imposed by the judge on the offender, as articulated in the reasons for sentencing. Sentences increase in severity according to the Code, depending on the increasing degree of confinement of the offender. Table 1 outlines all the categories of sentences that are imposed by judges or juries according to Walker's (1969) and Shapland's (1981), studies:

Table 1

*Categories of Sentence, with Increasing Severity**

1. Discharge: Absolute Discharge, Conditional Discharge, with no time served anywhere.

2. Fine, with no time served anywhere.

3. Probation (may be switched with fine, depending on the offender's means), served in the community with some restriction in local area mobility.

4. Deferred Sentence/Community Sentence (these two are equal in severity) with some additional restriction on mobility.

5. Suspended sentence, which may be recalled to be served in incarceration

6. Incarceration: community served, with strict limitations on mobility.

7. Incarceration, Jail (less than 2 years), severity increases with length of term

8. Incarceration Penitentiary (more than 2 years), severity increases with length of term*

* Sentence served in incarceration (categories 7, 8) is weighted 2: 1 for sentence served in community (category 6) based on case precedent (Ferenc, 2004).

For the purposes of this study, the variable sentence severity was operationalized to include cases that fell into categories 6, 7, and 8. Phase 2 of the study reported in Chapter 3, defined sentence severity is as a total value on a continuous scale of years, and is further categorized for being served in two possible locations: in the community and incarcerated in a facility. The variable had to take into account and quantify the difference in restriction on the offender serving a sentence in incarceration as opposed to in the community. In Canada, recent rulings of unreasonable duress of incarceration for offenders who serve time in jail prior to and post conviction, due to incarceration conditions has allowed for a 2 for 1 valuation; each 1 day served incarcerated prior to

conviction, instead of in the community, will be counted as 2 days time served in sentence (Ferenc, 2004). The same formula has been applied to the variable of sentence severity in this study, as is illustrated in Figure 1:

Figure 1

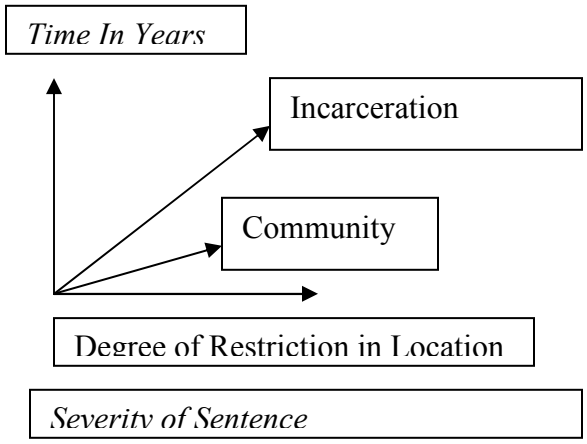

Figure 1. Illustration of the relationship between sentence time in years and the degree of restriction of the offender, where severity increases with both length of time and degree of restriction moving from community to incarceration.

The variable sentence severity is measured as continuous quantitative value, and can be measured on a scale in years of minimum length to maximum as defined by the penal code, and the location where the sentence is served; the longer the sentence served in an incarcerated facility, the more severe. It is common for judges to review the range of sentence available, and in fact, a discussion of sentence range is usually found in the stated reasons for sentencing, along with an explanation of the sentence chosen.

Limitations and Possible Weaknesses of the Study

1. The study was conducted by a single researcher, with a mixed method that requires a content evaluation of court case transcripts of judge's reasons for sentencing. Researcher bias may be evidenced in the content analysis from the transcripts. This limitation is more significant with the variable of public humiliation. The sentence severity is quantified by an independent definition and objective measure, and less likely to be biased.

2. Public humiliation is a new construct, which has been identified in the first phase of the study and has not been validated prior to this study.

3. This study is an ex post facto review of historically existing data and will provide no predictions, only an assessment of a possible correlation, between the variables. The knowledge generated from this study will help to create definitions and the observations from the study will be reviewed for meaning toward identifying variables that can be used in the future for a forward looking study.

4. The study controls for possible effects of variables that are related to sentencing that are not being considered; the age of the offender is restricted to those over the age of 20 so as not to be influenced by proximity to the age of legal responsibility and the Youth Justice Act of 2003 which governs management of young offenders. The study also controls for other acknowledged mitigators and aggravators such as previous convictions, identified emotional or physical illnesses that are relevant, and unusual factors influencing sentencing decisions as they are identified in the transcript of the reason for sentencing.

It was assumed that the judge's reasons for sentencing that are recorded as part of the court record and entered into the provincial judicial database used for this study are the complete and accurate account of an offender's sentencing hearing.

Summation

The response of judges in sentencing is a key opportunity for the expression of social standards in managing criminal behavior. There is a need for more in depth observation of sentencing practices, which are largely normative. Given social exchange theory (Homan's, 1974) and the exchange that occurs between the judicial system and the offender, the offender's payment for the crime is worth further exploration and analysis. This four phase study will shed light on sentencing practices through an analysis of the relationship between those practices and the sentence severity.

The next chapter of this dissertation will present the literature of sentencing practices, mitigation and judicial behavior, as well as a review of the field of shame, shaming and humiliation in the traditional, crime and punishment, retributive justice system and the restorative philosophy of crime management, which focuses more on restitution and repair of harm than on punishment. The outline of the sequential method and procedure used for this study follows in chapter 3.

Findings from the study will be provided in chapter 4 in answer to the hypotheses arising from the research question: is there a relationship between public humiliation and the severity of the sentence imposed by the judge in their reason for sentencing. The discussion of these results will follow in chapter 5, as well as a discussion of the discretion of judges in sentencing, the role of shame in society and as a strategy of the

judicial system, and the possible motivators of judicial behavior in the sentencing part of the criminal process.

While this study does not attempt to include an evaluation of use of punishment in managing crime, there is little or no empirical evidence of the efficacy of legal sanctions as a deterrent of crime (Archambault, as cited in Cragg, 1992). This conclusion was supported by Ten (1987), and his reference to the 1978 National Academy of Science's Panel on Research on Deterrent and Incapacitative Effects (p. 9).

Implications of this study for society as a whole and potential social change will be reviewed, with recommendations for the next steps in pursuing these issues.

CHAPTER 2: THE LITERATURE REVIEW

Introduction

The problem statement of this study focuses on two issues: 1) the presence of public humiliation as a part of sentencing, outside of sentencing guidelines and, 2) an exchange where public humiliation in some form can be used as a mitigator for a reduced sentence. The review of the literature therefore begins by examining the question of how justice is calculated, measured, and evaluated in society as part of a social system, and identifies existing theories and perceptions of punishment as quantitative responses to criminal behavior in a world where economic and utilitarian theories influence many social practices (Black, 1976, 1989; Fletcher, 1986).

Criminal sentencing is the means of calculating the punishment or debt owed by a convicted offender in order to account for the crime and there are opinions in the literature on sentencing severity, including mitigating and aggravating factors, that influence how sentences are determined and implemented (Etienne, 2004). Criminal sentencing has been under review recently in both the United States and Canada, reflecting current political interests and social standards. The research on sentencing practices is not well established and relies on law reviews and law journals for raising the issues. This part of the review informs the development and definition of the variable of sentence severity used for this study.

Recognizing that sentencing is normative behavior, the literature on sentencing is also reviewed for evidence of the role of the sentencer, the judge, and for insights into current issues of judicial behavior and judicial discretion in determining sentence

severity. One of the most important motivators for judicial reform has been the concern for the untempered judicial discretion that had resulted in vast discrepancies in sentence outcomes for offenders in different jurisdictions. Judges use differing evaluations of mitigating factors as part of the sentencing process, including the use of shame punishments and public humiliation.

Apologies, remorse, humiliation, and shaming have also been under scrutiny, for their role in sentencing and probation, as well as in the judicial evaluation of an offender's character (Braithwaite, 2000; Nussbaum, 2005). Shame punishments, public humiliation, and befit sentences have, in an atavistic manner, returned to favor in the criminal justice system over the past thirty years (Misner, 2000). The review examines shame in theories of moral behavior and moral education, and the use of apologies, remorse, shame, and humiliation as behavior management strategies by judicial administration. The literature in this area offers significant philosophical and evidentiary support for the isolation of a construct of public humiliation, the independent variable of this study. The review then focuses on methodology for testing the hypothesis: there is a relationship between public humiliation and sentence severity, by the use of content analysis of case transcripts from judges' reasons for sentencing.

The strategy for reviewing the literature first used a mind map to link the underpinning theory of social exchange and the key concepts of sentencing severity and humiliation, to related variables and factors. Then a keyword search was undertaken on databases of academic journals and the reference lists of more recent journal articles, in order to identify the seminal authors on topics of interest. The online databases that were

used in this study included Academic Search Premier, Proquest Criminal Justice Periodicals, Questia, The University of Toronto Criminal Justice database, and The University of Indiana, Bloomington Library database, Some of the keywords and phrases used to search these databases included public humiliation, shaming, shame sentencing, apology, remorse, criminal sentencing, sentence severity, judicial behavior, judicial discretion, schadenfreude, social exchange, and equilibrium. The concepts in this study draw from broad range of academic disciplines: philosophy, law, jurisprudence, sociology, psychology, and ethics; studies in all these areas were explored and are reflected in the range of books and journals reviewed.

Equilibrium, and Exchange in the Social System of Justice

Is there some form of balance or equilibrium at play in the common concept of justice? The word *equilibrium* engenders connotative images of stability and balance. Similarly, the word *justice* suggests balance: balancing right and wrong, weighing guilt and innocence, regenerating balance in the process of returning to some form of social equilibrium. Justice is often represented visually as balancing scales. This apparent need for balance and stability is significant in our understanding of how justice works as a system, if in fact there are social forces actively engaged to return the system to equilibrium (Tyler & Kerstetter, 1994). Just as in balancing weight scales, where physics and economics both dictate something must be given, taken away, or exchanged in order to achieve balance, there may be a quasi-economic dynamic involved in a judicial equilibrium.

The debate on the use of equilibrium as a concept over the past quarter century has been described as an intellectual crucible (Stern & Barley, 1996). The connotations of "balance, harmony, and even justice" are appealing, according to Bailey, "much more pleasant than the destructive gloom of entropy" (Bailey, 1994, p. 99).

Pareto (1935) was perhaps one of the first of the scientists involved in physics to take the concept from physical systems to social sciences, specifically economics. Pareto's definition of equilibrium was an understanding of the balance between what he called tastes, and the obstacles to their attainment (Pareto, 1963). Pareto's understanding of economic equilibrium was based on a model of a rational human being acting to optimize resources to their own benefit and self satisfaction. Applied to society, his definition of equilibrium was a state to which society easily returned after relatively small disturbances.

As general systems theory developed and exploration continued, other theorists weighed in on equilibrium and its theoretical extension, homeostasis. While Battenfly (as cited in Bailey, 1994) is credited with authoring general system theory, other theorists such as Henderson (as cited in Bailey) and Cannon (as cited in Bailey) also expanded from natural to social sciences and, according to Bailey, these theorists were influential in the development of the concept of social equilibrium in the theories of Talcott Parsons (1951) and James Grier Miller (1978), two of the major theorists of systems theory with definitive views of social equilibrium. According to Parsons's definition, equilibrium is a key construct, synonymous with order. Without equilibrium society cannot function effectively (Parsons & Shils, 1951).

Parsons (1951) explained that action or behavior is normatively rational, meaning it is influenced by social values and accepted social norms. It is rational in that it is goal directed, and it is normative in that actors use their beliefs and values to choose what means will achieve their goals (Lackey, 1987). This explanation will be significant to interpreting judicial behavior as part of a social system of justice.

The two concepts from Parsons's theory (1951) that are significant to this current study are referent points for categorizing the functions of all systems: functional requirements and processes of control. This analysis could be applied to society, as a highly complex system, which is made up of individuals, who have their own personality systems, embedded in a culture that defines the values of the society.

Each of these components, the individuals, the society, and the culture, are systems themselves that are all interrelated. The question arises as to how these three systems are bounded, in order to tell where one leaves off and the others begins, and how they are linked? Relative to this study, the question can be asked, do judges act in sentencing offenders based on their own personal values, their cultural values and social values, or systemic norms?

To help define the boundaries, Parsons (1951) referred to the criteria for membership in a system being a defined role. If one has a defined role in the system, one is a member or part of the system and contained somewhere within the system's boundaries. Recognition of the multiple roles people play allows them to move fluidly among different systems. Therefore, the basic unit of a social system is the individual, playing a role that the system needs in order to function. Thus both judge and offender

are playing roles; a thesis supported by Goffman (1959) in his detailed description of social roles.

> Parsons and Shils stated, "The social system is made up of the actions of individuals" (Parsons & Shils, 1951, p. 190). Parsons posited that there is a need to analyze compatibility of organizational operating patterns for their integration with other organizations and into society as a whole (Black, 1961). This was how systems maintain equilibrium: by continually generating order, by organizing, and integrating in an effort to maintain control of some steady state. This was a central theme of Parsons's social systems perspective.

In application, Parsons's theory supports the individualized discretion of judges in their role in the social system as representatives of themselves, as members of society, and as representatives of a justice system with social standards of morality and social behavior. It is just this compatibility that is to be analyzed in this study.

Theories of Social Systems and Justice

According to Chadwick-Jones (1976), Homans's social exchange theory is a collection of explanations, propositions, and hypotheses about social behavior. In a revival of the behaviorists, Homans's theory fused stimulus response work of psychology with the model of supply and demand from classical economics, using the laws of psychology to explain social behavior (Homans, 1961). This is a key factor in understanding the theory, as a relationship between persons and social behavior. According to Homans, humans are motivated by self interest, forming social connections to advance their own ability to access needed goods and services, using economic strategies of maximizing returns while minimizing costs, resulting in a positive net outcome.

Homans (1972) posited this quest for 'value' is fundamental and ever present in

all social interactions. The additional concept of *rational choice* theory has subsequently emerged as an adjunct or derivative of exchange theory, and elaborates further to say that society organizes into cultures and social structures such as institutions, in order to combine forces and expedite gaining rewards. Homans himself referred to it as a vexed question of rationality. Rationality is therefore anything that supports self interest in a calculated cost/benefit analysis.

What is the link between general social systems and current criminal justice systems? "Law is entering an age of sociology," stated Black (1989), and in this age there will be influences on the practice of law, jurisprudence, and social policy (p. 4). The variation between what is written into judicial law, and how people behave in a social system under that law is a rich area for theoretical exploration. Both Fletcher (1996) and Black agreed that there is a difference between the written standard of law and common social practice under any particular law, and that law will not always be obeyed.

On this point, the structural functionalists, with whom Parsons was so frequently associated, would take the position that law is a form of social control and individuals accept the law or, if they do not, are in conflict with society. Justice systems are the enforcers of social norms. It is a conservative viewpoint that reinforces a social status quo, social norms, and the maintenance of social equilibrium, using available social sanctions (Rich, 1979; Weisberg, 2003).

In contrast to the structural functionalists, the positivist theorists are said to be concerned with finding an explanation of crime in the criminal, and the social influences on criminal behavior, not in the law (Rich, 1979). Lack of compliance to the law must

lead to more discipline and increased attention to the deviant conduct with more enforcement. Positivists do not accept a legal concept of crime, and are looking for individualized justice. Fletcher described the positivist view of law when he stated that "a legal system worth its name must use force to close the gap between norms and actual behavior" (Fletcher, 1996, p. 29). He posited that law, governance, and rule, are the defining characteristics of a society; they both characterize the society and identify its boundaries. The organization of peoples into various societies has been based on their laws, means of governance, and control. Societies differ by their laws, and the jurisdiction of their law, even where political philosophy and culture are similar.

The justice system and criminal law enforcement are selective responses to law breaking, and a system of social control that evolved from commercial urban development, and the need for protection of property (Rich, 1979).

If society is defined by its system of law and social control, is a social system possible without some form of justice system? Is one system subordinate to the other?

Fletcher (1996) expressed one answer when he stated the creation of law creates an inevitable obligation of social enforcement, selecting from a range of possible socially selected options: criminal condemnation, forced compliance, forced compensation and punishment, thus placing the role of criminal sentencing into context (p. 29). Law precedes enforcement, and justice. What is left still unanswered though is does social norm precede law? This philosophical question is beyond the scope of this review. What is apparent though, is society's dependence on law in order to function. Black (1976) agreed there might be overdependence on specialists to manage all crime and conflict; we

as individuals and as a group have lost our ability to respond to crime and anti social behavior at even the lowest level without official intervention. The social justice system, with representatives in enforcement and the judiciary, has become the only response possible and ever smaller disputes and misbehaviors become integrated into the criminal justice system. The enlarged jurisdiction of criminal justice encompasses a broader range of socially unacceptable behavior that was previously relegated to schools and social groups to sanction, adding an additional role of moral education to the responsibilities of officials in justice.

Thus we see a dichotomy of social trends; on one side where law becomes less significant and people feel freer to disobey and abuse statute law, with discretion, opposite a trend to overdependence on justice administration to respond to the smallest infractions and perceived social deviance. Social equilibrium is more obscured. Norms are more difficult to identify and balance more difficult to achieve. Justice systems become more localized and the management of crime, through judicial discretion, varies not only from society to society but also from neighborhood to neighborhood, setting to setting. How then, can it be determined that justice is done?

Quantitative Law, Social Exchange, and Justice

"Law is a quantitative variable. It increases and decreases, and one setting has more than another" (Black, 1976, p. 3). This is an important concept for our purposes. Evaluation of law in quantifiable amounts allows for relative comparisons of 'more' or 'less', and therefore impacts on our evaluation of equity in distribution of law. Black expanded with several examples of comparative quantities of law. He stated, "Detention

before trial is more law than release, a bail bond more than none, and a higher bail bond more than one that is lower. . . . A decision in behalf of the plaintiff is more law than a decision in behalf of the defendant, and conviction is more than acquittal. The more compensation awarded, the more law" (Black, 1976, p. 9). Thinking of law in a quantitative perspective allows for the consideration of a number of related mathematical considerations. If there is a quantitative value of law that can be determined, is there, similarly, a quantitative value to justice? What is the right amount of justice?

There is literature that examines exchange in social interactions, and particularly in the area of criminal justice, with references to economic exchange theory, and utility theory (Fletcher, 2000) Crime, as an example of a social interaction, is antisocial behavior evaluated against the relative available consequences and punishments, to determine an equitable exchange frequently referred to as distributive justice (Homans, 1974).

In the current criminal justice system, this balancing is most apparent in the process and practice of sentencing offenders. Considerations relevant to the crime and the criminal, such as the relative seriousness of the offense, are weighed against the various considerations on the side of society, such as public safety. A particular value is subsequently assigned to the crime and criminal in the trial process, and is then balanced with social consequences in a utilitarian manner to reach some equity, and thereby resolve the dispute. In the Western system of justice this social consequence is most often derived from the sentencing of convicted offenders by the courts or their surrogates, as designated administrators of justice. Even in reformed justice practices, that use

conciliatory justice to replace punitive justice, such as restorative justice (Black, 1961; Braithwaite, 1999; Roach, 2000) there is an exchange of restitution or reparation for the offending criminal behavior in lieu of traditional punishment, thereby restoring balance. The paradigm of a utilitarian exchange permeates Western justice.

Fletcher (2000) argued the time has come to move beyond being stuck in, "the calculus of utility" to exchange dynamics in our management of criminal justice and move to a more reformist perspective (p. xx). This may not be possible. There may be universal laws of equity and social exchange that govern human action.

Value equations and an economic metaphor are not new to social sciences (Gergen, 1980). Exchange is classic to economic theory and was explored in social science theory by Claude Levi-Strauss and B. F. Skinner (as discussed in Browning, Halcli, & Webster, 2000). It underlined George Homans's theory of social exchange (Homans, 1974). Homans applied general concepts of *rationalizing* and *markets* to all social behavior.

All societies deal with the question of distribution of resources, rewards, and punishments at some level (Parsons, 1951) Exchange theory refers to the propositions that individuals are hedonistic, and that they seek to increase pleasure and reward, and reduce pain and punishment. These individual preferences are sufficiently similar to combine together to create a consensus of social norms. The norms together form a template for social behavior and society. Society then as an entity guides behavior and can then create sanctions to enhance the likelihood of group conformity to the norms. Thus the legal code acts as a systemic guide to normative behavior using negative

sanctions such as punishment as motivation. Justice, and the social institution of justice administration are essential, even if abhorrent, to normative exchange arrangements (Gergen, 1980). “Men revile injustice, not because they fear to do it, but because they fear to suffer it,” Plato pointed out in the dialogue between Thrasymachus and Glaucon, on the nature of justice (Hamilton & Cairns, 1989).

Homans also introduced the concept of fairness in distributive justice; the rewards and costs for individuals, and the proportion of rewards to costs, should be perceived to be distributed fairly, in some ratio. This rule of distributive justice operates as a variable in social exchange theory (Chadwick-Jones, 1976). Significant to this rule is Homans’s proposition that when the rule fails, and proportional distribution is not intact, a person will feel anger, in proportion to the degree of variance from fair distribution. Therefore, there is an expectation of equity in distributive justice, and an emotional response to injustice. This theory adds significantly to understanding both society’s response, as well as judicial behavior in dealing with, and in response to crime. It may also be the explanation for *schadenfreude*, that underlying emotional gratification at seeing someone who has been somehow inequitably advantaged become disadvantaged (Miller, 1993).

Fletcher expressed his perspective:

> The facts may diverge from the law. When a divergence of this sort occurs under scientific laws, the appropriate remedy is to reformulate the law…When a similar divergence occurs in the realm of human conduct under human laws, we assume that the right thing to do is to change not the law, but rather to discipline the deviant conduct. This need to change conduct produces the practices of stigmatization, sanctioning and punishment that some philosophers, called positivists have taken to be the essence of a legal system.
> (Fletcher, 1996, p. 29)

Equity in justice must not be confused with equality. The concept of equality under law, equal access to justice and equal protection of citizens is a fundamental principle of western law, enshrined in the United States under the 14th amendment to the American constitution. "Consider the work of Rawls (1971) on moral philosophy. Rawls argues that justice is the first virtue of social institutions. In other words, in designing social institutions, it is important that "criteria of fairness be considered" (Tyler, Boeckmann, Smith & Huo, 1997, p. 3).

There is no role for equity if the term equity implies any interpretation of fairness in the legal system according to Kaplow and Shavell (2002). Their claim was that, "A welfare-based normative approach should be exclusively employed in evaluating legal rules. Legal rules should be selected entirely with respect to their effects on the well-being of the individuals in society" (p. 3). Ignatieff supported this view. He believed the most common criticism of modern welfare is that, "in treating everyone the same, it ends up treating everyone like a thing" (Ignatieff, 1984, p. 17).

The conclusion of this would be that fairness as equity, as in corrective justice, should not be considered. If this is so than any corrective measures that are solely punitive in nature, and only for the purpose of responding to the wrong doing and restoring equity, without regard for anyone's well being, or without the promise that such wrong doing will be deterred in the future are without value. Does this deny the universality of equity in justice and human behavior?

This proposal must be considered with an eye on the origin of criminal law. According to Ashworth and Wasik (1990), criminal law was established, not to respond

to crime, rather as a response to the actions of victims of crime, and as replacement for personal revenge and vendetta as a means of resolving crime. The law would provide an alternative to what they labeled the tit-for-tat practices, or the inclination to retaliate (p. 31). The law thereby provides a displacement function, as an alternative to the natural inclination to rebalance equity through individual retaliatory actions. There is no reason to believe that this socially organized and operating displacement would have less emphasis on rebalancing equity than any individual's inclinations.

Current practices seem to also contradict Kaplow and Shavell's (2002) concern that well being is to be the only consideration of response to crime. Fletcher (2000) pointed out that there is a trend toward determinate sentencing, and away from discretionary judicial decisions. Sentencing guidelines are initially determined by the offense, not the offender. This trend is most apparent in the recent adoption of mandatory minimum sentencing, which dictates specific sentences are to be assigned to particular crimes or offenders, with the requirement for written, judicial opinions, to accompany any but the most minimal of variations.

Equity theory and social exchange are then naturally extenuated from individuals to social systems and therefore to the justice system. This is particularly important and possibly troublesome in consideration of the move for criminal justice to become more administrative and less normative as Fletcher (200) claims. Law is the tool for governmental social control according to Black (1976). The potential for equity in the use of law provides stability and regularity to the practices of the administration of justice, but may overly institutionalize normative human behavior without the advantage

of human oversight. Justice is then providing localized equity at some price, yet to be determined.

This returns the discussion to Alessio's (1990) observations regarding the nature of balanced relationships. Sentencing an offender serves to balance the power in the relationship between society and the individual. The committing of the offense creates an imbalance, in favor of the offender until the offender is required to fulfill some social requirement, usually punitive and constrictive, as a means of formal rebalancing.

Victims and their supporters speak of the sentencing trial as providing closure, however this sense of full circle, or closed cycle may be the readjustment to a relation that had been perceived as imbalanced. Given the tendency to determinate sentencing, it is difficult to argue that a criminal sentence is any more than a predetermined value, selected from a possible range of options, to be plugged into the justice equation to restore balance to the social system.

In discussing the integration of social exchange into a justice system, how social exchange is developed at the individual level cannot be ignored. Early childhood experience, directed by family and caregivers is probably our first opportunity to be exposed to social exchange and in fact possibly most meaningful, in terms of understanding social behavior (Gergen, 1980). Piaget and Kohlberg (as discussed in Henslin, 1997) both identified social behavior as learned in stages, beginning at a young age, and it is reasonable to assume that social exchange and rational choice may also be developing, even if the rational choice abilities are limited in early years to utilitarian benefits of avoidance of discomfort and pain.

Logically, the connection with social exchange and social behavior begins with those with whom one has an emotional bond (Gergen, 1980). This factor may be influential in behavior, where choices take into consideration emotional costs and benefits that are realized throughout life. Therefore, the closer the individual is to an emotional benefit, the higher the value of the social exchange (Turiel, 1994). The ordering of proximity would follow systemic developmental proximity: parent or caregiver, family, local community including social and work or school interactions, larger community such as city or town, institutions of less proximate access, such as government. This latter category would include institutions of government administration, including justice.

For offenders, who are being asked to account for illegal and immoral behavior to the administrating institutions of the justice system, there is little emotional cost or benefit. By institutionalizing the management of the offender and their behavior, in the traditional system, the focus has shifted to the social costs of the offense, and in fact a valued choice option has been removed. Without the emotional connection, the process is far less likely to elicit the offender's cost benefit analysis in favor of positive social behavior.

Sentencing Systems as Social Exchange Systems

Black's (1976) theory of quantitative law outlines the relative value of variable components of the application of the legal system. Part of this is the relative value of punishment, where Black concludes that more punishment is perceived as more law. "The greater a fine, the longer a prison term, the more pain, mutilation, humiliation, or

deprivation inflicted, the more law" (p. 3). In fact, Black goes further with a definition for quantifiable law when he says, "More generally, the quantity of law is known by the number and scope of prohibitions, obligations, and other standards to which people are subject and by the rate of legislation, litigation and adjudication. As a quantitative variable law, I count all of this and more" (p. 3).

It is valuable at this point to return to Homans's (1951) theory and his propositions about distributive justice. His proposition stated that when there is an inequitable distribution of justice, the resulting response would be emotional for the purposes of reducing perception of inequity. These emotions include feelings of guilt (Chadwick-Jones, 1976). If there are feelings of guilt that accompany distributive injustice, then there may be a social expectation of some expression of guilt by the offender as a natural human response. The lack of expressed guilt would trigger anger due to the continuance of the perception of injustice. Therefore, imposing guilt, through shaming activities would alleviate to some extent the imbalance that the offender has created in their favor (Strang, 2002).

This would also be in keeping of Alessio's (1990) explanation of the triangulation of equity and his reference to Heider's theory of return to balance. The two parties involved in a judge-offender situation would be in a negative relationship due to the offense. In seeking to regain balance, and enter a positive relation, a third factor would be needed. Guilt would be the third factor, with the potential to generate equity. For the offender, the expression of guilt, through a confession, apology, expression of remorse or demonstration of shame, would provide a means of bringing the parties into balance by

reducing the influence that had been gained in the offense. For the judge, the need for an expression of guilt, by way of an apology, would act to humble the offender, and in fact put the offender at the judge's disposal. The expectation of the offender's guilt and expressions of remorse would suffice to balance the relationship.

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The significance of social exchange in justice cannot be avoided. Even restorative justice, that circumvents administrative justice and uses community based processes has managed to mimic traditional justice in providing a means to rebalance the social relationship and reestablish social norms, using social exchange that is similar to the traditional system but with different commodities being exchanged; where the retributive system exchanges punishment for offense, restorative justice exchanges restitution for expressions of guilt. All of this is done without the high costs of judicial administration associated with criminal prosecutions, trials and detention.

In summary, for the purposes of this study, examining social exchange theory sheds light on understanding the criminal justice system and sentencing. Social exchange in the form of either traditional judicial sentences or restorative justice agreements that are in exchange for antisocial behavior, provide the opportunity to return relationships to social balance and create perceived equity.

Punishment and Sentencing

There is no clear guiding philosophy to sentencing in the current American Federal Sentencing Guidelines, leaving judges to choose their own favorite penal goal (Hofer & Allenbaugh, 2003). A number of issues might be considered, related to the

offense, the offender and society at large. Along with the social need for stability and regularity, justice administration recognizes individuality of the offender in some manner and the Guidelines provide for some degree of flexibility.

The debate continues between the equity version of sentencing policy, frequently seen as economic and utilitarian, and normative sentencing policy, focused on welfare and well being, and not fairness. But in fact the mixture of considering both fairness and the well being of the offender, or defined differently, wrong doing versus culpability, has indeed been considered in sentencing, as is explicit in praxis:

> The notions of attribution and accountability represent an independent dimension of liability. Acts can be wrongful, but the actor, not accountable; or the act justified and lawful, and the actor, accountable. Culpability, in contrast, is limited to wrongful acts. A justified act is not wrongful, and the actor not culpable. Further, the degree of culpability is linked to the degree of wrongdoing. The personal culpability for murder is greater than for larceny. We could use the term "blameworthy" to refer to culpability, but some people may think of blaming a wrongdoer as the expression of a sentiment such as contempt or scorn. There is no passion of this sort implied in saying that an actor is accountable or culpable for a wrongful act. (Fletcher, 2000, p. 459)

The evaluation of culpability enters into sentencing decisions, with a principle that the less culpable the offender, the less severe the sentence (Shapland, 1981). Culpability is measured independently from the offense, with consideration of possible mitigating factors.

Thus social exchange is observed between the offender and the administrators, where the offenders can exchange acknowledged mitigators for degrees of freedom. The task of defense is to propose consideration of a maximum number of mitigating factors. Fletcher (2000) points out that while there are eight variations of recognized mitigators,

such as, diminished capacity, youth, and duress, all of which act as excusing conditions, none of these have formalized status or constitutional support (p. 337). Informal social exchange is incorporated into sentencing as part of administrative procedure in the sentencing portion of a trial or in a negotiated plea bargain. Due to administrative constraints, the latter process has become popular as an economic means of administering justice (Zacharias, 1998).

"Criminal punishment is harsh in America and it has been getting harsher," according to James Whitman (2003, p. 3). There are a broad range of punishment and sentencing theories and practices available for review (Zimring, Hawkins, & Kamin, 2003). These theories and practices base themselves on political, social and economic rationales, and not on an innate human need to punish (Abel & Marsh, 1984). For the purposes of this paper it can be assumed that sentencing is in response to an identified crime (Wilmot & Spohn, 2004).

The definition of punishment includes a component of guilt (Acton, 1969). Punishment is the consequence for having been found guilty of breaking the law. Therefore we can associate punishment with criminal law, and punishing sentences as the administrative consequence of law breaking or breaching social norms. Possible case dispositions are considered, through a sentencing process. Punishment is one of those dispositions. Punishment has been defined as the infliction of suffering on the guilty (Quinton as cited in Acton, 1969). Suffering in our current social environment is associated with deprivation, isolation and limitation, as opposed to historical associations

of punishment with inflicting of pain (Olson, 2003). This association of suffering with punishment is a key concept in analyzing philosophies of sentencing.

Additional definitions of punishment focus on the diminished personal status of the one being punished as perceived by themselves and by others in society. This may include some form of deprivation, loss or unpleasantness. The other defining criterion is that the punishing treatment is deliberate, not accidental or coincidental (Walker, 1969). There is an interactive component between society at large and the offender that is at the essence of defining punishment. Hart (1998) posited it is the expression of the community's disdain or contempt for the convict which characterizes punishment.

Still other definitions identify the human need for revenge. Abel and Marsh (1984) sum up their understanding of punishment as, "some act, (usually painful) reasonably calculated to appease the desire for vengeance excited in victims or other private individuals with interests in the victims…Victims or people interested in them are seeking appeasement for their loss, pain or humiliation" (p. 25). Rossi and Berk (1997) expressed their view of punishment as an obligation, "One can speak of the obligation of the criminal justice system to punish persons convicted of crimes in fair and evenhanded ways as well as the duty of judges to give out sentences in ways that are consistent with that obligation" (p. 3).

Contrary to that opinion, there are vast differences in the actual sentences being imposed for similar crimes, not only across national borders, but also from one jurisdiction to the next within countries, and while these differences may reflect local

social norms in beliefs of just punishments, they may also reflect the underlying structures and design of criminal justice systems (Albonetti, 1998; Ferenc, 2003).

The Canadian Criminal Code defines the purpose of sentencing without mention of the word punishment, but does refer to sanctions. Other differences in criminal justice systems are related to the method of selection or appointment of administrators. In some countries and states, judges and prosecutors are appointed while in others they are selected through public elections. Where prosecutors and judges are elected to public office, there would be more concern by these administrators of justice for public perceptions of punishment and sentencing (Champagne, 2003). The resulting strategies reflect public sentiment and concerns about crime more than any particular penal philosophy (Champagne & Cheek, 2002).

The aims of a penal system fall under categories of: retribution, rehabilitation, deterrence, community safety, and include some of the most significant and established reasoning (Champagne, 2003). These multiple and diverse aims explains how the current system has come to be as fragmented as it is. Sentencing of offenders is the core of penal systems. The determination of disposition of criminal offenders is the key role and responsibility of the judicial body after the determination of guilt or innocence. This procedure in itself may be subject to challenge (Berk & Rossi, 1997).

One of the aims of sentencing, known as Montero's aim, in reference to the Spanish, twentieth century jurist, is to provide a joint, public response to offenses and protect offenders from arbitrary, unofficial public retaliation for the offense (Walker, 1969). Social control demands consensus on responding to offenses, in a body of law and

order. With a variety of penal philosophies used over history, it is possible to identify three of the mainstream ideologies that are currently cited in the literature as influencing penal strategies. These are a utilitarian philosophy (Bentham, 1996), a retributive philosophy (Ten, 1987), and a humanitarian philosophy (Walker, 1969).

The utilitarian theory is what Ten (1987) calls a *consequentialist* theory, which justifies punishment in terms of its social benefits or positive social consequences and produces the greatest social utility. This philosophy leads to obvious intuitive concerns with individual rights, liberties and equity; however elements of utilitarian theory are evident in penal practices as defined in the role of punishment in the Canadian penal code cited above.

The retributivists, as they are labeled by Ten (1987) are those who regard an offender's act of wrongdoing as deserving of proportionate punishment in response. Also known as the just desert theory, the philosophy underlying this theory is that wrongdoing is deserving of punishment, with no view or concern to possible benefit (Frase & Tonry, 2001). Two variations of retributive justice can be identified. One of these is as outlined above, and sees punishment as a means of inflicting deserved suffering on an offender. The other variation, takes its base in distributive justice, and sees punishment as a fair exchange for the unfair advantage that was awarded the offender in commitment of the crime. Thus punishment is a rebalancing of social fairness (Ten 1987). These two variations further support each other and their common perspective; that crime leads to obligatory punishment.

Of these two theories of sentencing, utility theory and retributive theory, which one of them has claim to being more valuable? The answer given by Ten (1987) quotes R. M. Hare, "The retributivists are right at the intuitive level, and the utilitarians at the critical level" (p. 36). Ten posited that the two theories can compromise, and be reconciled, if neither is taken to the extreme, and the values of both are considered in sentencing decisions. For that reason, and to draw larger distinctions, it is possible to collect these two theories together, as limited retributive theory, to distinguish them from humanitarian theories.

Is retribution of any kind a justifiable aim for a secular penal system? Walker (1969) would argue not. Walker differentiated between natural, individual, human responses to injustice, the human desire to see an offender atone with some suffering, and the systemic response to offenders in an officially designed program that would impose the same suffering.

While the concept of limited retributivism does succeed in putting boundaries on punishment, it is still a step away from other more humane thinking, as represented by humanitarian theories of sentencing. Humanitarian thinkers follow a fundamental principle in punishment and sentencing that states the penal system should cause a minimum of suffering necessary to both the victim and the offender (Walker, 1969).

This principle was also expounded by Jeremy Bentham (1970, 1996), and referred to as the frugality of punishment. This principle would by definition put limitations on the utilitarian or retributive viewpoint. Humanitarians reject the morality of inflicting suffering, even if it is the minimum possible, as cruel and unusual punishment.

Humanitarians argue there are some forms or degrees of suffering that should never be imposed, however effective they may be at supporting crime prevention (Walker, p. 14).

Supporters of this philosophy press for an overhaul of the current penal system (Braithwaite, 1999; Roach, 2000), and proponents of humanitarianism range from those supporting penal reform to others who would lobby for penal abolition.

Perspectives on Sentencing

For a majority of offenders who plead guilty, their most important contact with the justice system comes during the period between conviction and the passing of sentence (Shapland, 1981). Most sentencing determinations are made by individual judges according to Fitzmaurice and Pease (1986). They stated, "It is an important decision not only for the offender. A judicial sentence is an expression of power on behalf of society, made in its name" (p. 1).

The task of sentencing is complex and multi-faceted. It involves consideration of a number of elements, as well as the specific situation of the offender at the time of sentencing. It is more than a mechanical process, and engages high level human cognitive abilities to understand and interpret as well as apply theoretical considerations to specific cases (Fitzmaurice & Pease 1986). Sentencing is most frequently one person pronouncing a determined and formulated punishment on another, as a result of calculated factors and thoughts concluding in a decision. As an example of any human behavior involving decision making, it may be prone to the same errors as other human behavior.

There is no one agreed upon model for the sentencing process, nor a widely accepted set of determinants of sentencing outcomes, according to Jo Dixon (1995). One model suggested by Nigel Walker, Michael Wilmer, and Roy Carr-Hill, is based on four possible types of sentence: nominal, financial, supervisory and custodial (Walker, 1969, p. 203). These authors affirmed that every sentencer must use some model for sentencing decisions, not unlike a roadmap, according to the analogy Walker uses:

> The analogy of a map is a good one, because it helps to make clear the difference between a sentencer and a psychologist, psychiatrist or social worker whose task it is to report on an sometimes to treat an offender. The latter are like geographers, who need complex maps to describe the districts in which they are interested" maps, which show vegetation, land use, population... and so on. The sentencer, on the other hand, whose task is to choose between a limited number of possible measures, is rather like the motorist who simply wants to drive through the same district by the best roads. All he needs is a road map, uncomplicated by the detail of the geographer's atlas. (Walker, 1969, p. 205)

. Dixon (1995) posited that there is an error in assuming that courts operate under a unitary model of sentencing, but rather sentencing is contextual, subject to multiple influences, and therefore no one model can capture the variations that occur across courts (p. 1164).

The laws that govern sentencing and the processes of sentencing are a microcosm of current social standards for justice (Fletcher, 1996). Similar sentencing systems and norms govern most western societies including similar factors that are considered aggravating and mitigating. Berk and his colleagues conducted a survey for the US Sentencing Commission to establish American social norms in sentencing using a national probability sample in 1994 and short vignettes as sample illustrations of offenses

to represent cases, asking randomly selected participants to choose the appropriate sentence suited to the crime presented in the case (Berk, et al., 1994).

The Sentencing Commission was created in 1984 to provide guidelines for sentencing in the federal courts, and dealt with the challenge of meeting four targeted goals:

1. To provide effective deterrence to those who might consider violating the federal criminal code.
2. To provide just punishment for those who were convicted.
3. To ensure uniformity in sentencing across the many federal courts.
4. To make provision for departures from uniformity when justifiable. (Berk, 1994).

Social norms of sentencing are most clearly evident in the recorded judicial decision and disposition, and the reasoned sentence (Walker, 1969), and therefore the recorded reasons for sentencing are a valuable resource of data for this study. The statement or homily that accompanies the sentence outlines the retributive, corrective, and/or deterrent aims. Therein, may also be the substantive evidence for the offender to support an appeal, if it is arguable that the justice's reasoning was in some way flawed. Reasoning is based on some established norm, or matrix that considers the offense, the offender, and possible responses. More recently, conditions of available incarceration facilities have also played a role in the judges' consideration of the sentence term (Ferenc, 2003).

Walker questioned whether justices who have been responsible for determination of guilt in a case should then be responsible for sentencing, and suggested that in cases involving incarceration, a separate sentencing body should be used. This concept differs

from the existing separation of trial and sentence, which divides the process into two components, but involves the same adjudicators (Walker, 1969, p. 161). Walker posited that the separation of the sentencing authority from the trial authority would result in less retributive and more economical, humane and corrective sentences. His proposal recognized human limitations and the fundamental difference in a decision of guilt as opposed to a selection of suitable sentence.

Historically, befit sentencing was seen as both a right and responsibility of the judiciary (Whitman, 2003). From the time of colonial magistrates, judges had full discretion in sentencing and often sought to tie the sentence to the crime as either restitution or reformative, without a systemic guideline. Befit sentencing requires judges to have broad discretion, and sometimes can be prone to judicial publicity seeking in order to garner public support, as in prior to judicial elections (Stryker, 2005).

The recent stringent curtailment of judicial discretion and the growing use of determinant sentencing have reflected both the criminal justice system's increasing reliance on incarceration, as well as concern for independent judicial discretion, toward what has been called, assembly line justice (Misner, 2000). Befit sentencing is now seen, almost as a protest, by members of the judiciary to sentencing guidelines and its resulting summary justice, and an attempt to introduce back into the system some direct personal accountability of an offender for the nature and extent of an offense. Befit sentences have also blurred the lines of sentencing outcomes, where that debate has been in opposing arguments of retributive versus restorative shaming where the dilemma focused on either reducing crime rates or rehabilitating offenders. Using shame in befit sentencing is seen

as an effective means of inflicting punishment and at the same time moving toward rehabilitation and restoration (Posner, 1998).

Posner (1998) cited Texas Congressman and former Court Judge, Ted Poe, stating he believed shaming helped rehabilitate by ensuring offenders could not distance themselves from the reality of their actions, and highlighted the reduced recidivism rate of offenders who had been dealt with using shame conditions. Befit sentencing that uses shame in the composition and structure of the sentence is ensuring the offender's recognition of the offense, and is seen as axiomatic in being the first step to rehabilitation (Posner, 1998).

Sentence Severity

Efficacy of sentencing is a topic of significant debate. Does sentencing to punishment have a deterrent effect on individuals? Such factors as the rate of recidivism, the relative success of early release from custody and the undeterability of certain groups of offenders have called into question the possibility of achieving, with any significant degree of success, the goal of individual deterrence (Cragg, 1992).

Social stigma is one of the effects of being named an offender in the penal system, and in fact, may be an unofficial form of random public retaliation against the offender, in contradiction of Montero's aim (Walker, 1969). Walker highlighted the potential social stigma risk of the sentencing system when he stated, "For example, since stigma is an unofficial penalty, which can often impose suffering that is excessive by any criterion, we should seriously consider whether it is not possible to exercise more control over it"

(Walker, 1969, p. 3). There are other arguments against sentencing that suggest our current sentencing system has a discriminatory social impact (Margalit, 1996).

Sentencing is more than a mechanical process. It engages judges in high-level cognitive abilities to understand and interpret as well as apply theoretical considerations to specific cases (Fitzmaurice & Pease 1986.

Throughout the past two decades, a number of studies have focused on offender characteristics, influencing sentencing (Albonetti, 1998; Hofer & Allenbaugh, 2003; Zimrig et al., 2003). Albonetti determined that judicial discretion is influenced, rightly or wrongly by a number of factors that then impact on case disposition (Albonetti, 1998) as has been mentioned already, including: the complexity of the case, the offender's race and gender, and the offender's guilty plea. She found that these factors indirectly impacted on sentencing decisions and the sentence severity. These factors may also influence a relation between shaming and sentence severity, and must be included in this current exploration, as subcategories of offender.

Champagne (2003) referred to Nagel's earlier studies from over thirty years ago that compared decisions of elected and appointed judges to see if this influenced judicial decisions in the United States. He quoted Nagel's findings at that time, that elected judges, usually from partisan positions, were more lenient in their decisions than appointed judges. Partisanship has dominated judicial selection more recently, according to Champagne (2003) and while this has made, in his evaluation, the selection of judges more competitive, it has not altered the relationship of justice selection to judicial

decision that Nagel established thirty-five years ago. He concluded that today, almost all judicial candidates campaign with a popular, tough on crime theme, and that the latter day dominance of Republican party positions overall in policy has influenced judicial policy and justice selection, whether that selection is by election or appointment.

It has been proposed that control over judicial discretion has been achieved through determinate or mandatory minimum sentencing, a pre-determined guide to sentence severity (Sigler, 2003; Walker, 1969). There has been much debate and a few iterations of determinate sentencing over the past two decades, with variations of more or less restriction on judicial discretion (White, 2002). In the United States, several states and even the federal government has moved to creating sentencing commissions, charged with determining sentencing ranges and requirements, with mixed results (Frase & Tonrey, 2001; Hofer & Allenbaugh, 2003). The impact of determinate or mandatory sentencing is to reduce individualization of case disposition, and relieve the justice from consideration of the impact of sentencing, a consideration some say is valuable for the safety of the community, and others say is unusually cruel in lack of specificity. In the category of determinate or mandatory sentence, we can also include precautionary sentences, passed to provide additional protection beyond the scope of the offense.

The category of *dangerous offender* in Canada allows long term incarceration, beyond the life sentence, which is at this time is a fixed number of years, not usually exceeding 20 (Criminal Code, 2005). Sentencing in this category goes beyond a single justice's discretion and is understood to be a communal determination of the Attorney General.

Controlling the arbitrary ability for any particular justice to sentence beyond the recognized range without significant safeguards for the offender is another means of controlling the sentencer. In the same vein, prohibited sentences restrict those sentences that are deemed unacceptable for categories of crime from being imposed. If sentences are imposed by a justice that are beyond the scope (or even if within the scope) of the offense, there is also the opportunity for the challenge of appeal. Appeals provide a means to review sentencing decisions if the offender wishes to challenge them, and some sentences, such as life sentence carry with them automatic rights to appeal but with limited grounds (Walker, 1969).

The overall nature of determinate or mandatory sentencing is its rooted effort to generate what is perceived as a fair practice in administering justice by enforcing more equitable practices in sentencing decisions. It could be argued that in the case of managing human behavior, where each individual is so unique, with their own situation and circumstances, any effort to equalize treatment is by definition unfair (Ignatieff, 1984) in its lack of consideration of individual differences; thus, determinate sentencing is set up to defeat the very purpose it sets out to address. Once predetermined sentence lengths are established, justices are more likely to anchor their sentence in the centre zone of the range.

Mitigation of Sentence Severity

The introduction of the consideration of mitigating factors into the sentencing process came about according to Shapland (1981) with the reform movement in criminal

justice in the mid-twentieth century that focused attention on the potential for an offender's rehabilitation. There is recognition in all penal systems for the consideration of circumstances and conditions associated with the commitment of a criminal act, as possible reason to modify by reducing a sentence or exempt an offender from the normal penal measures, or in the opposite case, aggravate the sentence more than the normal severity (Shapland, 1981). Presentation of these factors in the sentencing process can be on the part of the prosecution or the defense. Consideration of these factors is usually left to the justice and proscribed, in a large part, by the degrees of freedom in the discretion of the justice determining the sentence of the offender (Bibas, 2001). Human behavior plays a large roll in considering mitigating factors, not only in relation to the offender, but also in relation to the justice:

> Sometimes the sentencer's reasoning can only be described as sentimental or superstitious. During and immediately after wars, offenders who have taken active parts in battles- and especially those who have been wounded – can often expect lighter sentences from judges or magistrates who seem to be trying to express their country's gratitude. (Walker, 1969, p. 165)

Mitigating factors can be divided into two subgroups; one group of grounds that justify considering the use of a reduced penalty scale, and the other group of grounds to be considered within a certain scale. Some of the considerations for reduced penalty include: age, diminished responsibility, self-defense, attempting an offense that is not completed, and aiding an offense. All of these criteria demonstrate the retributive philosophy, and separate responsibility for deliberate behavior from circumstantial actions (Frase & Tonry, 2001).

Other mitigators are related to the offender's socially positive behavior either as part of the offense, or after the offense, including efforts to repair harm done by the offense, cooperation with authorities in investigation or prosecution, demonstrations of remorse, apologies, all these on grounds of culpability. While these reasons may seem to be based on the moral character of the offender, they are more pragmatic and operationally related to administrative expediency, according to Frase and Tonry (2001). This is not to be confused with plea bargaining, the process of exchanging cooperation for a lesser charge, although the outcomes may be similar.

Mitigation is a consideration of post conviction sentencing. Further consideration might be made for mitigating factors that are consequential to the offense, but not directly related to the act of the offense, such as the offender's loss of a job, or physical injury, but only if the consequence results in a punishment perceived to be greater than would be expected for that crime (Bibas, 2001).

Unlike a trial, there are few rules of procedure that stem from statutes or case law to guide justices in mitigation portion of the sentencing process. Very little literature exists, and almost no historical materials refer to it. Shapland (1981) claimed it to be the most unconsidered part of court procedure. Studies have attempted to categorize and identify recognized mitigators (Fitzmaurice & Pease, 1986). If there are accepted mitigators for sentencing determination, should the offender's behavior be considered as a reasonable mitigator, and if so, what is the proscribed behavior for an offender in the situation of sentencing in order to affect the outcome?

It is the combination of two components: judicial discretion and moral judgment

of the offender, which creates the possibility for consideration of factors that are mitigators and aggravators. “What else is mitigation or aggravation if not a process through which moral responsibility and hence morality lead to the apportionment of a sentence on the basis of sometimes very extraneous morality/immorality” (Fitzmaurice & Pease, 1986, p. 125). Some scholars, such as von Hirsch (1994) chastised judges on how they include considerations of morality and asked if administrators of justice as representatives of the state and society be engaged in the use punishment as a means of enforcing moral development of citizens.

There is growing attention paid to mitigation in sentencing, according to Shapland (1981) explained by a number of reasons. The interest in rehabilitation drove the examination into individual offender’s character, and the judge’s role in estimating the rehabilitative capacity of the offender. This interest required more detailed information about the specific antecedents of the offense, including the history of the offender and their personality. In Britain, Shapland noted, “The increase in the number of sentences, especially non custodial sentences, for which tailoring of sentence to the offence and mitigating or aggravating factors relating to the offender or the offences have assumed a greater importance” (Shapland, 1981, p. 39). Weisman (2004) concurred with Shapland’s view and cited the trend in the Canadian courts to revise retributive justice practices for more restorative approaches, in which the offender’s character and ability to show empathy and remorse have even greater effect than in traditional court practices.

Secondly, limited court resources for providing probationary reports and pre-sentence assessments have driven defense counsel to be more proactive in seeking their

own assessments and interests. At the same time as resources are dwindling, courts are asking for more guidance in sentencing, and recent changes in Canada to the Criminal Code under the Act requires a pre-sentencing report on the offender's past behavior and response to the offense, which are interpreted by defense to be a means of demonstrating the offender's remorse through apologies and restitution. All these personality factors are considered as part of the mitigation portion of the sentencing process. Yet according to Shapland, (1981) there has been a paucity of statute and case law with details on information on mitigation, no formal codification of the practice and the term is not yet even listed as a category in the index of the Canadian Criminal Code, the summary of the Criminal Law Amendment Act, 2004.

In court, prosecution or police, in contrast, may present factors as potential sentence aggravators. These factors are most frequently offense related, fact based evidence; for example, the prior convictions of an offender (Shapland, 1981). They are not unsubstantiated predictions of future behavior.

Mitigators differ from aggravators in that they are not always fact based or offense related. Mitigators are organized by how they are related to the offense, the offender or the victim (Shapland, 1981). Shapland's study of British court transcripts resulted in an extensive categorization of factors presented by defense counsel and non-represented defendants as mitigators for sentencing consideration. These factors are summarized here to help assess the range of factors available or perceived as possible influences on sentence severity:

1) Mitigators related to the offense contain justification and excuses for the crime being committed,
2) Mitigating factors related to the individual's circumstances but not necessarily directly connected to the offense,
3) Consideration of the character of the offender and his attitude toward the offense
4) The offender's circumstances prior to the commitment of the crime or the anticipated circumstances for the offender as a result of the sentencing.
5) An additional number of factors are related to court administration processes independent of the offender or the crime, such as: time already served before trial, availability of probation programs, or other community based interventions, capacity of jail to accommodate the offender, and no prior history in the court. (Shapland, 1981, p. 55-77)

To accept mitigation as a consideration in sentencing, one has to accept sentencing as a means of remediation, restoring equity to social interactions where the balance or equity has been disturbed by the offense to the disadvantage of the victim and society. Mitigation is the beginning of remediation. The acceptance by the judge of the offender's explanation is the critical point where the offended party or their surrogate determines the character of the offender, and their perspective toward them in the future. If the account or explanation is seen as sufficient, then equity is restored, and remediation is complete. If insufficient, the merit of the offender in the offended party's eye is

diminished. Both in daily interaction and in the case of court sentencing decisions, this process has significant weight (Nussbaum, 2004)

The offender is responsible for showing proper regard for the process of correction. The remedial work must not be done lightly, flippantly or obviously insincerely, or another offense may well have been committed, which is often more serious than the original one. This involves management by the offender of his appearance, tone of speech and gestures as well as the words he says (Shapland, 1981, p. 45). Respect shown towards the justice and social rules is a means of repositioning the offense in the eyes of the justice, and renegotiating the offender's status, what Shapland refers to as, "readjusting the person" (p. 46).

An offender does this by separating himself from the offense and verbally aligning himself on the side of the accepted social values with declarations of self-deprecation and remorse. While the offender is redefining their own character, the sentencer can appreciate and demonstrate compassion for the special individual circumstances and history of the offender, so that the sentencing process is not insensitive or mechanistic.

Opportunity to demonstrate character has been enshrined in the United States Supreme Court 1976 declaration that the defendant in a death penalty case must have an opportunity to present their life history and appeal to the compassion of the jury (Nussbaum, 2004). The court found that the possibility of compassion is essential to sentencing. Nussbaum quoted the decision as referring to the relevant facets of the

offender's character, stemming from the "diverse frailties of humankind", (*Woodson v. North Carolina, 428 U.S. 280,303,* (1976) as cited in Nussbaum, 2004, p. 21).

Factors related to the offender's circumstances should not be considered in sentencing according to Ashworth (1994) and are without any persuasive theoretical support. They are more related to the justice's concerns of how the determination will be perceived if individual character attributes are not taken into account at all. Ashworth challenged mitigation done on the basis of the offender's acts of heroism, collateral pain, and employment history as having no valid substantive support in relation to sentencing decisions. He added that in order to be fair, if we argue that the offender's social situation is a contributor to the offense; proportional sentencing should then focus on the offender's social disadvantage as a mitigator.

To summarize the issue of sentencing and mitigation Ten, (1987) and Culver, (1998) came to the conclusion that there is no one theory, practice or value to sentencing that can govern all others, and a pluralistic approach is needed, to allow consideration of all the values, aims and goals of society.

Abel and Marsh (1984) might have partially agreed with Ten (1987). They concluded that there is already a consensus that crime and the response to crime has been managed through periodically or geographically shifting emphasis among philosophies of rehabilitation, retribution and deterrence. However, they caution, "Believing that the answer lies somewhere in the simultaneous pursuit of these three objectives, we jump from one to another as the failures of each become obvious in succession" (Abel & Marsh, 1984, p .3). They posit that this is a mistake. Even if society and social values and

priorities are in a process of change, the responses to these changes should not be makeshift and transient if the intent is they are going to be durable. They might caution that while a pluralistic approach may appear to be flexible, it is actually confusion. As the pendulum swings in sentencing philosophies and practices, from one extreme to the other, there appears only to be consensus on this confusion, and our overall lack of success in self-government. Sentencing with accompanying mitigation factors may or may not be the best way to manage criminal behavior; however as a strategy it continues to be prominent in the administration of justice, and therefore deserves ongoing intensive scrutiny.

Judicial Discretion in Sentencing

Judicial discretion, that space between what the law proscribes as the sentence range and the justice's actual determination of sentence, is where factors mitigate or aggravate the decision. Under Western systems of justice, there is discretion for justices to express their beliefs about the merits of the case, the merits of the offender, and their expectations for the future in their consideration of mitigators and aggravators as part of the expressed reasons for sentencing.

At this point the discussion of judicial discretion becomes most pertinent to this study for two reasons. If justices are allowed little or no discretion in sentencing determination, then their role is diminished to the equivalent of administrator, applying formula social sanctions, without professional interpretation (Hofer, Blackwell, & Rubick, 1999). Why then would justices need any special skills or expert knowledge of law, and what would be the purpose of electing justices as opposed to appointing them, as

with other officials of justice administration? Again, the danger in automating sentencing is the loss of individual consideration for the perception of fairness in equal treatment (Oberdorfer, 2003).

One British author commented:

> It is an ancient criticism of the administration of the law in this country that we have every reason to be proud of our criminal courts up to the moment when the decision as to guilt or innocence is reached and every reason to be ashamed of them afterwards Our courts, say the critics, take five hours to determine what in many cases the simple question as to whether the accused is innocent or guilty and five minutes to resolve the infinitely more difficult problem of treatment (Page as cited in Shapland, 1981, p. 32).

While this debate is ongoing, there is considerable discretion available for justices within the range of proscribed sentencing to make mitigation in sentencing practice an area of concern. It has been stated that judicial discretion allows for consideration of the offender, the offense and other relevant, influencing factors. The offender's character as an individual, almost as a separate entity from the crime, and his behavior both in relation to the crime and previously have potentially significant influence.

It is valuable to examine existing explanations of how judicial decisions are arrived at in relation to these influences. Attribution theory (Heider, 1958) helps shed light on the justices' decision-making processes, where it is assumed that offenders have character traits attributed to them (Fitzmaurice & Pease, 1986) " People underestimate the impact of situational factors and overestimate the role of dispositional factors in controlling behavior," according to Fitzmaurice and Pease, (1986, p. 18). In their research they found most judges believed people are inhibited from committing crimes because of

moral beliefs and fear of social stigma, both personal rather than situational factors (p. 19). They also point out the tendency of a false consensus bias on the part of judges, in interpreting the behavior of offenders, assuming that their own hypothetical response to a situation that resulted in the crime being committed is the appropriate response, and any deviation is inferred to be due to a personality fault.

Shaver's work from 1975, although not recent, explored a number of applications of attribution theory to the relationship between the judge and the offender and the discretion in the decision making process (Shaver, 1975). Shaver focused specifically on how attribution theory accounts for explanations of responsibility. He stated that when causality is not easily identified, as simple cause and effect in the commitment of a crime, the sentencer is required to attribute some other explanation of responsibility, and will consider factors that are within their own realm of interpretation of the world. These attributes will vary with the sentencer's sense of affiliation with the offender, which is interpreted as their ability to see the offense as if it was their own. Again, the further the sentencer is from affiliating with the offender, the more likely the sentencer will turn to nonfactual and moral reasons.

Shaver (1975) also cited the factor he called, distortion in the motivation of the assessor, as a potential influencer in sentencing decisions. He pointed out one such distortion as the belief in a just world. This distortion is a means of managing the dissonance created for the justice from inflicting suffering in punishment, and yet seeing himself as a morally good person. Such a distortion causes the sentencer to determine that a person on whom they are inflicting a sentence must be a morally bad person, or they

would not be receiving the sentence, and thereby alleviating the justice of personal responsibility for the sentence decision. Shaver termed this, defensive attribution.

The issue of judicial discretion and decision making is, according to Miller (1999) a moot point. Miller summarized and concurred with the judicial position outlined in Feeley and Rubin (1998) in stating that judges engage in what is described as soft policy decisions on a regular basis, and that it is legitimate for them to do so. Soft policy is policy derived from other than authoritative texts, and includes policy derived from case management. This reliance on soft policy has resulted in the judicial practice of weighting sentence served in incarceration prior and post conviction, allowing a credit of 2:1, that every day served incarcerated counts for two in the calculation of actual time to be served in some jurisdictions, where facilities are limited (Ferenc, 2003) The conclusion would then be that judicial discretion is intact to some degree in sentencing (Bazemore, 1994; Misner, 2000.)

Offender Behavior as a Component of Sentencing Consideration

It has been established that the judge's belief in the concept of the offender's culpability and responsibility for the crime is central to the sentencing system. One of the frequently mentioned considerations in judicial decisions is the offender's character, which is illustrated by his behavior, in such examples or demonstrations as apologies and showing of remorse (Weisman, 2004). Those who are believed to regret their actions are viewed as more worthy, more deserving of compassion, and more entitled to sentence mitigation than those who have violated these norms but are perceived as not regretting

their actions. What role do these demonstrations of the offender's personal character play in mitigating the justices' final sentencing decisions?

While responsibility for the offense is the particular focus of the trial portion of administering justice, it carries also into sentencing, and the relationship between offense seriousness, victim impact, offender characteristics and culpability are 'intricate,' again, because of attribution theory, according to Fitzmaurice and Pease, (1986, p. 16) and the natural tendency for humans to interpret behavior using their own values.

The judge's assessment of the offender's moral responsibility is then a factor in the sentence determination and frequently reflected in the sentencing statement. Judges are determining moral guilt as well as contextual responsibility.

There is also a recent tendency to view crime as more a moral issue rather than a utilitarian concern, at the same time as a contradictory accompanying shift in looking at punishment as less individual and more in line with retributive theory and just deserts (Misner, 2000). Devlin (as cited in Fitzmaurice & Pease, 1986) stated that, " …the degree of moral guilt is regarded as an important determination to the severity of the sentence and makes it even more compelling for us to look at the meanings of this concept" (p. 116).

The offender's behavior is a means of reaching what Tavuchis calls the "perceived necessity of an account" for the offense (Tavuchis, 1991, p. 6). What do judges have to use as references in their assessment of an offender's moral guilt? They are dependent on their ability to correctly interpret the offender's character, through his behavior, and his response to the justice process:

> The degree of moral guilt is not the only determinant of the severity of the sentence but is universally regarded as an important one. It manifests itself in two ways. Firstly in the gradation of offences in the criminal calendar [code]: in order of gravity they are not arranged simply according to the harm done. Secondly, by taking into account the wickedness in the way the crime is committed: sentences for theft are not graded simply according to the amount stolen nor even according to more refined methods of estimating the harm done.
> (Devlin as cited in Fitzmaurice & Pease, 1986, p. 123).

So in fact it is the offender's morality, being judged along with the offense in the sentencing determination. All information about the offense, the victim and the context has been made available. A process is initiated where the justice considers aspects of the offender that will eventuate in a sentence. Some of these aspects are directly related to the offender's attitude to the crime and the court: his taking responsibility for the crime, pleading guilty, and admitting wrongdoing, demonstrating an appropriate response to the moral reckoning mentioned above.

Offender behavior that is contraindicated in mitigation is the opposite of the kinds of behavior that show willingness to be morally responsible; not pleading guilty, showing no remorse, or lack of empathy for the victims or the state will have an antagonistic impact on sentencers (Weisman, 2004). For the offender who believes he is not guilty, if convicted, his behavior will be used to demonstrate why no consideration should be given to mitigating the sentence. Weisman expressed his concerns for the wrongfully convicted, whom consequently are punished even more severely, without possible sentence mitigation that results from more cooperative offender behavior (2004). Such a concern calls into question the consideration of any behavior of the offender as a mitigator.

Others would concur with Weisman, but for different reasons, that there is no room for consideration of the offender's morality, or even responsibility in sentencing decisions. B.F. Skinner (1971) highlighted what he believed the misinterpretation of behavior as autonomous, the various influences and attributions impacting on selecting any kind of behavior, and a person's actual inability to be responsible for their own behavior. He posited the concept of the autonomous human is a device used to explain the unexplainable, and is created from ignorance. Skinner believed that knowledge erased belief in human autonomy (1971). Skinner's rejection of the concept of free will and responsibility also included rejecting punishment for behavior with more focus on effecting change not through determining culpability as an attribute of the offender, rather by changing the environment of the offender.

The Return of Shame in Punishment

In keeping with the current political and philosophical perspective of crime there has been some implementation of moral sanction, or shaming in sentencing, away from simple utilitarian crime management, in order to, in the words of Nussbaum, "revive the blush of shame" (2004, p. 227). There is a widespread dissatisfaction with existing punishments according to Massaro (1991) that have driven some judges and communities to seek alternatives to the growing use of prison and parole. The rising numbers of incarcerated adults, the inability to ensure neighborhood safety, and the public demand to reduce recidivism have all been part of that frustration with the current system and the search for alternative sanctions (Braithwaite, 2000).

There is a resulting rise in the use of shaming sentences and punishments range from the "mundane to the Byzantine" in their design and purpose (Book, 1999, p. 653). Justices, left without formal guidelines or strategies, have freely created their own punishments, which are either more closely befit to the crime or deliberately and punitively humiliating to the offender**.**

Degradation, Shaming, Remorse, and Apologies

Responsibility and accountability, two words that form an underlying theme in evaluating offenders are connected to the moral emotions of shame and remorse. This theme speaks to the moral judgment of people; the ability to know right from wrong and behave accordingly. Moral development deals not only with an individual's development of self, but also our ability to live in society.

. Shame is one of the emotional responses associated with moral development, along with guilt and embarrassment (Alpert & Spiegel, 2000; Braithwaite, 2000; Eisenberg, 2000).

A better understanding of the role of shame is an important part in responding to such behavior. There is some agreement that the word shame originated from a root that had the meaning of covering. And it is accepted that covering oneself is seen as a shame response to a sense or feeling of being exposed (Lewis, 1971). Shame has been defined as a blow to self-esteem, a feeling of pain or degradation brought on by the awareness of having done something incongruent with one's self image (Lynd, 1958). The feelings associated with experiences of shame are painful as they highlight traits that we hold as

part of our identities, but of which we are anxious to keep concealed, both from others and from ourselves. Shame is in fact an emotional expression in an attempt to conceal our own lack of self esteem. (Alpert & Spiegel, 2000)

These definitions agree that shame is a form of emotion, a negative affective state, a painful emotion that involves seeing the entire self as negative or inferior. Shame has been called one of the self-conscious emotions because it is related to self-evaluation (Eisenberg, 2000) but it would appear to have both a moral and non-moral meaning. Words associated with shame include dishonored, disgraced, as well as ridiculous and indecorous (Oxford Dictionary, 2004).

In understanding shame, there is recognition of a social relationship. Shame exists in a social context, whether or not there is actually an audience present at the time (Eisenberg, 2000). Shame is experienced by one who has been offended into entering into such an affective state (Lewis, 1971). The social factors that arouse shame are the presence or perception of criticism, ridicule, abandonment and scorn.

Shame is particularly felt when the discrepancy between what is expected by oneself and by others, and what is reality is part of a deception of others, when that deception is revealed. When exposure occurs, the tendency is to conceal the discrepancy even further, and hide from those that have witnessed the shame. (Alpert & Spiegel, 2000) But the true exposure in shame is to oneself.

Shame is a separate entity from the other self-conscious emotions such as guilt and embarrassment. Embarrassment is the response to specific situations, not necessarily related to morality, where one is exposed at a disadvantage to how one would like to be

perceived by others. Embarrassment is usually transactional, in that it is related to a specific event at a certain time, and dependent on the event occurring within the perception of some audience (Tangney, 1998).

Guilt, while considered a higher order emotion, and more related to moral values, is a personal interpretation that may be independent of any external event or actual immoral activity, and therefore may not be reliable as a driver of moral behavior. Guilt is more socially aware than shame, in that guilt is an emotional response to others, which triggers some sense of responsibility, as an expectation of self, and sets the grounds for a social response. Guilt is then both situational and less inner focused. Guilt can exist independent of moral reason (Tangney, 1998). The separation of guilt and shame from each other, while difficult, has been defined as the difference in degree on focus on self, according to Lewis (1971) and Tangney (1998). “When shamed, an individual's focal concern is with the entire self. A negative behavior or failure is experienced as a reflection of a more global and enduring defect of the self. The shamed person feels worthless and powerless.” (Konstam, Chernoff & Deveney, 2001, p. 26)

According to Eisenberg (2000) guilt is the more moral response in that it is focused on the incident of the transgression, and triggers restitutive reactions. These include confessions, apologies, the need to make amends, to make the situation normal or better. Shame can be experienced without an active restorative response and is more focused on self-assessment of the evaluation or status in front of others (Ferguson et al., 2000).

There is some support for the idea that guilt and shame occur together, in moral development in children (Ferguson et al., 2000). Conflict that triggers a shame response occurs when individuals participate in behaviors that are incongruent with an internalized set of rules for behavior that they have adopted as acceptable, or what Heider (1958) called their "ought" behaviors, based on what they believe they ought to do (p. 218). This set of beliefs form their moral values, and these values govern their activities.

Other cognitive theories of moral development highlight the awareness of right and wrong, good and bad, progressing in developmental stages, starting from an initial awareness of negative consequences that occur very early on, at the ages of around two or three years old (Thomas, 1997).

The issue of understanding consequences, the effect on others, and the ability to use empathic reasoning to relate consequences of one's actions to an effect on others is part of that moral development. That in turn over time develops to a level where it influences moral behavior, independent of external monitors. It is that ability to empathize and sympathize that generates a guilt response. Guilt has been shown to highly correlate with empathic response (Eisenberg, 2000).

Shame could be seen to be a factor in influencing moral behavior in that shame generates a fear of offending propriety, what Plato called, "that divine fear that we call shame" (translated by Rouse, 1999). However that avoidance behavior in the young child is still motivated by the moral standards of others and concerns about consequences to oneself, and not an internalized moral conscience. In this it is a lower level motivator of moral behavior.

There are cultural differences in the display of different emotions and in standards of moral behavior. The expression of shame is not as accepted as the expression of guilt and remorse in Western society. Expected expressions of moral emotions are significant, because according to Markham and Wang (1996), the norms or rules about emotions are thought to serve as a kind of glue that holds a society together. In the West, demonstrations of emotion are encouraged as expressions of sympathy and empathy, such as in part of an apology.

Shame has not been shown to be associated with strong empathic reactions, which would be in keeping with the self focus of shame as opposed to the other focus of guilt. In fact, shame has been related to a discharge of hostility against the other, and aggression, both blatant and latent, and may trigger anger that is played out on others (Tangney 1996). Konstam and her colleagues (2001) cited Leith and Baumeister, and stated:

> Defensive externalization or blame lessens the pain of shame in the short run by reducing the self-focus and negative affect associated with shame. The person who is shamed may withdraw or may react with a hostile, humiliated fury, reactions that do not provide opportunity for empathy. (Konstam, Chernoff, & Deveney, 2001, p. 26).

A test for assessing shame in an individual has best been documented by Tangney, with the Test of Self-Conscious Affect, (TOSCA: Tangney, 1992). The test uses self report of cognitive and behavioral responses to shame and guilt. It uses subjects' responses to every day life scenarios to determine shame proneness and guilt proneness.

Empirical research shows that while guilt and sympathy are believed to motivate moral behaviour and play some role in its development, shame is not by itself as closely

or easily connected. (Konstam et al., 2001) Guilt and sympathy have been found to be significant emotional responses for influencing moral behavior, and assist in the internalizing of moral values. Guilt is an activating emotion that generates creative solutions to reduce guilt feelings. However shame is passive in generating positive actions. It is self-debasing, and does not offer the positive redeeming opportunities, a factor that seems to be ignored in shaming offenders.

It would also appear that there is a shame cycle that once engaged, spins out of control. Being involved in a shame experience results in humiliation (Miller, 1993). That leads to shame toward self, which triggers anger toward the one who is imposing the shame, which can lead to aggression toward the other person, and further anger at oneself for being aggressive, which is just further reason to feel shame (Alpert & Spiegel, 2000).

Effective Use of Shame in Influencing Moral Behavior

If shame does not directly relate to moral behavior, is there any role for shame in influencing the kinds of behavior society is trying to encourage? Braithwaite (2000) speaks of shame not only as an emotion experienced by an individual in a certain social situation, but as a social response that is communicated by society to the offender:

> Societies have lower crime rates if they communicate shame about crime effectively. They will have a lot of violence if violent behaviour is not shameful, high rates of rape if rape is something men can brag about, endemic white-collar crime if business people think law-breaking is clever rather than shameful. (Braithwaite, 2000, p. 281)

The social connection between shame and the system is in the expectation that being involved in antisocial behavior or a criminal offense is in itself shameful, and

should elicit some response. The kinds of responses that are expected are restitutive in nature. This might include seeking forgiveness and looking to rebuild relationships. According to Alpert and Spiegel (2000) these activities will help the individual defend against feelings of self blame and worthlessness. This is more what society believes an offender should be feeling as a shame response to their antisocial behavior, than the actual emotion response experienced by the offender.

The value of a social sanction of shaming would then be to tap into early level moral emotions and the offender's fear of exposure and dishonor at the hands of close society. The use of shaming in this manner is dependant on: a) a well articulated and communicated standard of expected moral behavior, b) a swift and public response for noncompliance and, 3) social cohesion that will actually impact on the status of the offender (Braithwaite, 1999). Shame is then an extrinsic control on moral behavior by virtue of threatened potential negative sensation, in short, aversion. Braithwaite (1999) described the act of shaming as a means of making people responsible for informing offenders just how resentful they are about the impact of the offender's criminal behavior

Shame is a pivotal concept in Braithwaite's theory of reintegrative shaming (Braithwaite 2000). He distinguished stigmatizing shaming, which reduces an offender's self image, degrading and humiliating the offender, from reintegrative shaming, focusing on the offensive behavior, not on the offender, within a framework of respect for the offender, a good person who has done a bad deed. Braithwaite (1999) summarized his theory by proposing that societies that take crime seriously but respond in a manner that is forgiving and respectful will have low crime rates, while societies that respond in ways

that degrade or humiliate offenders will have higher crime rates, a thesis supported by Margalit's (1996) claim that decent societies do not use institutions to humiliate their citizens.

It would appear in summary, from Tangney's work (1991) that shame as an emotion is only effective in influencing moral behavior in a positive manner where there is a basis of moral character and values to draw upon. If there is no shame attached to participating in anti social behavior, there will be no inhibition by any negative emotional response.

Shame in the Justice System

Ashworth and Wasik (1998) determined, "The criminal law (even when its responses are non-punitive) habitually wreaks such havoc in people's lives, and its punitive side is such an extraordinary abomination, that it patently needs all the justificatory help it can get" (p. 32). Historically, shaming and humiliation have not always been associated only with criminal behavior. Visible and religious minorities, alternative life styles and sexual orientation and other behaviors or human variations have been subject to systemic shame and humiliation ensconced in law (Hart, 1963).

Both public shaming and community shunning, a response that resulted from identifying a citizen as having behaved in a manner that should differentiate and isolate them from the proper community, were popular as means of punishment in 17th century colonial America, where jails and prisons did not exist. Shame punishments were deliberately staged as public exhibitions, in centrally located places, such as town squares, or in front of churches, and engaged the community in participating in

denouncing the wrong values of the offender, a person known to them in their own community. Many of these practices were given up in the era of penal reform and the growth of urban centers in the 18th and 19th century. As the goals of reform and rehabilitation for criminals came into play, offenders were offered an opportunity to do penance in solitude instead of in public, resulting in the development of penitentiaries, originally religious communities of penitence, where contemplation and change could be achieved (Book, 1999).

Rehabilitation fell out of favor in the 20th century, due to largely disappointing outcomes, coupled with a quickly growing society that could not and still cannot accommodate the demands for individualized programming that is needed for quality rehabilitation. With growing concerns about safety and an eye on political expediency, retributive justice has gained acceptance to fill the need. Incarceration has been seen as at least a temporary means of gaining security by keeping offenders off the streets (Book, 1999). The integration of shaming into the retributive system is not new, but a variation.

Societies inflict shame on their citizens, and at the same time provide "bulwarks" that protect citizens from shame, according to Nussbaum, (2004, p. 223) and the law plays a significant role in these processes.

The key concept in discussing shaming in the philosophy of retributive justice is the relationship between guilt and punishment. To reiterate, the purpose of punishment is to inflict suffering on the guilty, while keeping within the proportionality of the offense. Massaro (1991) summarized the retributive perspective in his statement, "'an eye for an eye' is the proper redress for a crime, in order to set right the moral balance" (p. 1891).

The pure simplicity of shaming in retributive thinking makes it very attractive as a response for criminal actions and explains the rise in its use over the past thirty years, as both public and the judiciary's disenchantment with other crime management options has escalated. Misner (2000) warned, "The policymaker who does not acknowledge the centrality of retribution, and the attraction that retribution has for the general public, does so at her own risk" (p. 1303).

The traditional retributive justice system communicates shaming in practices and processes. Offenders are isolated, labeled, humiliated, and uniformed in the clothes of the penile system. These strategies influence offenders to experience shame, and to reject those representatives of society who are enforcing it, the criminal justice system and its agents.

This is the basis of Sutherland's argument in his theory of differential association (as discussed in Tittle & Burke, 1986). The offender, in order to reduce shame, affiliates with those to whom the offensive behavior is more acceptable, such as other criminals, and the actual activities that are shame related might be inverted, so that to the criminal subculture, law abiding behavior is shameful. Braithwaite (2000) agreed with this design flaw in the traditional criminal justice system, and said that mainstream law and order cultures are highly stigmatizing, becoming natural incubators for criminal subcultures that allow offenders to find pride, the opposite of shame, in their actions (p. 281). Braithwaite posited those who are closest to the offender, and have had a role in creating the moral parameters are in the best position to respond; the farther away the

social sanction from the individual's experience of moral values, the less effective that response in triggering the offender to feel shame.

Humanistic reintegrative shaming is based on the premise that people do not stop seeking parental approval. Humans maintain a belief that in parental relationships, there is the potential for unconditional positive regard. It is the act of close social shaming, as opposed to the experience of punitive shame that may be the more effective in influencing behavior. To date restorative justice practices are not mainstreamed, but rather seen as affiliated alternatives in special cases (Roach, 2000).

During this most recent period of tough on crime, restrictive sentencing legislation, legal arguments and utilitarian considerations had driven out any moral components of sentencing decisions, and in a backlash, both communities and judges have returned to requiring some form of moral response be integrated into justice administration (Posner, 1998).

On this basis, when the law uses shame in any capacity in managing criminal behavior, it is drawing on a grounding of the individual's moral development, and socialization from early childhood, and the belief that in each individual, there is an internalized capacity for moral reasoning. Without that grounding, there is no capacity for the individual to experience shame, or humiliation, and the potential value of shaming is lost as an instrument of punishment, deterrence, instruction or reform, any of which is used in argument to support the use of shaming in a response to crime. This fundamental consideration is significant for the use of shaming under any philosophical perspective.

There are a number of pre-existing conditions that must be present in order to use

shame effectively in sentencing according to Massaro, (1991): 1) The offender must be a member of an identifiable social group or community, 2) the offender must feel a negative social impact to their own status in that social group 3) the shaming must result in the group disengaging from the offender in some meaningful way, 4) the offender must fear or feel the impact of the group's sanction and withdrawal, and 5) there must be some way of the individual who has been shamed to regain social acceptance after a period of time, or, in lieu, be permanently rejected and isolated from the group. Under these conditions, shaming has potential impact on an individual's future behavior.

One of the weaknesses of judicial sentencing is the very human tendency for judges to use their own frame of reference and their moral beliefs and values in determining case outcomes (Fitzmaurice & Pease, 1986). Thus the determination that any given activity or punishment will be perceived by the offender as shameful, or humiliating is also based on the judge's experiences as the example of the social norm.

In contrast, Dan Kahan (1997) argued that shame penalties have a certain power as an expression of society's values, and that public humiliation makes a statement. He posited it is the inability to hide from public scrutiny, sanction and stigma that come with shame, that do not exist even in imprisonment. Kahan is a strong proponent of shaming relative to other alternative sanctions because of its strong social influences.

Braithwaite (2000) would appear to agree with Kahan. He stated:

> Societies have lower crime rates if they communicate shame about crime effectively. They will have a lot of violence if violent behaviour is not shameful,

> high rates of rape if rape is something men can brag about, endemic white-collar crime if business people think law-breaking is clever rather than shameful. (p. 281)

Punishment, deterrence, public safety, instruction and reform, are all arguments put forward by proponents of the use of shaming punishments Opponents of shaming have taken a stand that shaming is ineffective in any capacity as a justice strategy because many offenders simply do not care (Whitman, 1998). Tangney (et al., 1992) concurred, stating, "I think [shaming is] going to exacerbate the very problems that these judges are trying to resolve," (p. 474). Massaro (1991) has cited examples of recently imposed shame punishments. The use of signs or labels indicating the status of the offender as a convicted criminal are common sentences, in the form of bumper stickers on cars or distinctive license plates. Shirts offenders are ordered to wear with printed statements, sandwich board signs worn in public locations, offender purchased advertisements in newspapers, or on public billboards, and publishing offenders' names and offenses on internet sites are all mentioned. This can be accompanied with court orders to perform community work while attired in the identifying sign or clothing.

Shaming can also take the form of court ordered public apologies, oral or written, offered in court, in public or community settings or in newspapers. All of these with mention of the offender's crime and conviction.

Ideally, for retributivists' purposes, guilt and shame would be closely tied together (Tangney et al., 1996). Shame is, in moral terms, supposed to be a self-reflection of the guilt of having wronged another. The recent administrative practice of deferring criminal trials for scheduling reasons, sometimes for months or even years, and then

incarcerating the offenders, away from the communities they live in, has resulted in the uncoupling of guilt and shame (Braithwaite, 1999). Shame requires an audience of known and loved ones, and as prison terms have grown in length and distance, shame opportunities have diminished. Some think this is a loss to the system (Kahan, 1997; Whitman, 1998).

Shame sentences are beautifully retributive according to Whitman (1998). They form a merited response to the offense. They fulfill a traditional purpose of criminal sentencing that was outlined by Lord Devlin (as cited in Posner, 1998) in focusing not on utilitarian concerns of costs and benefits but on morality. Posner outlined the historical use of retributive shaming in colonial America, where small town communities made public denunciation of offenses, public humiliation and shaming effective, as a strategy to manage moral behavior of citizens. The use of stocks and pillory, distinctive letters sewn on to clothes, maiming and branding all identified offenders, causing offenders physical injury, emotional distress, psychological damage and social stigma. Public demonstrations of remorse were also part of the justice process. Offenders would verbally declare their guilt, and remorse, mostly in religious settings or in front of town elders. "Such scenes were 'criminal justice as social drama,' punishment as theatre. Public rituals of this kind in a face to face community served not only to articulate moral lessons to the offender and the community generally, but also to legitimate the system of criminal justice" (Posner, 1998, p. 1871).

Massaro (1991) posited that shaming sanctions fit into this new brand because

they are designed specifically to make the offender's conviction and punishment a public spectacle, and more significantly, to trigger a negative self-concept in the offender. He stated that in shame punishments, public embarrassment and humiliation are not consequences of the punishment, but rather their principle purpose.

Some retributivists would argue with Massaro, and say that shame is only a potential side effect of any punishment, and not reliable as a punishment in itself. Because shame must be experienced by the offender, it is impossible to qualify or quantify the experience of shame, and it is therefore unreliable for purposes of the evaluation of the amount or form of punishment being commensurate to the crime.

Others argue that shame is a reasonable community response to offensive behavior and suitable as alternative sentencing, for both economic and social benefits (Kahan, 1997). It costs less to sentence an offender to a form of public humiliation than to incarcerate them for even a brief period while providing an opportunity for processing what Massaro calls, society's "moral calculus" (Massaro, 1991, p. 1893).

Is shame then a reasonable substitute for other forms of punishment and in what quantity? For retributivists, it can be seen to have punitive value, on some comparative scale. It is difficult to compare different forms of punishment to determine actual value, and shame punishments, as with other punishments, are just as susceptible to being unreasonable, disproportionate or inhumane responses to criminal offenses (Nussbaum, 2004).

The legalities of using shame punishments are another concern. Appellate courts have frequently struck down shaming as a form of probation, according to Book (1999)

on the grounds that it is an abuse of judicial discretion. This argument, Book posited, is based on the interpretation of probation only as a means of rehabilitation of an offender. If shaming is perceived as a form of punishment, the inclusion of any punitive aspect that is not in a statutory list of probation activities is outside of the current justice system and the judge's authority. Likewise use of shaming in punishment has been challenged on statute (Book, 1999)

The inclusion of all shaming activities in prohibition from probation does not disqualify it from being accessible to judges, but has limited the judicial use of shaming and made it subject to challenge. It may require what Book (1999) has called for; a redefinition of punishment and probation to accommodate shame punishments as an alternative to incarceration within the sentencing component of case determination.

Book thought it critical to clearly define the use of shame as punishment with standards and limitations. The risk, he suggested, of not clarifying and codifying shame punishment is in indiscriminate judicial case determinations that can become, "tainted with dangerous vindictiveness and vigilantism" (Book, 1999, p. 653).

Then, it would be appropriate to use shame as punishment, in sentencing, ignore the rehabilitative potential, and focus on the moral message and social stigma of exposure to provide an adequately severe response. Book (1999) believed that while shaming should have retributive goals, it in fact had more of a restorative than punitive effect. He stated, "Ultimately, shame punishment is good for society because it allows offenders to return to productive lives without the stigma of prison, and it provides the public with

some tangible evidence that the offenders are paying their debts to society" (Book, 1999, p. 654).

Some authors have proffered shame is the only way for a community to express its outrage at offender behavior. Stryker stated, "Shame has a moral clout lacking in fines or community service; it is cheaper than prison" (Stryker, 2005, p. C-3). Kahan (1997) agreed and posited that shaming is both cost effective and politically popular, and is rising in use in the system because people want a form of moral condemnation in punishment of offenders.

Just being involved in a criminal charge already triggers shame punishment, in media reports, community response and shunning of an accused (Berk & Rossi, 1997). The existence of a criminal charge then by itself transposes the individual to a category that is segregated and in Goffman's (1963) categorization, subhuman, not worthy of dignity afforded to upstanding citizens.

Stryker (2005) pointed out the dangers of exposing members of society to shame prematurely, in the publication of names of charged but not convicted individuals, and cites the case in Toronto Canada, where a man who was publicly named as being charged in a pornography prosecution, but later exonerated, committed suicide in response to the stress of being wrongfully charged and publicly exposed.

Because shame has such negative emotional impact, and is perceived to be abhorrent, it is thought that shaming also has the added value of generating public and offender deterrence from crime (Misner, 2000). Can it be determined from these arguments if shame punishments have a place in modern western justice systems, and

crime management? The debate on the use of shame punishment is ongoing, indicating that the final decision has not yet been made.

There is irony in this discussion in that the use of individualized shame punishments is on the rise at the same time that there have been tighter restrictions placed on judges in sentencing by the introduction of state and federal guidelines and legislation that call for determinate sentencing, with little or no room for individual judicial discretion (Etienne, 2004). The impact of these changes is far reaching, with significant ethical concerns about shame punishments, their use and abuse (Acorn, 2005).

Offender Remorse and Shame Mitigators

In specific offender behavior in the remediation of an offense, special attention should be paid to the expressions an offender makes to demonstrate their opinion of themselves and the offense, most clearly viewed in the offender's own response to the charge and finding in mitigation. Shapland (1981) drew a grid of four quadrants in which she divided offender's response, with a vertical axis, representing the offender's view of responsibility for the offense ranging at the top from denial of responsibility to acknowledgement at the bottom, and a horizontal axis representing the offender's opinion of wrongdoing in regards to the offense, again ranging from denial on the left to acknowledgement on the right. On this grid, she graphed the possible positions for the offender: where there is denial of both responsibility and wrongdoing, the offender will give no account of himself or herself. Where there is denial of responsibility but acknowledgement of wrongdoing, the offender will offer excuses. Where there is acknowledgement of responsibility but denial of wrongdoing, the offender will offer

justifications for the offense. And where there is both acknowledgement of wrongdoing and responsibility the offender will offer apologies (1981, p. 49). This grid is useful for delineating the range of response in a qualitative/quantitative format and informs the research design of this current study.

Further distinction between these quadrants, and particularly between apology and remorse, should be made to understand their roles in sentence determination. There is according to Weisman (2004) excessive scrutiny and value placed on remorse as opposed to apology in the sentencing system. The difference, he stated, is in the means of expression, where apologies can be expressed through written and oral communication, remorse must be observed. An apology is in the content, while remorse is in the context of the expression, the apparent discomfort, and distress exhibited by the offender. Remorse reported by a third party, as in defense statements, has reduced impact.

An offender can feel remorse in a number of these quadrants, but the remorse will differ in each section. In a mitigation speech, more than one quadrant of the four may be represented in the presentation.

Remorse as an expression of distress in the offender is meant to equate if not in quality, then in quantity to that of the victim, and create an empathetic relationship between the offender and the court (Weisman, 2004).

Weisman (2004) points out that remorse has been surprisingly under researched and unexplored, even though the attributions of remorse, and particularly the absence of a demonstration of remorse by an offender has been cited as a significant factor in sentencing and parole decisions in Canada and the United States. The demonstration of

remorse appears in psychological assessments as an indicator of normal human behavior and lack of pathology (Sundby, 1998). Those offenders whom are not able or willing to show remorse are considered amoral and sociopathic, their lack of remorse a demonstration of further risk to society. To add to knowledge on the effect of remorse, the National Capital Jury Project in the United States has been examining how jurors determine if offenders who are being tried in capital cases are remorseful (Sundby, 1998). One of the observations highlighted in the project was the jurors' perceptions of the offenders' discomfort as a sign of remorse.

Remorse as a mitigating factor is in fact an exchange of an expression of regret for the reduction in sentence. This expression can take several forms, including: pleading guilty, cooperating with police or prosecution, efforts to make reparations, apologies, and self inflicted punishment, shame, injury or attempted suicide (Bagaric & Amarasekara, 2001). While some of these expressions are mitigators in their own right, they also are components of remorse, expressed as effort to participate in socially appropriate response to lawbreaking. Without clear statutory weight to remorse as a mitigator, judges have continued to apportion sentence reduction using it as the basis across cultures and locations. Duff's theory of punishment (as cited in von Hirsch 1993), a variation of retributive justice looks at punishment as the logical consequence of crime, and with the aim of inducing repentance through the remorseful acceptance of guilt. He highlighted remorse as a means of reintegrating the offender back into the community. If Duff's theory is correct, then remorse is not only a significant mitigator in sentencing, but also central to the very purpose of sentencing offenders. Remorse would not then reduce

sentence, it would replace sentence. There would be no need to punish an offender who has acknowledged their wrong action and undertaken not to repeat it. Duff argues against remorse as a replacement for harsher sentences, and believes that hard treatment and punishment aid in the inducing of remorse and repentance.

It has also been posited that remorse should not be considered as a mitigator because it is a moral response, and outside of the administrative realm of consideration for judges. Bagaric and Amarasekara (2001) argued that regret for having broken the law is the least duty of an offender in response to their offense, and like others who do the least of their responsibilities, there should be no special reward or benefit. As well, they added that with a strong vested interest in reducing their sentence, remorse is the easiest mitigating factor to produce, "since it requires no tangible exertion or demonstrable behavioral change (apart from the saddened expression and perhaps the occasional tear or two) and being purely subjective, it is almost impossible to rebut" (p. 265).

Apologies as a Mitigator

An offender's apology is, in Shapland's words, "a complex account" (Shapland, 1981, p. 48). Similar to remorse, it is an exercise in restoring equity by humbling oneself, and thereby lowering the status of the offender in relationship to the victim and society. It is an expression of personal distress meant to equate to the distress of the victim, in what will hopefully be perceived as being offered in an equal and equitable manner (Walster, Walster, & Bersheid, 1978).

The apology may have several elements, including: expressions of embarrassment, chagrin, understanding of one's error, disavowal and repudiation of the offending act, vilification of self, commitment to change behavior, and the offer of some supply of restitution, or restitution in kind (Goffman, 1971, p. 143).

Apologies in sentence mitigation are separated both in time and location from the offense. In the court setting, the apology is most frequently directed to the Justice, and in fact the offender is directed not to address the victim unless given permission or direction to do so. The time lapse between the commitment of the offense and the apology also influence the interpretation. The longer the time lapse the more the victim develops resistance to the expressions of the offender as non-spontaneous and insincere (Acorn, 2005; Nussbaum, 2004). Therefore the sequence of the apology in the mitigation process takes on significance. The apology cannot precede the account of the offense, the context or the assessment of damages done, or it will be discounted.

In Shapland's (1981) count of mitigators related to offender behavior, she categorized all forms of the offender's attitude that were used in mitigation speeches by the defense. Categorization, included factors related to the offender's cooperation with the prosecution, factors related to the offenders' recognition of wrongdoing, factors in planning for the offender's future behavior to be in keeping with the law through personal changes, factors demonstrating the offender's shame in being in court, and apologies, or similar demonstrations of contrition.

Of these factors, apologies rank as the highest number of mitigators with a total of 37 times apologies were offered in a total of 164 different mitigators offered in

defense/offender speeches before the justice (Shapland, 1981). Shapland noted that the length of mitigation speeches differed where offenders plead guilty to the charge, waiving presentation of evidence in trial, and explained that presenting the character of the offender in mitigation allowed the justice an opportunity to evaluate what had not been observed in a trial process.

Mitigation speeches are most frequently delivered in court by defense counsel, and not by the offender directly (Shapland, 1981). Third party report of offender contrition can act as an additional barrier to the potential credibility of the offender. The dilemma is now created where a justice is determining the moral integrity of the offender without having heard directly from the offender at any time.

If justices are influenced by offender's attitudes, and particularly expressions of shame as a demonstration of moral maturity, would it be to the benefit of the offender to represent him or herself in this section of sentencing process? Shapland's (1981) study included a count of unrepresented offenders in both Magistrate and Crown courts, illustrating the process in managing lesser and more serious offenses. In unrepresented cases only 2 out of a total of 31 cases where offender attitude was one of the mitigators, were apologies and contrition used in the offender's own statement for mitigation in front of the justices (p. 62).

Is an apology only a self serving device to mitigate sentence severity? Tavuchis, (1991) pointed out the possibility when he stated his summary of this cynical perspective, "Apologies only account for that which they do not alter and lay the foundation for future offenses" (p. 7). Clearly apologies are included in mitigation speeches for the purpose of

influencing the severity of sentence, however Tavuchis insisted that apology is more than expediency and the desire to escape punishment. It is in fact self punishment through self-imposed shaming. He differentiated two possible formats an apology can take; an apology of defense, which focuses on the reasons for the offense, and an apology of regret, focusing more on the emotional impact, self shaming punishment. Apology and remorse have both been included as factors in this study for their relation to the sentence outcome.

Compulsory Compassion and the Implications for Sentencing

Does a guilty plea indicate contrition or remorse? Bagaric and Amareskara (2001) strongly posited not necessarily, as did Weisman (2004). A guilty plea may mean there is a strong case on the prosecutor's side and defense wants to mitigate, or that there is a feeling of having injured a victim without remorse for having broken the law.

> However, those familiar with the courts, such as legal representatives, know that it is part of the mythology of the courts regarding offenders that pleading guilty is equivalent to showing remorse and so [the offender] may use these words as alternatives or as taken-to-be alternatives for [apologies], (Shapland, 1981, p. 63).

The offenders' plea is a factor considered in this current study. The exchange of guilty pleas, apologies, and remorse for reduced sentence is an acknowledgement of the offender's provision of safety in return for some freedom. As well, Maslow noted that safety needs often transfer to religious explanations for support. The belief in redemption through confession, and the need for compassion in dealing with human error has often been the motivator in decision making in dealing with lawbreaking (Nussbaum, 2004).

The Effect of Shaming on Judges

Shaming has been discussed as an influence on the offender, and somehow to their eventual if not immediate benefit. Further exploration and discussion is necessary to holistically examine the process of shaming and its effect on the person or body responsible for the shaming activity, the judges that determine sentencing, restitution and punishment. How is a person impacted by the experience of imposing shame and humiliation, in a most public manner on another?

Set aside the argument that criminal offenders are a special category of individuals not worthy or considered as ordinary people. The dehumanization of offenders is not a sufficient argument, but rather the crux of the discussion, that allows any group or individual to be in a position to be dehumanized (Nussbaum, 2004). On a utilitarian basis, if all behavior maximizes personal pleasure over pain, then there must be some pleasure for the shamer, or there would be more hesitancy in taking on this activity (Ten, 1987). Concern for the potential pleasure derived in humiliating others has been central to penal policies and practices, and discussed in penal theory throughout the late 20th century (Zimbardo, Haney, Banks, & Jaffe, 1974).

In response to the argument that shaming is a means of rebalancing social equity by further disempowering an offender whose criminal action Markel (2001) said had taken disproportionate advantage of liberties, Ashworth and Wasik (1990) pointed out that criminal law was first established, not as a means to respond to crime, but as a means of controlling the actions of the victims of

crime, and ensuring that personal revenge and vendetta are not used to resolve offenses. The law provided a displacement function, as an alternative to the natural inclination to rebalance equity through individual retaliatory actions. There is no reason to believe that this socially organized and operating displacement, using judges, would have less vindictive emphasis on rebalancing equity than any individual's inclinations. Mark Kappelhoff of the American Civil Liberties Union (as cited in Book, 1999) concluded there is no research to suggest shaming is effective in reducing crime, rather, it is "gratuitous humiliation of the individual that serves no societal purpose at all". It would appear, without more research, the current position on shaming is at best less than sufficient to promote shaming as a valuable sentencing strategy for the criminal justice system, and indeed the trend to using these new sanctions can be dismissed as they are by Massaro (1991) as, "misguided spasms of judicial and legislative pique" (p. 1890). Massaro challenged whether western cultural norms and urbanized judicial systems meets the requirements deemed necessary in order for shame to be used effectively:

> I argue that the dominant social and cultural traditions of The United States do not reflect the level of interdependence, strong norm cohesion, and robust communitarianism that tends to characterize cultures in which shaming is prevalent and effective. Moreover, federal and state law enforcement includes no public ritual or ceremony for reintegrating or "forgiving" a shamed offender. Given these circumstances, I conclude that public shaming by a criminal court judge will be, at most, a retributive spectacle that is devoid of other positive community-expressive or community-reinforcing content. Additionally, I hypothesize that these judicial shamings will not significantly deter crime in most urban, and likely many non-urban American settings (1991, p. 1883).

Schadenfreude

It therefore appears the least researched but still significant effects of shame punishments are related not to the offender but to the shamer. Shaming, in diminishing the offender, automatically raises the power and status of the shamer, as relatively better off than the person being shamed (Miller, 1993; Nussbaum, 2004). The sense of moral superiority, referred to eloquently in German as *schadenfreude* (Miller, 1993), explains the sense of satisfaction of seeing someone who is perceived to be abnormally elevated brought low through public humiliation. It may well be, in spite of its repugnance, a normal human response that even social scientists are not immune to:

> So what's new about this? People are people -- they use informal conversation for gossip, innocent or malevolent, for Schadenfreude, for eliciting pity, claiming power, stoking the insatiable demands of some guilt. Is there anything in the free talk of scientists that is of *value,* over and beyond normal letting go?
> (Laszlo & Hoffman, 1998, p. 690)

The discussion of the shamer treads into the territory of judicial mandate and the neutrality of judges and their role in the system. There is a perception that judges have the capacity and the task of objective decision making, which makes their entry into the area of extra judicial sanctions somewhat perilous. Lane (2003) cited this concern expressed by various justices:

> [The] Hon. Cindy Lederman: If we as judges accept this challenge we're no longer the referee or the spectator. We're a participant in the process. We're not just looking at the offense any more. We're looking more and more at the best interests, not just of the defendant, but of the defendant's family and the community.
>
> Cappalli: When judges move out of the box of the law and into
> Working with individual defendants, transforming them from law-breaking

> Citizens to law-abiding citizens, we have to worry. Because what has always protected the bench has been the law…. If we take the mantle of the law's protection off of judges, and put them into these new roles, we have to worry about judicial neutrality, independence, and impartiality. (p. 955)

Public Humiliation as a Judicial Strategy

There has not, according to Lane (2003), been enough research carried out in this field to empirically support using shame or humiliation in punishment, which makes an ethical discussion even more important as a barometer of social norms and standards and a caution against diminishing the individual protections afforded offenders under the various constitutional and charter rights that have been created in western societies. It is important to differentiate between the shame an offender may experience and shame that is purposefully imposed by an agent of the justice system for the specific purpose of causing the offender to experience public humiliation. One is a natural consequence of socialization while the other is a deliberately implemented management strategy, and must be carefully orchestrated and perpetrated. Miller (1993) offered, "If shame is the consequence of not living up to what we ought to, then humiliation is the consequence of trying to live up to what we have no right to" (p. 145). Do judges, as representatives of the justice system, deliberately engage in humiliating or causing offenders to be humiliated in an explicitly public manner through sentencing? What do they say or write in their deliberation that reflects degradation of offenders, beyond the determination of punishment to fit the crime? It might be argued that the term *public humiliation* is indeed redundant and that all humiliation is by its nature public.

The inclusion of the additional descriptive is to differentiate humiliation as an experience from public humiliation as a deliberate judicial strategy of diminishing selected individual's public dignity as a means of social control. Is this practice, as Margalit (1996) has warned, evidence that we are moving further away from being a decent society, with the risk of slipping down a path that will result in further erosion of human dignity and rights? As history has demonstrated with the incremental use of public humiliation in Second World War Europe, as a strategy to dehumanize selected populations, making further and further deprivations of their human rights more socially acceptable because they were sanctioned in legal practice (The Nuremberg Project, 2003). When judicial practices that are normative become institutionalized over a period of time, it sets the stage for systemic integration of these practices the "settling" of practice, not only in law but also across society, in spite of moral or ethical concerns (Nussbaum, 2004).

What Phillips and Grattet (2000) identified as the settling of legal meaning of terms, then dictates subsequent judicial behavior. They cited Friedman's comment, "At any given moment, legal rules and categories exist on a continuum from controversial to settled" (p. 567). These humiliating behaviors, which are not documented as effective for the purposes of criminal reform, may be normatively institutionalized, prior to being settled.

Public Humiliation as a Social Construct

The boundaries of law and justice, social behavior and social systems and their meaning, require more exploration. Social constructs are excellent tools for that exploration. Social constructs facilitate identifying groups of behaviors that have some commonality in their meaning, which is especially important in social sciences because of the specialized interpretation of terms that cross inter-disciplinary fields, complicating the ability to use terminology in cross disciplinary understanding (Phillips & Grattet, 2000). With a more detailed examination of social constructs, defined as the meaning behind the labels of behavior, grouped in logically related clusters, researchers can advance understanding of relationships between different constructs themselves and the disciplines that interpret them.

Foucault (1972) highlighted in his seminal work, *The Archeology of Knowledge,* it is wrong to believe that everything with the same label is the same thing, and in fact our language practices are arbitrary. He termed the study of these formations *archeology*. Using this structural process, *objects* are generated.

Foucault's thesis (as discussed in Creswell, 1998) suggested a post-modern approach to the development of social constructs, with an acceptance of the potential for multiple realities; an iterative process of constant comparison to establish meaning of terms and objects, and room for new constructs to be added to the lexicon.

Shawver (1998) cited Lyotard's definition of postmodernism that seems particularly suited for the exploratory nature of social construct development, and differentiated it from modernist thinking. She paraphrased Lyotard as saying that

postmodernist thinkers hold incredulity toward met narratives and skepticism toward any and all grand theorists who believe they had a final and correct theory or the last word.

In the field of justice studies, Phillips and Grattet (2000) highlighted the relationship between this meaning making and the determining of legal terms, and pointed out that the process of meaning making is a social achievement as opposed to one based on legal rules. The authors also cited Mertz's observation that meaning for legal terms and processes occurs both formally and informally, both inside and out of the legal world (Mertz, as cited in Phillips & Grattet, p. 568). The authors added, "Despite the acknowledged centrality of courts and judicial opinions in the "fleshing out" of legal rules, there has been little research and theory on the social process by which legal concepts are formed, elaborated, and delimited" (p. 568). Therefore, taking a postmodernist approach, there is a continued review and evaluation of processes used in the courts and elsewhere in the criminal justice system as a strategy for defining meaning that can be captured in social constructs that can then be used to examine more closely those very processes. The circularity of the cycle contributes to an ever developing knowledge that is never complete, but always in development.

There is a "legal model" of judicial decision making according to Segal and Spaeth (as cited in Phillips & Grattet, 2000). It is the collection of rules and assumptions about the origin and meanings of terms within the judicial system, and it offers considerations of precedent and plain meaning as common considerations. It also includes the judges subjective sense of balance between what the authors call, societal interests, and the Constitution or body of existing statute that defines rights.

The authors point out there is a gap in the legal model as a means of understanding judicial process:

> A substantial body of research has shown that the legal model fails to consider the influence of judges' political values and ideological commitments on judicial decisions (See Segal & Spaeth 1993; 1996; Spaeth 1995; Segal et al. 1995; Segal & Cover 1989). Such work, however, has been primarily concerned with explaining the objective outcomes of cases (e.g., judges' votes) and is less focused on the social processes through which judges make sense of a legal rule, frame their decisions, select or create justifications, and embed their interpretations of specific statutes within broader systems of meaning. (Phillips & Grattet, 2000, p. 263)

The difference between what Karp (1998) has labeled and delineated as shame punishments and public humiliation is in the determination not related specifically to the offense. The examination of a construct of public humiliation will help identify themes that will be useful for further study and exploration in this important area. To begin to develop a construct of *public humiliation* requires definition of the term and concepts that contribute to it. In the term public humiliation there is a reference to a deliberate behavior that is directed from one person to another or a group, and is meant to be observed by others, thereby capturing the public part of the definition. The definition used in this study and developed in the preliminary stage in a pilot study has been cited in Chapter 1.

Methodology in the Literature

In social sciences, there has been a recent division of labor between theory and research, which has resulted in researchers focusing on technique and theorists focusing

on ideas, leaving the observer to manage bridging the connection between the two (Creswell, 1998). This has proven an unsatisfactory strategy for all concerned.

Feagin, Orum, and Sjoberg (1991) recognized that social research is a social enterprise, not a theoretical one, with social processes being carried out in a social context. The statistical analysis of aggregates has a valuable role in advancing the ability to generalize knowledge with sufficient representative sampling. At the same time, there is ample room in social sciences for study that focuses on researching social interactions, patiently and methodically, one at a time in order to build a complex, holistic understanding of a phenomenon.

This kind of study method, moving from small detail to big picture, intuitively guided and pedantically detailed, does not have firm or clear guidelines. It is evolving constantly and engaged in asking the questions, how, and what, as opposed to why (Creswell, 1998, 2003).

Jupp (1993) supported case content analysis particularly for use in criminology studies, " In providing an illustration of the different parties at work—subjects, researchers, sponsors and gatekeepers—and the way in which they are able to protect their interests, the case study gives an insight into 'what is' or 'what can be'" (p. 146). "…We are thinking, probing and interpreting beings who live in a complex culture and are free, up to a point, to put our own construction on events and act accordingly" (Dallos & Sapsford, 1981, p. 433). Therefore, social constructs are both individual and collectively useful for explanation, analysis, comparison and evaluation. This study uses

case content in the social construct of public humiliation for the purpose of exploring and analyzing judicial sentencing.

Content Analysis as a Research Strategy

Holsti's (1969) work on content analysis noted communication involves deliverers and receivers of messages, and their messages being transferred. Content analysis is always performed on the message. Content analysis is a scientific enterprise, and that is what distinguishes it from other forms of reading text, according to Roberts (1997) and makes it particularly well suited to the purpose of the researcher who wants to better define and understand social constructs; those descriptors that capture a number of social behaviors or ideas into a collective category that can then be used for further understanding, comparison or analysis. The ability to extract themes and categories from content that can help organize and define ideas is an important component of both qualitative and quantitative research. .

Both Creswell (2003) and Tashakkori and Teddlie (1998) described a mixed method approach to this task, using qualitative case data for first conducting a constant comparative content analysis that defines attributes or themes, helping with the development of construct identification (p. 134). That construct is then available for comparing or correlating to other behaviors or variables, in quantitative analysis. This process of combining qualitative and quantitative study into holistic method models is what Tashakkori and Teddlie believe to be the most advanced approach to the science versus nature argument. This holistic method is the research design employed in this study.

The history of research in the justice system has been a point of sensitivity and diverse responsibility, as is ironically illustrated by Wood's allegory of the Canadian Federal Justice system:

> Legend tells of a golden age of research in Camelot (read Solicitor General Secretariat). Then vandals (Department of Justice) sacked Camelot. Renegades (personnel division) energetically eliminated former comrades. A researcher enslaved by vandals composed the haunting lament: "By the Supreme Court Building I Sat Down and Wept." Camelot was abandoned. (Woods, 1999, p. 171)

Case analysis in law is a traditional means of pedagogy, dating from the 1870's direction of then Harvard University's Dean of Law, Professor Christopher Columbus Langdell, his ideal of teaching law as a science, and using case study to "draw conclusions about core concepts based on reasoned examination"(Mcdonell, 2002, p. 68).

Jupp (1993) pointed out, as an argument for the benefit of using case study in criminology, that the very policies and practices that a researcher would want to examine represent specific political viewpoints and positions that have been taken by those in a position of power and authority. The very act of examining these policies and practices could potentially be seen as undermining the existing system.

In content analysis, Roberts cited Laswell's definition: "We do no more than describe what is said according to the usual meaning of language to those who use it and by whom it is assumed the statement is read" (as cited in Roberts, 1989, p. 147). In order to capture both latent and impressionistic values of content, Roberts suggested using the clause as the unit of analysis, and a technique he called *Linguistic Content Analysis*, (LCA), indicating that subjective interpretation of any one coder will be minimized if a

complete clause is considered as opposed to analyzing individual words and attempting to define the context.

For the purpose of construct development, where the individual words "public" and "humiliation" may not appear, it would seem that using clause analysis would be beneficial. Roberts (1989) also highlighted the value of content analysis for identifying "psychological states of persons or groups as the cause of communication and attitudinal and behavioral consequences of communication," both of significant value for construct development related to social behavior (p. 169). The use of this methodology seems well suited for a study of this nature.

Content Analysis of Sentencing to Define the Construct of Public Humiliation

The construct of public humiliation must be defined and expanded on as a foundation for research into this part of judicial behavior. Theory and research show judges use the sentencing speech to express their personal impressions and interpretations of the offender's character, as well as to mete out the determined punishment in an address the offender (Karp, 1998; Shapland, 1981). The construct of public humiliation was generated from the content analysis of a preliminary study of sample cases, which extracted qualitative source. The data could be analyzed and categorized, forming a taxonomy of public humiliation. The construct, once established and then further categorically identified as either present or absent in the judge's reasons for sentencing, is available for use in examining its relation to other components of sentencing.

The construct of public humiliation itself is not flattering. It is abhorrent to most individuals to consider themselves as humiliators. It identifies an individual as being

either at best in the tough position of imposing negative sanctions, or at worst, sadistic (Miller, 1993). Miller summarized the difficulties with particular focus on research alternatives for humiliation, and concluded that we are better to capture the activities of state and law and what he called their structural coercions, than to attempt to capture the lived experiences of humiliation. He believed that the nuanced experiences of individuals are largely impossible to capture or recover, or can only be collected as impressions.

There is also the social perception of judicial impartiality and objectiveness to consider, and while there is evidence that judicial decisions and even legal definitions are influenced by individual perceptions, the judicial authority is still deeply lodged in respect for the fairness of the process (Lippke, 2003; Shapland, 1981,). This perception would generate an interviewee effect if a researcher chose to interview subjects and impair using interviews or observations as a data collection strategy.

Examining Judge's Reasons for Sentencing

Examining judicial decisions in sentencing is a viable alternative to observing judicial behavior. The actual procedure for sentencing is governed more by precedent than statute, reflecting the overall failure to make policy, either formally or informally for criminal defense counsel systems (Miller, 1999). This study assumes that a purposive sample of cases and the judges reasons for sentencing is not necessarily representative of all cases, or all courts in Canada, however they are a sample of practices that exist, and are consistent within the provinces.

The sentencing of a case is the expression of the justice's thoughts, explanations, justifications and impressions, and direction to the offender placed within a framework of

the judicial system, made public (Lippke, 2003). It is therefore a logical location to begin to research the meaning of concepts and constructs used by them as representatives of the justice system, as opposed to using collected interviews of judges or offenders. There is always the danger of any researcher in asking any question, and how the question is asked, "And how we ask and answer them types us politically and dispositionally: as Whigs, romantics, conservatives, communitarians, libertarians, feminists, pessimists, optimists reformists or revolutionaries" (Miller, 1993, p. 90).

Alternative Research Methods

A number of possible data collection strategies and research methods were considered. Interviews of judges would perhaps add some in depth individual perspective. Surveys would not be a preferred choice if the goal were to capture nuances of judicial thinking. The limited information collected in a survey might possibly miss important considerations.

Content analysis of cases is the most reasonable method. There are a number of sources for case findings. Most courts now not only keep records, but also publish databases with case outcomes and findings. These are a rich source of information collected in an accessible and searchable format to support research and analytical initiatives. From this database it is also possible to identify the gender of the offender, the age, the offense that has been charged and the plea entered.

Using Case Review to Bridge the Gap between Theory and Research

While the division between theory and research appears to be widening, several social scientists are resisting the need to choose between these two aspects, and are deriving a means of integration. In this study, using qualitative case data to develop a social construct for input in further quantitative analysis is an example of that integration.

Benz and Newman (1998) did not endorse making a choice between large-scale generalizability and small-detailed evaluation. They promoted a balance between quantitative and qualitative methods, behaving interactively, and using inductive and deductive processes at different points in time.

Tashakkori and Teddlie (1998) concurred that there is no need to promote one method of inquiry over another, that all inquiry is subject to some form of protocol, methodology, peer review, and other benchmarks of rigor and the opportunities to mix methods in research design enriches social sciences.

Creswell's (1998) definition of a case was not as an object of study, but as a "*bounded system"*, [italics from source], bounded by time and place - a program, an event, an activity, or individuals" (p. 61). Criminal cases situate within a context of a physical, historical, social and economic setting.

Stake (1995) outlined that cases to be studied can be selected because of some uniqueness, in what he labeled, intrinsic case study, or because they focus, as in this study, on an issue or issues that the cases illustrate, such as public humiliation, in what he called instrumental case study. Case content review allows the researcher to observe a

social phenomenon in its natural setting, the "flesh and bones of the everyday life world" (Feagin et al., 1991, p. 7).

Data Collection

Three modalities of data collection from cases were considered and compared: interviewing participants, participant observations and content analysis of secondary documentation.

Interviews as a Data Collection Strategy

Interviewing participants has been encouraged by Dallos and Sapsford (1981), Yin (1989), and Tashakkori and Teddlie (1998). They posited that the proper subject matter for criminology studies is the meaning of actions, and not the causes of any specific behavior, and that interviewing subjects provided the best opportunity to discover meanings, even proposing researchers using verbal cues to stimulate focused subject response in a semi structured manner.

While there is strong support for the use of interviewing, there are a number of possible limitations to this strategy for data collection, that fall into the categories of interviewer effect and interviewee effect. Where the case is an event, program or situation, the interview is usually retrospective to the event. The subject's recollection, and interpretation of that recollection may be influenced by a number of factors, including: their desire to portray themselves in a certain manner to the interviewer, their desire to be seen by the interviewer in a particular light, their ability to recall, the interviewer's presentation and personality, and the subject's affinity or lack of affinity to the topic (Tashakkori & Teddlie, 1998).

This area of concern Tashakkori and Teddlie (1998) called *participant reactivity.* Goffman (1971) forewarned that any social interaction requires individuals to take on roles, and that these roles will be a social face. Other concerns include technical difficulties of recording, time limitations and access to the subjects. The most important limitation of interviewing is in the protocol of questions used by the interviewer. Qualitative research can be easily undermined by leading questions that turn the research into a self-fulfilling prophesy (Creswell, 1998).

Participant Observation for Data Collection

There is a range defined by how much participation in the area is engaged in by the researcher, from no participation at all to insider participant with an ability to influence the outcome (Creswell, 1998). The more the researcher engages in actively playing a role, the more that participation must be taken into consideration in analysis of the data. Participation breeds opportunities for influence, as has been historically evidenced by Elton Mayo's 1930's demonstrations of the Hawthorne effect (as cited in Franke & Kaul, 1978), the influencing of behavior by virtue of subjects being aware they are being observed.

Content Analysis as a Strategy of Data Collection

Content analysis as a data collection strategy in qualitative case review is well suited for social science studies, and in particular studies in the field of criminal justice and social change, because it delves into real human experience at a fundamental level (Creswell, 1998).

Holsti's wrote in 1969 on content analysis, and he noted communication involves deliverers and receivers of messages, and their messages being transferred. Content analysis is always performed on the message (Holsti, 1969). He outlined three possible purposes of content analysis: to generate some inferences about the text itself, to further understand the antecedents of the communication, or to become more aware of the effects of the message (p. 24).

The value of content analysis can be measured in the social value of all verbal and written communication, as one of the key means to educate, transfer values, and group attitudes, and exert social influence, the very core of what makes society function. Content analysis described in a generic way any analysis of narrative data (Tashakkori & Teddlie, 1998).

.Holsti (1969) proposed the most salient quality of content analysis is its generality. The term generality is meant to express that the outcome of content analysis must have some relevance beyond being descriptive. The objectivity of the collecting and the characteristic of the data that results in its categorization are irrelevant if not placed into a theoretical or contextual framework that illuminates something about the message or the messenger, and is related to at least one other datum. The exercise of identifying the words themselves, or counting the number of times they are used are of little significance.

> Such results take on meaning when we compare them with other attributes of the documents, with documents produced by other sources, with characteristics of the persons who produced the documents, or the times in which they lived, or the audience for which they were intended. Stated somewhat differently, a datum about communication content is meaningless until it is related to at least one other

> datum. The link between these is represented by some form of theory. Thus all content analysis is concerned with comparison, the type of comparison being dictated by the investigator's theory. (Holsti, 1969, p. 5)

This extension of content analysis beyond the numbers, to the underlying contextual meaning of the data is referred to as latent content analysis, and requires an additional, subjective interpretation of contextual features of the data, beyond the simple existence of specific words to find the meaning and any latent theme. This concept is also relevant to this study as the hypothesis focuses on the context of public humiliation.

Babbie, (1996) asserted that content analysis of documents and archives is a form of no participant observation because the researcher is observing the outcome without participating in it. Content analysis can be useful to help isolate and identify repetitive themes, concepts and content components.

Roberts (1989) made a significant contribution with a design variation on content analysis, where he changed the unit of study from the word, to the clause, and called the revised method *Linguistic Content Analysis* (LCA). He posited that contextual meaning, or what is termed impressionistic meaning, is better found when words are viewed within the context of a clause. He categorized clauses as to their purposes in communication as being one or more of: perceptions, observations and justifications, and his thesis was that understanding the purpose of the communication, which is made manifest by the examination and categorization of the clause, is a better indicator of intentions of the communication, and social behavior.

His study reviewed published speeches and texts from the Nazi period in Germany during World War II to illustrate the difference in meanings inferred from using

both the traditional word analysis and his LCA method. The results of his study indicated the LCA method was a better source of information for placing content into context, and for interpreting.

Is there then a preferred data collection method? The most reasonable conclusion is the methods should be suited to the cases, in terms of access, reliability, ethics, and, perhaps even efficiency, as well as fitting with the purpose of the study. For this study, linguistic content analysis (LCA) (Roberts, 1981) of court case transcripts from a publicly available database meets these criteria, as well as being eminently suited to the purpose of the study**.**

Social Construct Identification and Case Study Method

Case reviews seem particularly well suited to the purpose of defining and analyzing social constructs; those descriptors that capture a number of social behaviors or ideas into a collective category that can then be used for further analysis. The ability to extract from case data the themes and categories that can help organize and define ideas is an important component of both qualitative and quantitative research.

This concurred with Cotterrell (1996), who posited that social constructs are social phenomena, and can only be understood when developed in their proper social context, as is within a case:

> By referring to the disciplines with which this chapter is concerned as social constructs, I mean to indicate that they are to be understood primarily as social phenomena rather than as intellectual phenomena; that their character can be understood only in relation to the particular historical circumstances in which they exist and is determined not by pure intellectual necessity but by particular social, political, and economic conditions, patterns of institutional organization, and

> structures of power of many kinds. All of this is, from one viewpoint, obvious. (Cotterrell, 1996, p. 42)

It is in the management of any case selected that one can measure the quality and worth of the justice system, especially because Western societies posit equal but individual treatment of each case under the law.

For this reason there is no place in justice for anachronisms, outliers, and anecdotal incidents that vary from accepted standards. The very existence of such cases would evidence the failure of the system, and illustrate how case review is not only desirable but also necessary as quality assurance in justice. Anything that is wrong in any individual case is by definition wrong for all, and must be brought to the attention of the system for further discussion.

Feagin, Orum, and Sjoberg (1991) outlined that the nature of the particular social phenomenon under study can be an organization, a role, or role-occupants, which would support the rational of using this method for examining judges as role occupants, decision makers, in the organization that administers justice (1991, p. 2). Geis (writing in Feagin et al., 1991) defined the appropriate method for studying criminology as a "brew" of scientific and historical approaches (p. 201). Geis posited that there has been a tension between mathematical methods and case study methods in the history of the discipline, driven by the "meliorative streak" of criminologists, who want not only to study the phenomena of crime but contribute to the influence and control of criminal behavior, and improve the justice system, which can perhaps be best achieved through illustration rather than correlations (p. 203). Geis's preference was most apparent in his comment:

> The sociologist likes to think of himself as a "scientist" in the sense that a physicist or a chemist is a scientist. Indeed, in his anxiety to assume that authoritative role, he has proved himself most willing to jettison every unquantifiable element in the field of human studies. He does not throw out the baby *with* the bath water--he throws out the baby and keeps the bath water for hard chromatographic analysis. The baby is held to be described by the results. (Geis, writing in Feagin et al., 1991, p. 219)

There is an additional issue that must be considered that is not unique but significantly relevant to any studies of justice, offenders, crime, criminology or the criminal justice system, the issues of access, privacy, disclosure of information and privileged communications that are inherently part of our legal and justice systems:

> Even where permission is granted, activities are severely curtailed. Where access does not need to be formally negotiated, for example in the courtroom, many of the day-to-day activities are 'backstage' and there are individuals and groups that have interests in ensuring they remain hidden from view. What is more, the criminal justice system as a whole is concerned with practices and policies about the detection, control and punishment of crime, each of which has important security aspects and the interests of security, however they may be defined, invariably run contrary to the goals and aims of researchers. (Jupp, 1993, p. 130)

Exploring the Relation, between Public Humiliation and Sentence Severity

Exploring the relation between public humiliation and sentence severity requires an open process that does not predetermine any direction or causal relation. While some logic might dictate that sentence would be influenced by the use of humiliation, in fact the inclusion of humiliation might be dependant on the judge's view of the sentence range available for an offense. Therefore it is proposed to look at the question in both ways. A linear regression using sentence severity as the dependant variable will explore the first approach.

To explore the alternate direction of the relation between public humiliation as the dependant variable and sentence severity as an independent variable, it is proposed that logistic regression analysis will allow for this examination of the relation between these two variables while holding other factors and variables constant. Garson (2005) explained that logistic regression provides the ability to predict a dichotomous dependant variable on the basis of continuous or categorical independents. In this study, the dependant variable, public humiliation is either present or absent, and sentence severity is on a time continuum or is represented in categories as incarcerated or conditional/community served.

Logistic regression, according to Garson (2005) will also allow for analysis and ranking of the relative importance of other independent variables available in the case data, such as in this study the categories off offender; offender's age, gender, and the plea entered, and to assess interaction effects.

The literature further suggests the chi square test (Snedcor & Cochran, 1989) goodness of fit to calculate a cumulate distribution and test the hypothesis of a relation between the construct of public humiliation and the severity of sentence. Details of the method for researching the relationship between these two variables are explored in the next chapter.

In summary, this review has established the philosophical and theoretical underpinnings as well as the current issues and arguments that are involved in any discussion of sentencing the justice system. It has highlighted the dilemmas of shaming and humiliating offenders. It has established the arguments for a sequential, exploratory,

qualitative/quantitative research design, using linguistic content analysis, and regression analysis for examining judicial reasons for sentencing. Analysis of the data will further illuminate this dilemma, and set the stage for discussion of the results, and the implications and ethics of judicial practices.

CHAPTER 3: METHOD OF THE STUDY

Introduction

The purpose of this sequential, mixed method study was to explore the use of deliberate public shaming and humiliation in criminal sentencing for which there are no explicit sentencing guidelines, and which exceed criminal codes to broaden the knowledge of how extra-legal, morally founded judicial processes are related to offenders' outcomes.

The data for this study was drawn from a purposeful sample of court case transcripts available to the public in word searchable online databases of the Governments of British Columbia's and Alberta's Ministries of Justice. Further details of the sample and data used for this study are described in this chapter. The research method for this study used a sequential mixed method, exploratory research design; a form of mixed model research as outlined in Tashakkori and Teddlie (1998) and Creswell (2003). In this study qualitative strategies initiated the study, followed by the quantitative strategies. Qualitative data were collected using linguistic analysis of judicial case content where public shaming and humiliation were evident. This yielded a taxonomy and classification of incidents of public humiliation. Using this taxonomy and classification, quantitative data analysis provided hypothesis testing and the probabilities of change in sentence severity in the presence of public humiliation.

It was implemented in four phases, each of which is outlined below in Table 2. Each phase added more information to be used in subsequent parts of the study. Phase 1 was the preliminary study, which used a qualitative linguistic content analysis of four

case transcripts to develop a definition of the construct of public humiliation and the taxonomy of kinds of humiliation found in judges' reasoning. Phase 2 applied the categories developed in the preliminary stage to a larger sample and defined the variables for examining the sub problems of the different categories of offenses and offenders. In Phase 3 univariate and bivariate analyses were used to identify relationships between public humiliation and sentence severity with measures of simple correlations. A similar analysis was conducted between the variables in the sub hypotheses presented by the sub problems of offense and offender categories. Phase 4 developed the model and predicted the probability of how these variables influence each other, in regression models. An outline of the research design is in Table 2:

Table 2

*Schedule of 4 Phased, Sequential, Qualitative/Quantitative Analyses**

Phase	Objective	Method	Outcome
1	Develop taxonomy of public humiliation in judicial sentencing	Qualitative Linguistic Content Analysis (LCA)	Identification of the terms and categories of public humiliation in sentences.
2	Classify incidents of Public humiliation	Mixed: Qualitative LCA and Quantitative: Frequency counts Of subcategories of offender and sentence length in years	Determine the presence and types of public humiliation in sentences
3	Hypothesis testing	Quantitative: Univariate and Bivariate analysis of the relationship between public humiliation and sentence severity in categories of offender and offenses	Determine the likelihood of the relationship between public humiliation and the severity of judicial sentence Determine any influence of categories of offender
4	Determine the Probability of the effect of public humiliation on the severity of judicial sentence	Quantitative: Linear Regression	Determine the probability of the change in the severity in the judicial sentence based on the presence of public humiliation
	Determine the The effect of sentence given on the presence of public humiliation	Log Regression	Determine the probability of the change in the presence of public humiliation based on the sentence given to the offender

- All analysis was done using SAS 8. 2 software

Mixed Method Research Design

The sequential mixed model exploratory study design (Creswell, 2003) is used to develop a new theoretical construct in a little researched practice area of judicial sentencing. The quantitative data collection is an approach to transposing the emergent theoretical construct derived from ex post facto archival transcript data into categorical data, which then allowed for relationship testing with other factors present. Unlike the sequential mixed model explanatory study, that gives priority to quantitative strategies, the sequential mixed model exploratory model places priority on qualitative strategies. Together the design strategies explore, define, and assist interpretation of public humiliation as a theoretical construct and as a variable (Creswell, pp. 215 – 216).

It could be proposed that other forms of research designs, such as interviews and surveys, are equally if not more valid. The issue of access and convenience predominated, however, as judges are not readily available or willing to participate in interviews. There are, however, a number of existing, online, publicly accessible data bases of criminal court cases, including judicial reasoning in case dispositions. These databases provide the most efficient resource for researchers that have ever been available. Secondly, court transcripts of judicial sentencing are historical documents that are designed to provide the reader with the rational and reasoning behind the decisions of the justice. The additional support in interviews might add further to the understanding, but the basic information is available without concerns for interviewer and interviewee

effects, which in the case of judicial decisions might have significant influence on the quality of interview data. Thus, the decision was that the best method for studying the research question in this study was a mixed method, of first identifying the behavior using content analysis, and then quantifying the behavior relative to the outcome sentence. In summary, the sequential exploratory mixed method used resulted in a multi phased, multi problem research approach.

Key Elements of Setting and Context

Although this study used content analysis of ex post facto transcripts of judicial determinations and not live observations in court, it is valuable to get a sense of context as to where these determinations are made. Provincial courts are spread through large urban and regional centers, sometimes in leased commercial space as opposed to buildings built specifically as courthouses. Some of the busiest criminal courts in Toronto are in urban strip malls and low rise industrial buildings, sandwiched between retail stores, and are indistinguishable as courts of law from the street. From a central corridor, the courthouse is divided on either side into a series of courtrooms, each with an antechamber that leads into the courtroom itself.

The Judge or Justice sits elevated behind the Bench facing into the room. Unlike many American courtrooms, where the accused sit with their counsel, in these courts, they may be seated alone or with alleged accomplices in the box or dock of the accused, which backs onto a wall to the Justice's left at a slightly lower level. The wall behind this dock has a door. The accused are brought up from holding cells in the

basement of the building by bailiffs, through side corridors, and led into the box without their feet touching the courtroom floor. Most often accused will stand if it is a short hearing. Defense, when not conferring with clients may be at floor level behind a desk in front and to the right of the justice. They may use a podium on the floor to address the witness and the judge. The prosecutor, or crown counsel, sits at a desk to the side of the defense counsel. Court reporter and court secretary sit directly in front of the Justice at floor level. There is a witness box on the justice's left. Canadian court etiquette is relatively formal, usually quiet, with justice's taking active roles in managing the cases, asking questions, and asking for documents throughout. Justices wear robes with crimson sash and white ties. Court employees and counsel for both sides bow slightly to the judge when entering if court is in session and maintain a formal style of communication and will always preface any reference to each other with, "My friend…", or "My colleague…" throughout the trial and sentencing.

The sentencing hearing can be a separate hearing, and the justice addresses the offender and courtroom with a summary of the facts of the case, and reasons for sentence determination prior to actually pronouncing the sentence. It is in this speech in the courtroom the justice will review their understanding of the facts and give their explanation of how the determination was made. Justices frequently will also review any aggravating or mitigating factors in their oral presentation immediately before pronouncing the actual sentence and thereby account for differences in sentences or their determination from the possible range of sentence selection for the specified offense as detailed in the guidelines of the Criminal Code. After the pronouncement, counsel for the

defense can ask for clarification of the pronouncement, specific conditions or interpretations of the sentence, and these too are recorded as the reasons for determination. It is also during this part of the sentencing process that judges will provide editorial comment about the case or the offender, and will expand on their thinking and opinion in coming to their determination, or ask the offender at that time for some additional component to be part of the sentencing, such as a public apology.

The Qualitative Component of the Research Design

Rein and Winship (as cited in Thacher, 2004) cautioned researchers in any study of judicial behavior on drawing conclusions from relationships between variables. They warned of the "danger of strong causal reasoning," and how the claims that some intervention will have indirect effects on a social problem results in the ignoring of questions about the intrinsic value of those interventions. Rein and Winship argued it is asking too much of social science to provide what can probably rarely be identified as a truly strong, causal relationship that ties any intervention to a result. This warning is well warranted for justice administrators who believe some form of moral action on their part will influence the offender's long term outcome, as well as for researchers who would posit the relation between intervention and outcome.

Case review of court trials and judgments, through transcript and data analysis, is similar to looking at a snapshot in time. In cases from criminal court, the procedural history, the facts that resulted in the case being prosecuted, are important to understanding the judgment. A Judge's stated reasons for sentencing is a form of full case

review, and uses a model for laying out the case. This detailed layout facilitates the utility of the judgment as an element for study, similar to the model for case study by Mcdonell (2002). It is through this model, Mcdonell believed, that our understanding of how the law and justice operate is enhanced, and our own individual principles are derived.

Linguistic content analysis is a uniquely qualified mechanism for analyzing the raw data of the judges' stated reasons for sentencing. It is through these words, both spoken and written, that the officers of justice, offenders' advocates, prosecutors, and other judges transfer their interpretation of law and social behavior, as gatekeepers of the system of law enforcement and social control. Transcripts that record verbatim what judges say in court, their written judgments, which outline their reasoning in decision-making, and case disposition, are rich, archival sources of data to interpret judicial thinking. There are excellent examples of the use of linguistic content analysis as a research strategy in the field of justice studies. The details of case dispositions extracted from over 400 case transcripts from the late 19th century formed the database for an extensive review of prosecutorial discretion in criminal case outcome by Ramsey (2002). In this study she described the method of content analysis that allowed her to analyze public norms and values that appeared in newspaper reports of the crimes at the time, in addition to, and in comparison to the actual judicial dispositions of the convicted offenders. Phillips and Grattet (2000) used case data extensively to examine judicial thinking, meaning making, and decision-making, and for the development of the construct of hate crime from a normative concept to a legally defined construct. Their

study was informative in the development of the new construct used in this study: public humiliation.

Phase 1 Qualitative Sampling Strategy and Selection

All cases were from the Web site archive of published reasons for judgments, of the British Columbia and Alberta Ministries of the Attorney General for the year 2005 (http://www.albertacourts.ab.ca/go.aspx?tabid=13; http://www.provincialcourt.bc.ca/judgmentdatabase/index.html). The study used 80 case transcripts, from the total of all cases in 2005. The selection of the Provincial databases as a source for sampling was for the ease of access, searchability, and convenience that the Internet allowed. These transcripts are in the public domain and they are accurate court documents. They provide a verbatim account of the judges' statements, the responses of the offenders, and counsel, with limited risk of recording error or omission.

Phase 1 Qualitative Data Collection and Analysis

This study used purposeful sampling, in an opportunistic manner for identifying, the use of words and phrases that indicate the presence of a concept or activity of shaming or humiliating. The following words/phrases were entered as preliminary searches: apology; remorse; shame; no remorse; public humiliation; shaming; moral; morality.

The process of identifying the categories for classifying content began with definitions of humiliation from the literature and language sources (Acorn, 2005; Miller, 1993). Dictionary definitions of humiliation, while insufficient for the researcher's

purpose, provided a starting point for understanding the general meaning of the word (http://www.dictionary.com). A dictionary definition (www. dictionary.com, 2006) includes; "depriving one of self respect or self esteem"; "a state of disgrace accompanied by feelings of embarrassment, shame, mortification and abasement". This definition is first collected from dictionary sources. Validity for the definition of forms of public humiliation comes from academic sources (Acorn 2005; Karp, 1998; Miller, 1993; Nussbaum, 2004; Weisman, 2004).

Case text was copied from the Web site to a master database, as raw text, and then coded. The coded data was transferred to a spreadsheet with no identifying features. Four cases were reviewed and, in keeping with LCA, phrases and clauses were identified by their content, extracted, analyzed, and categorized. Cases were further screened and selected to maximize the variation in criminal charge and age range of offenders. Four judges were included in the final preliminary sample. In this study, public humiliation is related to judges' sentencing speeches and stated reasons for sentencing offenders that is summarized in the taxonomy in Chapter 4. An example is this judge's statement to the offender, "Now, before I impose the terms of the conditional discharge, I have seen that your mother has been crying. I want you to apologize to her right now for the grief that you have caused her" (Provincial Court of British Columbia, Justice Database, 2005).

The findings from the sample analysis of content in cases in the preliminary study demonstrated the potential to isolate these behaviors from within the general text of judges' reasons for sentencing. The taxonomy is fully summarized in the findings in Chapter 4, in Table 4, and includes: the judges' use of debasing or embarrassing

comments towards offenders; judges' requirements for debasing or embarrassing activities by the offender, including public apology; judges' references to offenders' lack of remorse 4) judges' reference to the offenders' lack of responsibility; Judges' reference to offenders' voluntary apology or acknowledgement of responsibility, and; offenders' own expressions that could be categorized as remorse, crying, apologizing.

. The objective of this preliminary review was met: Judges did record information in their reasons for sentencing an offender that included categories defined by the terms shaming or humiliating that had been put forward by the literature (Karp, 1998; Miller, 1993; Nussbaum, 2004). The outcome of this analysis was a) confirmation that these shaming and humiliating elements were present in some cases b) the creation of a taxonomy of forms the humiliation, following Shapland's (1981) categorization and c) the development of an operational definition of Public Humiliation in judicial sentencing. The variable of public humiliation was operationally defined for this study as the presence of one or more of the elements listed in the taxonomy in the text of the judge's reason for sentencing. The themes that emerged from this analysis and the taxonomy of public humiliation is elaborated in Chapter 4.

Phase 2 Qualitative Sampling Strategy and Selection

A purposeful search of the court Web site's 2005 cases was conducted, using the Web site's search tool for a total of 80 case transcripts. A sample of 52 cases was selected because of the presence of public humiliation. Cases were reviewed in a preliminary scan for descriptive details to identify charged offense, conviction, plea, gender, Judge, and date. Only cases where the Crown is the complainant were included in the revue. These

cases were easily identified by their title, *R v Offender's Name*, R representing Regina. Cases where other mitigating or aggravating factors were mentioned in the reason for sentencing, or where the charges were against co defendants were excluded. Case text was copied from the Web site to a master database, as raw text, and then coded. The coded data was transferred to a spreadsheet with no identifying features. A full description of the sample population will be included in chapter 4 and the results of the study.

Phase 2 Qualitative and Quantitative Data Collection and Analysis

The objective in Phase 2 of the study was to expand the exploration and to identify if the problem of judicial humiliation was more widely practiced. The method was to use the taxonomy of public humiliation in an analysis to identify and categorize a larger sample of 80 court case transcripts, drawn from the Court databases of the Provinces of Alberta and British Columbia. The cases selected for the sample in this phase were identified using the search capacity of the Courts' website and the search words referred to in Chapter 1: "humiliation", "shame", "shaming", "embarrassment", "remorse", "apology". A sample of 52 cases included the presence of public humiliation, and kind of offense and were qualified if they fit the age and inclusion criteria. The balance of the sample of 80 cases were selected for no presence of public humiliation, the offense type, and also qualified to meet inclusion criteria. This sample of 80 cases was analyzed for the presence or absence of public humiliation and the severity of the sentence imposed. The method used in this phase was linguistic content analysis (LCA) (Roberts, 1989). LCA captures both the latent and impressionistic values of the content of

judges' reasons. This methodology seems well suited to this study because public humiliation is an attitudinal and behavioral expression in the judge's communication.

The data were then converted to quantitative categorical values. Quantitative analysis of frequency and length of sentence in years was performed. Additional demographic and case data related to categories of offender were also extracted from each of the sample case transcripts: age of the offender in years as of last birthday, gender, the nature of offense as either fraud, possession of narcotics for trafficking, or sexual assault, and offenders' pleas of guilt or innocence.

The small quantitative outcome of this phase was the generation of frequency distributions of offender and case characteristics. These categories were used to develop the definitions of variables (See Table 3).

Table 3

List of Variables Collected from the Database for Review

Main Variables	Symbol
1. Public Humiliation	
• Subset 1: Judge imposed/initiated public humiliation	ph
• Subset 2: Offender self imposed remorse/apology	ap/remorse
• All forms combined	PH
2. Sentence Severity	
• Subset 1:Incarcerated sentence (in years)	inc
• Subset 2: Community Served (in years)	cond
• All forms combined (weighted)	whtsent
Sub Categories of Offender Considered as Additional Variables:	

3. Type of Offense Charged	
Subset 1: Sexual assault	sexual assault
Subset 2: Possession of Narcotics for Purpose of Trafficking	ppt
Subset 3: Fraud over $5,000.00	fraud
4. Offender's Plea to the Charge : Guilty	G
Not Guilty	NG
5. Gender of the Offender	M, F
6. Age of the Offender in years	

Phase 3 Quantitative Data Collection and Analysis

The objective in this third phase of the study was to develop and test hypotheses regarding the possible relationships between these variables of sentencing.

Defining Sentence Severity

In Canada, sentencing usually is a form of detention or control of the offender for a set period of time and can include variations in length and location where the sentence is served: incarceration or in the community. The disposition of the case is accounted for in the sentencing determination. The guide to that disposition most readily accessible is the Criminal Code. In the Province of British Columbia, Canada's Criminal Code, section 718 is the first section under the rubric of purpose and principles of sentencing Section 718.1 states: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." (B.C. Criminal Code 2005)

In keeping with Black's quantitative evaluation of justice, both length of term and form of control of the offender make for the quantitative value of the sentence. The

categories of sentence appear in Table 1 on page 24. Thus time served in prison is more severe than time in jail, which is again more than time served in the community, also known as a conditional sentence which is in effect, unsupervised mobility at home.

There are possibly a number of important areas of research involving the presence of public humiliation in sentencing: the victim impact, the offender impact, the community perceptions of these practices, recidivism, and community crime rates are just a few. This study will focus on sentence severity as perhaps the most important immediate outcome for the offender. The sentence ranges for the offenses reviewed in this study are as illustrated in Table 1 on page 24: (category 6) incarceration: community served, with strict limitations on mobility, (category 7) incarceration in jail (less than 2 years), where severity increases with length of term, or, (category 8) incarceration in penitentiary (more than 2 years), where severity increases with length of term.

Phase 2 of the study described in Chapter 3, defined sentence severity as a total value on a continuous scale of years, and is further sub categorized for being served in two possible locations: in the community and incarcerated in a facility. The variable had to take into account and quantify the difference in conditions and restriction on the offender serving a sentence in incarceration as opposed to in the community. In Canada, recent rulings of duress in incarceration for offenders who serve time in jail prior to and post conviction has allowed for a 2 for 1 valuation; each 1 day served incarcerated prior to conviction, instead of in the community, will be counted as 2 days time served in sentence, and can be carried into post conviction calculation of sentence length (Ferenc,

2004). The same formula has been applied to the data for the variable of sentence severity in this study.

The variable sentence severity is measured as continuous quantitative value, and can be measured on a scale in years of minimum length to maximum as defined by the penal code, and the location where the sentence is served; the longer the sentence served in an incarcerated facility, the more severe it is considered. It is common for judges to review the range of sentence available, and in fact, a discussion of sentence range is usually found in the stated reasons for sentencing, along with an explanation of the sentence chosen.

In this quantitative phase, sentence severity as measured in years based on the formula of weighting sentence served in incarceration 2:1 to sentence served in the community was the independent variable. The presence of public humiliation in the judges' reasons for sentencing as measured and categorized in content analysis was the dependent variable.

The main hypotheses were:

> H_0 #1 There is no relationship between the presence of public humiliation, measured and categorized by content analysis, in the judge's reasons for sentencing and sentence severity as measured in years, by the formula of time in years and location where the sentence is served. Time served incarcerated is weighted twice to time served in the community.
>
> Ha #1 There is a relationship between the presence of public humiliation, measured and categorized by content analysis, in the judge's reasons for sentencing and sentence severity, as measured in years, by the formula of time in years and location where the sentence is served: time served incarcerated is weighted twice to time served in the community.

Both of the variables, public humiliation and sentence severity, could each be further refined into two subsets. The variable of public humiliation was further defined to mean a) the form that is imposed by the judge in imposed shaming, or b) self imposed by the offender with expressions of apology and remorse.

Sentence severity was defined as the calculation of total sentence length. It was separated into further categories based on the location where the period of the sentence was to be served. Incarceration was defined as a different category of sentence than a conditional sentence served in the community. This further categorization of the two main variables created the opportunity to explore for additional relationships by refining the hypotheses:

> H_0 #2 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.
>
> H_a #2 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.

Similarly, the study explored sentences served in the community as a separate category:

> H_0 #3 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.
>
> H_a #3 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.

To explore for factors in different categories of offenders that are possibly intervening in the relationships additional hypotheses were included in the analysis:

H_0 #4 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the kind of offense, categorized into three distinct categories: fraud under 5 thousand dollars, drug trafficking, and sexual assault.

H_a #4 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the kind of offense, categorized into three distinct categories: fraud under 5 thousand dollars, drug trafficking, and sexual assault.

H_0 #5 There is no relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and age of the offender as measured in years.

H_a #5 There is a relationship between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and age of the offender as measured in years.

The two categories of public humiliation defined in the taxonomy, a) judge imposed humiliation of the offender and b) offender's self imposed humiliation, were also hypothesized separately to test for co linearity:

H_0 #6 There is no relationship between the presence of judge's imposed humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

H_a #6 There is a relationship between the presence of judge's imposed humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

H_0 #7 There is no relationship between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

H_a #7 There is a relationship between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for

sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

Cultural values may suggest that there would be different standards of how judges would use public humiliation with male and female offenders and this possibility was forwarded in an additional hypothesis:

H_0 # 8 There is no relationship between the offenders categorized by gender, and the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing..

H_a # 8 There is a relationship between offenders categorized by gender, and the presence of public humiliation measured and categorized by content analysis in the judges' reason for sentencing.

Univariate and Bivariate analyses were conducted to determine the probability of a relationship for each of the hypotheses. The tests used for these simple correlations were selected based on the nature of the variables as discrete or continuous. The tests were Fisher Exact test, t-tests, analysis of variance, and chi square tests (Jupp, 1993). The outcome of this phase was the findings for these tests and their levels of significance. These are reported in Chapter 4. In this study, the data from cases was divided into two nominal categories, with the presence, of, (PH), or lack of public humiliation (no PH), in the judges' reasons for sentencing the scale for measuring this variable.

Phase 4 Quantitative Analyses

The objective in this final phase of the study was to determine, within the limitations of the sample method, the likelihood of an offender receiving a less severe sentence by the Judge when an element of shaming or humiliation was present in the transcript of the judge's reasons for sentencing. The method used to explore for this

probability was a series of linear and logistic regression analyses conducted on the same sample 80 cases, introducing the variables to the equation sequentially to find the best fitting model. This phase explored first using sentence severity as the dependant variable in a stepwise linear regression analysis and then using public humiliation as the dependant variable in a stepwise logistic regression analysis. Stepwise logistic regression analysis was used as a method capable of translating a dichotomous variable into a dependent log variable (Draper & Smith, 1998). In this study it enabled estimation of the probability of humiliation occurring under conditions of the independent variables: the length and location where the sentence is served, and categories of offender: the plea of guilt or innocence, the age and gender of the offender, and the kind or nature of the offense. The variation of the models took into account the exploratory nature of this study and the interest in determining, if possible, do judges use humiliation knowingly because they know the severity of the sentence or does the use of humiliation have a mitigating effect on the sentence outcome? The outcome of these analyses and the findings from these tests are reported in Chapter 4. The discussion of the results of the analyses and possible implications appear in Chapter 5.

Ethical Considerations

A preliminary academic Internal Review Board approval for ethical conduct of research was obtained for a retrospective review of archival material using the court website database for research purposes prior to beginning data collection for this study. No individual or case was identified in the study, or in the discussion of the results, in

order to protect the identity (and not cause any further humiliation) of those involved, even though the court web site of judgments is in the public domain.

CHAPTER 4: RESULTS

Introduction

This section will discuss in detail the sample of cases that were reviewed, the analyses performed, and the results. To begin the discussion, it is valuable to briefly review the purpose of the study and the hypotheses that were proposed, and then to proceed with the analyses, before once more reviewing the hypotheses in light of the results. The primary purpose of the study was to explore for any relationship between the presence or absence of public humiliation, found in the form of documented judges' reasons for sentencing, and the subsequent sentence severity imposed by the judge.

The main research question asked if the presence of public humiliation in the judge's reasons for sentencing is related to the subsequent severity of the sentence, and it was proposed that the presence of humiliation will be associated with lower sentence length and severity, due to the social exchange that occurs, where humiliation is exchanged for other punishments. The method used to respond to the question was an exploratory, sequential, mixed method research model that first looked at a small sample of qualitative data in a preliminary study in order to identify and develop the construct of public humiliation and its taxonomy. The study expanded that analysis to a larger sample and analyzed the relationships between the variables converted to quantitative categorical values.

The Taxonomy of the Construct Public Humiliation

The analysis from the preliminary study looked at four cases drawn from the online database of case transcripts of the Province of British Columbia (Benoliel, 2005).

The sample cases were drawn using the word search capability and search words: “humiliation”, “shame”, “apology”, and “remorse”. LCA was used in this analysis. Eight themes emerged from the analysis:

1. A degrading, debasing or embarrassing factor of the offender mentioned by the judge as part of the review of the case or sentence determination.

The judge’s mentioning of these factors was noted in two sections of the reasons for sentencing. The first section, the review of the case would note the observations of professional assessors, media, or other external advisors, and quote reports of less than socially expected responses, with the use of derogatory names, challenging the offenders’ responses as insincere, unreliable or unacceptable.

The second section, the actual sentencing, would also include directions to the offender of how they have failed to meet social standards and that these factors are part of sentence determination.

2. A debasing, embarrassing or shaming activity required by the judge, including a public apology.

The judge’s requirement in the form of direction to the offender to perform some action that would be by virtue of having to be done on demand or in public represents a demonstration of the judge’s power over the offender, and their vulnerability in choosing not to respond accordingly. The specific requirement for an apology, from the offender to either the victim or their own family member reducing the status of the offender to that similar of a child, needing direction for proper social behavior.

3. Judges' reference to lack of remorse

The judge's review of the offender's remorse is tied to the sentencing guideline that allows consideration of the moral character of the offender, as well as the capacity for taking responsibility for the offense. The expression of remorse is what has been referenced as evidence of the offender regretting the action and being aware of the consequences. Lack of remorse is viewed with the opposite perception, and considered not only as a potential lost mitigator, but a harsher aggravator, and shameful in itself. Wiesman (2004) argued that remorse is a misleading indicator of the offender's character, because it requires an admission of guilt for the charge, without consideration of circumstances or innocence.

4. Judges' reference to lack of acknowledgement of responsibility

The judge's review of this quality as a missing part of expected behavior again served to denounce the offender's character flaws, lack of moral maturity or right thinking in response to their actions.

5. Reference to unsolicited negative public exposure in the media as shaming or embarrassing

The judge's reference to the offender's exposure through newspaper, or television coverage of the offender's relation to the offense as being the source of public shame or the loss of the public's good opinion.

6. Reference by the judge to voluntary apology offered by the offender

The judge's reference to knowledge of a voluntary apology having been offered by the offender was a consideration in the requirement for denunciation of the offense and consideration for the potential for the offender's rehabilitation, both of which are formally outlined in the sentencing guidelines. While ostensibly, the judge's mentioning this voluntary action is used to the benefit of the offender in sentencing, in that it is perceived to be favorable social behavior it is also a public reminder of the self debasement and part of the review of how the offender is continuing to behave, and therefore demeaning to the offender's self esteem.

7. Reference to voluntary acknowledgment of responsibility.

The judge's reference to the offender's acknowledgement of responsibility for the offense is in essence stating that the offender has done the job of the court prosecutor, or more accurately, saved them from having to do their job, as well as the decision making job of the Justice, by taking responsibility for the offense. It is technically possible for an individual to take responsibility for the actions of the offense but plead not guilty to the charge in the offense, however it is less likely. The judge is then citing the offender's voluntary, self humiliation in their admission of responsibility without having to rely on the burden of proof. Taking responsibility for one's actions is humiliating if those actions are socially unacceptable and the admission is to having breached socially accepted norms, showing personal fallibility in public.

8. Self imposed debasing or self shaming by the offender, and /or expressions of remorse, crying, either spoken by the offender or the offender's behavior referred to by the Judge

Judges' comments about the offender's expressions or displays of remorse, crying and emotional distress was a recurring theme of all the cases studied. Each time the offender expressed remorse, or cried for the victim, the judge commented on it in a positive and encouraging manner. The inclusion of expressions of remorse as part of this category also relate to the display of social error, personal fallibility, emotional lack of self control in expressing emotions in a public and formal setting and public admission of a debt of the offender to the victim. Table 4 summarizes these categories:

Table 4

Categories of Themes from Content Analysis: Aspects of the Construct of Public Humiliation Categorized as Judge Imposed or Offender Self Imposed

Category 1: Judge Imposed:
1. A debasing, embarrassing, or shameful factor related to the offender mentioned by the judge as part of review of the case or sentence determination
2. A debasing or shaming activity requested by Judge of the offender, including a requirement of a public apology
3. Reference by the judge of the lack of remorse of the offender
4. Reference to the offender's lack of acknowledgement of responsibility
5. Reference to unsolicited negative public exposure in the media as shaming or embarrassing
Category 2: Offender Self Imposed:
6. Reference to a voluntary apology offered by the offender to the court or the victims.
7. Reference to the offender's voluntary acknowledgment of responsibility
8. Self-imposed shaming by the offender, reference to the offender's expression of shame and /or expressions of remorse, crying, either spoken by the

offender or referred to by the Judge

These themes and categories were found in the content analysis of the 4 sample cases analyzed. The themes were categorized as being evidence of the presence of public humiliation. They were also further divided into categories: a) judge imposed humiliation (themes 1-4) and b) offender self imposed humiliation (themes 5-7). The outcome of the analysis was the creation of the construct of public humiliation. This analysis was followed by Phase 2 in the study, where the variable was defined and operationalized.

In Phase 2 a larger sample of 80 cases was analyzed using LCA and categorized according to the taxonomy and the terms were defined. Public humiliation, as a practice of sentencing, was defined as any degrading of the offenders' status or self esteem. This includes the expressions of the judge to impose and illicit shame from the offender, to lower the offender's status in public, as well as direct expressions of the offender in the court setting to demonstrate their reduced status, degradation, remorse, or apology to the victim, the court, or any other related party. The operational definition of the variable was the presence of one or more of the categories in the text of judge's reason for sentencing, categorized into either Judge imposed or offender self imposed humiliation.

Sentence severity was defined as the sentence length, and was calculated in years as a total number made up of all time served incarcerated plus the time served on a conditional or probationary basis in the community. These were weighted 2:1, respectively. Sentence length relative to the kind of offense was taken into consideration,

in that the offenses have predetermined ranges as set out in the Criminal Code, and that precedent also plays a role for judges in determining the range they will consider. The British Columbia Court of Appeal upholds hat the relevant range for sentencing purposes is the range encompassed by like crimes committed by like people in like circumstances, and not simply the range from zero to the maximum. A further sub categorization of sentence severity segregated sentences with time served incarcerated in an institution and those with time served in a community setting as two variables.

In exploring for the relationship between these components of sentencing, in response to the main problem some other possible influences were considered in sub problems and included in the analyses. The study examined three kinds of crime to observe if the nature of the offense would be a factor. The assumption was that the seriousness of crime is quantitative (Black, 1963), and a crime is viewed relatively more seriously in the eyes of society, reflected in the required sentence length as set out in the Criminal Code (2005). The three selected crimes were, fraud over five thousand dollars, possession of a listed drug for purposes of trafficking, and sexual assault, as crimes with relatively increased incremental severity based on proscribed sentence ranges. The age of the offender, measured in years, and gender of the offender, were also included as potential influences on any relationship. The offender's plea to the charge of either guilty or not guilty was another factor considered for a possible influence.

The sample cases were drawn from databases of two Canadian provinces' web sites that publish judges' reasons for sentencing in complete word searchable texts. In selecting the sample, other possible influences: both mitigators and aggravators were

controlled by sample selection, and cases with declared mitigating or aggravating features were discarded.

The Hypotheses

The research question in Phase 3 suggested testing of a main hypothesis between the two main variables, public humiliation and sentence severity, and a set of sub hypotheses to account for the additional factors. As well, because this was an exploratory study and there was no clear direction of influence inherent in the variables, an extra set of analyses was undertaken in the final phase to determine if reassigning the positions of the main variables in the statistical analysis would have any substantial result in predicting the probability of an interaction.

The analysis first looked at public humiliation being dependant on the severity of the sentence. Thus, the main hypotheses were

> H_0 #1 There is no relationship between the presence of public humiliation, measured and categorized by content analysis, in the judges' reasons for sentencing and sentence severity as measured in years, by the formula of time in years and location where the sentence is served.: time served incarcerated is weighted twice to time served in the community.

> H_a #1 There is a relationship betweem the presence of public humiliation, measured and categorized by content analysis, in the judges' reasons for sentencing and sentence severity, as measured in years, by the formula of time in years and location where the sentence is served: time served incarcerated is weighted twice to time served in the community.

Additional hypotheses were generated regarding subcategories of the main variables:

H_0 #2 There is no relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.

H_a #2 There is a relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.

H_0 #3 There is no relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.

H_a #3 There is a relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.

Further hypotheses were generated to account for additional case factors that might influence sentencing:

H_0 #4 There is no relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the kind of offense, categorized into three distinct categories: fraud under 5 thousand dollars, drug trafficking, and sexual assault.

H_a #4 There is a relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the kind of offense, categorized into three distinct categories: fraud under 5 thousand dollars, drug trafficking, and sexual assault.

H_0 #5 There is no relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and age of the offender as measured in years.

H_a #5 There is a relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and age of the offender as measured in years.

While it has been advanced in this study that there is a construct of public humiliation that includes both the kinds of humiliation that is imposed by a judge and the

kinds of humiliation that can be offered by the defendant in a court trial, it was worthwhile to explore these two elements to determine if they are collinear or have separate influences. For this purpose, the two components of the construct were hypothesized and tested separately:

> H_0 #6 There is no relation between the presence of judges' humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.
>
> H_a #6 There is a relation between the presence of judges' humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.
>
> H_0 #7 There is no relation between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.
>
> H_a #7 There is a relation between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

Cultural values may suggest that there are different standards or practices for the different genders, and to evaluate this possibility an additional hypothesis was forwarded:

> H_0 # 8 There is no relation between the offender's gender, categorized as male or female, and the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing..
>
> H_a # 8 There is a relation between offender's gender, categorized as male or female, and the presence of public humiliation measured and categorized by content analysis in the judges' reason for sentencing.

Data Collection and Sample Group Characteristics

The sample cases were chosen purposefully, first using word search capabilities of the database to identify specific categories of crime, related to charges under subsections of the Criminal Code. The cases were examined for additional mitigating factors and were eliminated from the sample if other mitigators were present in the judges' reasons.

Cases were further selected using search words to identify the presence of humiliation in the transcript of the reasons for sentencing; the words *humiliation, public humiliation, shaming, shame, remorse,* and *apology* were searched across the web accessible databases of the British Columbia and Alberta Justice Reasons for Sentencing. Each of the cases that arose from this search were reviewed using linguistic content analysis to determine if the words indicated the presence of public humiliation in some form., The first group of cases was identified for inclusion using a sequential search of cases from the year 2005. A similar search was done for comparable cases, using the criminal charges under the categories of fraud, possession of a controlled substance for trafficking and sexual assault. This resulted in a sample of 80 cases, divided into three crime categories. Demographic information was coded into a spreadsheet format, assigning a sequential case number to each case. All information that identifies the case was recorded on the secured master data list and has been removed from the data analyses to protect the anonymity of the parties, even though the information has been available in the public domain via the courts' website. Data was analyzed and reported as aggregates, again to protect the parties.

The Analyses

All quantitative analyses were performed using SAS 8.2. In Phase 2 descriptive analyses were conducted of the univariate factors from the sample of 80 cases used in the study including: distributions of ages of offender in years from last birthday, gender, offense category, plea, presence of any form of public humiliation, sub categories of judge's imposed public humiliation, and presence of offender's apology/remorse, and sentence severity represented in length in years. These analyses are represented in Tables 5 through 14 in Appendix B.

The explorations from Phase 3 for relations between the pairs of variables in response to the hypotheses are listed here below, which are then followed by a series of regression analyses conducted in Phase 4 to tentatively explore probability models of relations between the variables, taking into account all factors that have been included from the data available.

The characteristics of the variables, as being continuous, such as in the length of sentence, or discrete, such as the gender or category of offense, meant the analyses needed to be performed using appropriate selected statistical tests, including: Fisher's exact test, chi-square test and t-test where applicable. Each case of paired variables, where the test *p*-value was greater than .05, was interpreted as there being no evidence of any significant relationship between the selected associated variables.

In response to the main hypotheses:

> H_0 #1 There is no relationship between the presence of public humiliation measured and categorized by content analysis, in the judge's reasons for sentencing and sentence severity as measured in years, by the formula of time in

years and location where the sentence is served. Time served incarcerated is weighted twice to time served in the community.

H_a #1 There is a relationship between the presence of public humiliation, measured and categorized by content analysis, in the judge's reasons for sentencing and sentence severity, as measured in years, by the formula of time in years and location where the sentence is served: time served incarcerated is weighted twice to time served in the community.

There was a significant finding in the bivariate analysis. The mean sentence length for all offenders where there was public humiliation in the reasons for sentencing was 4.73 years shorter than when there was no humiliation (p value < .001). The mean sentence severity for offenders where there was no humiliation was 8.157 years, while those where public humiliation was present had a mean sentence severity of 3.421 years in length.

The sub categories of sentence severity in location where the sentence was served were examined in the hypotheses:

H_0 #2 There is no relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.

H_a #2 There is a relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of incarceration as measured in years.

H_0 #3 There is no relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.

H_a #3 There is a relation between the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing and the length of community served sentences as measured in years.

There was a significant finding in the bivariate analysis between the presence of public humiliation as the dependant variable and length of incarceration as the independent variable (p-value < .001). In cases with no public humiliation, the average length of incarceration was 3.8732 years, where cases with humiliation had an average incarceration length of 1.126 years.

There was no evidence of a relationship between the use of public humiliation as the dependant variable and the length of the community sentence as the independent variable. These finding will be further explored in the discussion in Chapter 5.

In response to hypotheses, the subcategories of public humiliation were examined:

> H_0 #6 There is no relation between the presence of judges' humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.
>
> H_a #6 There is a relation between the presence of judges' humiliation, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.
>
> H_0 #7 There is no relation between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.
>
> H_a #7 There is a relation between the presence of offender apology or remorse, measured and categorized by content analysis in the judges' reasons for sentencing and the sentence severity as measured in the formula of sentence length in years and location where served.

When the analysis was repeated isolating judge imposed humiliation as the dependant variable, there was a similar result, with a significant relationship judges' imposed humiliation and the length of the sentence served in the community. The length of sentence when the judge imposed humiliation on the offender was an average of 3.324 years shorter than when there was no humiliation (*p*-value < .006).

The same analysis repeated isolating the presence of offender's apology/remorse as the dependent variable and sentence severity was also significant, with a *p*-value of .0028. The sample of offenders who expressed remorse or apology received an average sentence of 1.1729 years, while those who did not express any remorse received an average sentence of 2.7989 years. This relation was in keeping with the expected outcome if judges are allowed to consider moral response of the offender as a mitigator in sentencing determination. This will also be examined further in the discussion of the results in the following chapter.

In response to Hypotheses #8:

> H_0 # 8 There is no relation between the offender's gender, categorized as male or female, and the presence of public humiliation measured and categorized by content analysis in the judges' reasons for sentencing..
>
> H_a # 8 There is a relation between offender's gender, categorized as male or female, and the presence of public humiliation measured and categorized by content analysis in the judges' reason for sentencing.

A bivariate analysis explored if the presence of any humiliation was related to gender of the offender. Of the 80 cases reviewed in the sample, there was presence of public humiliation with 10 out of the 13, or 77% of females, and 42 of the 67 males,

about 63% of males. A Fisher's exact test showed that the resulting *p*-value of .5263 was not significant, and that there was no significant difference in the presence of humiliation in the reasons for sentencing between men and women offenders as is illustrated in Table 15:

Table 15

Presence of Any Public Humiliation in Judge's Reasons for Sentencing and Gender

Frequency Col Pct	Male	Female	Total
No	25 37.31	3 23.08	28
Yes	42 62.69	10 76.92	52
Total	67	13	80

Additional analyses related to gender but not included specifically in the hypotheses demonstrated that similarly, (*p*-value of .2232) there was no significant statistical evidence that the form of Judge imposed humiliation was used more often with females than males, even though Judges imposed humiliation with 62% of the females, but only 40% of the males.

The variable of the offender gender as related to the length of incarcerated sentence received was significant (*p*-value =.0070), indicating that men were incarcerated for a significantly longer period than women. This finding was reasonable in this sample data where there were no women offenders included in the sample of cases of sexual assault, the most serious crime. These findings are not influential in this study. The

analysis of the variables also generated what appears to be a spurious relation between the kind of offense and offender's gender illustrating there was a relation between males and offense, because there are no women convicted of sexual assault in the sample population. To account for intervening influences bivariate analyses were again repeated exploring for the relation between how the offender pleas to the court, as either guilty or not guilty, as the dependant variable and the other four variables: age, gender, offense, and public humiliation. The *t*-tests on these bivariate analyses provided no significant results, with no *p*-values of less than .05, indicating there was no significant correlation in this sample that could be accounted for by the offender's plea. There were no further significant results from any of the bivariate analyses of the pairs of variables.

The Use of Regression Analyses

In this exploratory study, the use of regression analyses was deemed appropriate to identify the significance of possible multiple factors that might be present as well as any possible interaction between the variables and to tentatively model the probability of interactions. In the fourth phase of the study two kinds of regression analyses are included in this study. The first is a linear, multiple regression that tracks for a significant regression line when using a continuous variable such as the sentence severity as measured in years as the dependant variable (Weisburd and Britt, 2003), and would indicate that a change in one variable present would be associated with a change in the other. The selection of sentence severity as the dependant variable would appear to indicate the relation is potentially directional, and that the regression indicates that the other predicting variables, including humiliation influence the sentence length (p. 420).

This supposition would be premature without exploring further, and for this reason, a second set of regression analyses was conducted, using logistic regression analysis, which indicates the natural logarithm of the odds of one entity existing in the presence of another. This analysis was performed using the presence of or absence of humiliation as a discrete, dichotomous, dependant variable. This analysis took into consideration the possibility that judges who know the sentence range available for any given offense prior to the case, based on both precedent and the sentencing guidelines in the Criminal Code, may be given to exerting other influences or directions due to this knowledge. The goal in running these two forms of regression analysis is to explore fully the potential relationship between the variables without assigning or determining any directional link.

Using multiple regression analysis allowed the use of multiple independent variables to predict the values of the single dependant variable in each regression. While the dependent variable must be continuous, for the independent variables dummy variables are inserted to hold the place of categories of discrete variables (Hosmer & Lemeshow, 2000). In this study, dummy variables were inserted to identify cases of the offense of sexual assault and the offense of possession of a listed substance for the purpose of trafficking.

Results of the Linear Regressions using Sentence Severity as Response Variable

To examine the relationship between the severity of the sentence as the dependant variable and the other variables as independent or predictor variables, three stepwise

linear regressions were performed. These three regressions used respectively sentence severity, the length of the incarcerated sentence, and the length of the community served sentence as the dependant variables in order to determine if there is any difference in the relation as to where the sentence is served.

The independent variables that were considered to be included in these three linear regressions, and introduced in steps were age, gender, use of any form of public humiliation, offender's plea, and dummy variables for the sexual assault and possession for trafficking categories of the offense. (The fraud category of the offense was implied for an offender if both the sexual assault and drug possession dummy variables for the offender had values of zero.) The significant results of these analyses are illustrated in Table 16, Table 17, and Table 18, respectively.

Table 16

Results of Stepwise Linear Regression with Sentence Severity in Years as the Dependent Variable and Public Humiliation and Offense as Candidate Independent Variables

Step	Variables Entered	*B*	*SE B*	B	*P*
1	Sexual Assault	6.61	1.15		<.0001
2	Sexual Assault	6.30	1.04	.52	<.0001
	Public Humiliation	-4.42	1.03	-.37	<.0002

Note. B is the unstandardized regression coefficient and β is the standardized regression coefficient.

Table 16 illustrates how the stepwise procedure stopped after the second step, having selected the sexual assault dummy variable and the Public Humiliation variable for inclusion in the regression equation, but rejected the other variables. The coding of the variables and the implied positive sign on the regression coefficient (*B*) for Sexual Assault in step 2 implies that the predicted sentence increases on average by 6.3 years when the offense was sexual assault. Similarly, the variable coding and the negative sign for public humiliation implies that the predicted sentence decreases on average by 4.42 years if any form of humiliation was present in the Judge's reasons.

Figure 2 below shows the relationship between sentence severity in length of sentence in years as the dependant variable and the independent variables: type of offence and presence of public humiliation in the judge's reasons for sentencing.

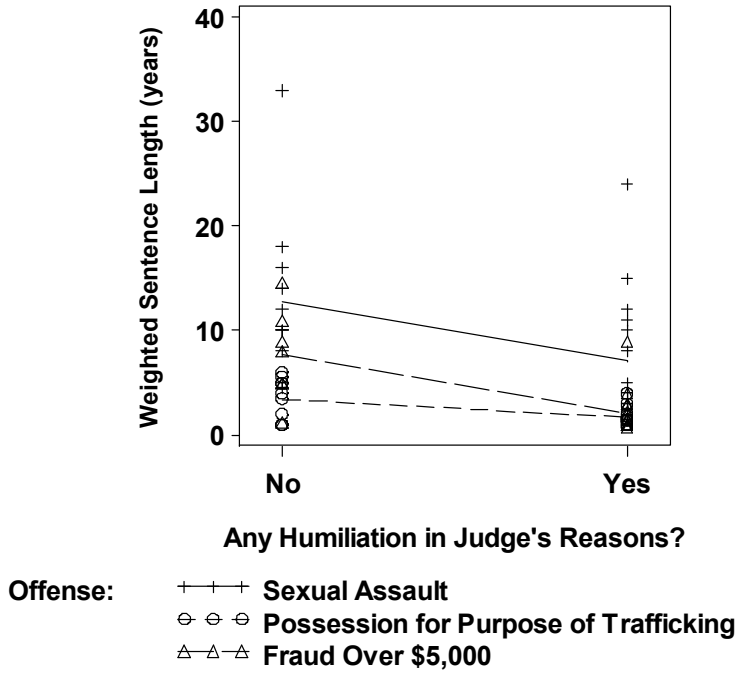

Figure2. A scatterplot of the relationship between sentence severity as length in years (weighted) and the variables type of offense and presence of any humiliation. The lines on the plot are the least-squares best-fitting lines for the three offenses. Each symbol represents one or more offenders. Note the presence of the outliers in the sexual assault category.

The outliers in *Figure 2* in the offense category of sexual assault imply that the homogeneity of variance assumption of linear regression is violated. Therefore, the *p*-values in Table 16 must be viewed with caution. However, since the *p*-values are so low as to be off the standard scale, the existence of the sexual assault and humiliation effects appears to be reasonably well supported and the outlier may be a case anomaly. It is not known whether any of these sentences were appealed and/or altered post disposition. Similar outlier problems are present in the analyses below, so all the *p*-values must be viewed with caution and any conclusions are therefore tentative.

Further analysis was conducted to explore for any differentiation between the possible location the sentence was served, either incarcerated in an institution, or in a conditional, community setting. For this purpose, a second regression analysis was performed that was identical to the analysis described above except that the dependant variable was the time in years an offender served incarcerated. Table 17 summarizes the results of this analysis.

Table 17

Results of Stepwise Regression with Time Incarcerated as the Dependant Variable and Judge's Public Humiliation and Offense as Candidate Independent Variables

Step	Variables Entered	*B*	*SE B*	B	*P*
1	Sexual Assault	2.95	.52		<.0001
2	Sexual Assault	2.77	.43	.51	<.0001
	Judge Humiliation	-2.61	.43	-.48	<.0001

Note. B is the unstandardized regression coefficient and β is the standardized regression coefficient.

As in the first regression, the variable coding, the *B*'s, and their signs imply that the time incarcerated increases on average by 2.77 years if the offense was sexual assault and the sentence length decreases on average by 2.61 years if the judge used humiliation. This was the only significant finding from the analysis.

Figure 3 illustrates the relationship between time incarcerated in years and the independent variables offense and presence of any public humiliation, No or Yes:

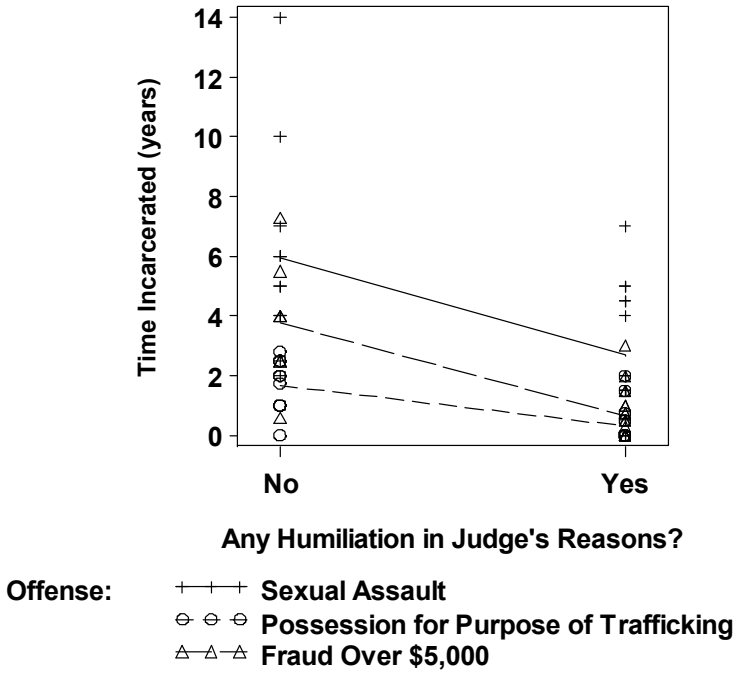

Figure3. A scatterplot of the relationship between time incarcerated and the independent variables presence of any humiliation and offense. The lines on the plot are the least-squares best-fitting lines for the three offenses. Each symbol represents one or more offenders. Note the presence of the outliers in the sexual assault category.

A third regression analysis was performed that was identical to the two analyses described above except that the dependant variable was the time an offender served in conditional or community sentence (in years). Table 18 summarizes the results of this analysis.

Table 18

Results of Stepwise Regression with Community Served Sentence Length as the Dependant Variable and the Presence of any Humiliation as a Candidate Independent Variable

Step	Variables Entered	*B*	*SE B*	B	*p*
1	Sexual Assault	1.02	.35	.31	.0047

Note. B is the unstandardized regression coefficient and β is the standardized regression coefficient.

As in the preceding regressions, the variable coding, the regression coefficient (*B*), and its sign imply that the predicted time served in a conditional or community served sentence increases on average by 1.02 years if the offense was sexual assault.

Figure4 illustrates the relationship between community sentence length and whether the offense was sexual assault. The dummy variable can respond, No or Yes:

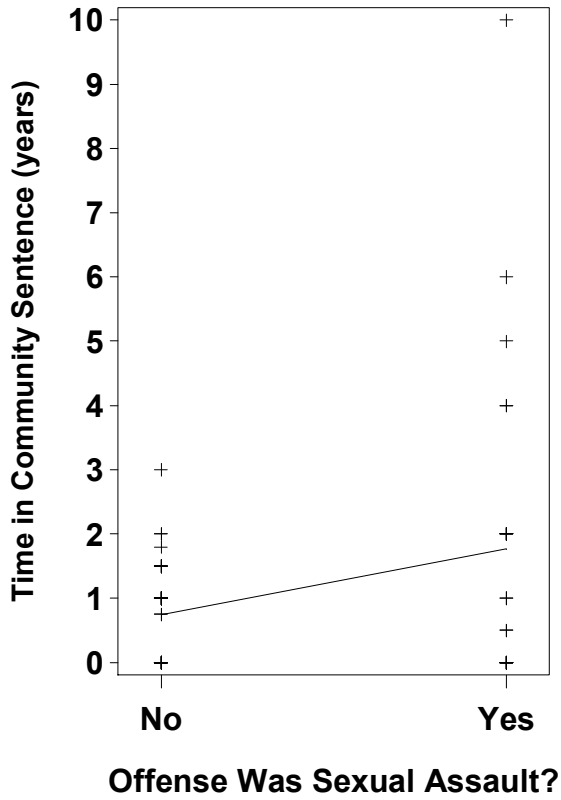

Figure 4. A scatterplot of the relationship between time spent in community sentence and asks whether the offense was sexual assault? (No or Yes) The line on the plot is the least-squares best-fitting line. Each symbol represents one or more offenders. Note the presence of the outliers, and the wider variance among the community sentence lengths among the sexual offenders.

A linear regression, similar to the first, with Sentence Severity as the dependant variable was then repeated, but the presence of Public Humiliation was removed from the regression as an independent variable and broken down into the two components as independent variables: presence of judge imposed humiliation and the presence of remorse or apology. Repeating the analysis with the two independent variables in comparison to the analysis using public humiliation examined for the co linearity between the independent variables and for possible confusion in the regression procedure

that is due to the inability to determine the weight of relative contribution of highly correlated variables.

In addition all the two way interactions between pairs of independent variables were included as candidate independent variables in this analysis. This resulted in a total of 20 candidate independent variables; Public Humiliation X Gender; Remorse X Gender; Plea X Gender; Public Humiliation X Offense; Plea X Offense; Remorse X Offense; Offense X Gender; Offense X Remorse; Gender X Sentence Severity; Gender X the continuous variables of Age, Incarceration, and Community Sentence; Public Humiliation X continuous variables of Age, Incarceration, and Community Sentence; Judges' Humiliation X continuous variables of Age, Incarceration, and Community; Remorse/Apology X continuous variables of Age, Incarceration, and CommunitySentence , (The Gender × Sexual Assault interaction variable was omitted because there were no females in the sample of offenders convicted of sexual assault.)

The stepping algorithm was set to stop when no *p*-values for entry of additional terms to the model equation were less than .05, and all *p*-values for removal of terms from the model equation were also less than .05. Table 19 illustrates the stepwise regression with Sentence Severity as the dependant variable.

Table 19

Results of Stepwise Linear Regression with Sentence Severity as the Dependent Variable and Using Judge Imposed Public Humiliation and Apology/Remorse and Paired Interactions as Candidate Independent Variables

Step	Variables Entered	*B*	*SE B*	β	*p*
1	Sexual Assault	6.61	1.15		<.0001
2	Sexual Assault	6.26	1.12		<.0001
	Judge Public Humil.(PH)	-2.57	1.06		.018
3	Sexual Assault	6.59	1.11		<.0001
	Judge PH	-2.54	1.04		.017
	Age × Apology/Remorse	-0.05	0.03		.048
4	Sexual Assault	6.92	1.09		<.0001
	Judge PH	-4.55	1.33		.001
	Age × Ap/Remorse	-0.09	0.03		.004
5	Sexual Assault	5.94	1.14		<.0001
	Judge PH	-4.66	1.30		.0006
	Age × Ap/Remorse	-0.12	0.03		.0003
	Age	0.13	0.05		.022
6	Sexual Assault	16.36	4.71	1.35	.0009
	Judge PH	-5.32	1.29	-0.47	.0001
	Age × Ap/Remorse	-0.11	0.03	-0.40	.0008
	Age	0.19	0.06	0.37	.002
	Age × Sexual Assault	-0.26	0.11	-0.95	.026

Note. B is the unstandardized regression coefficient and β is the standardized regression coefficient.

For interpreting this Table, the decision had to be made as to which step to accept as reflecting a reasonable model. The criterion of using a p-value of .05 was used, and

step 6 was selected for interpretation as the most informative at that critical level. The regression coefficients (*B*'s) for step 6 imply that the predicted total sentence length is increased by 16.36 years if the offense was sexual assault. Note this is much greater than the regression coefficients for sexual assault in the earlier steps, which are all between 5.94 years and 6.92 years. This large change in the regression coefficient occurs to balance out the addition of the term for the interaction between age and sexual assault in step 6.

The other regression coefficients in step 6 imply that (a) if the judge used public humiliation, the predicted sentence length is reduced by 5.32 years, (b) if the offender showed remorse, the predicted sentence length is reduced by .11 years for each year in age of the offender, (d) otherwise the predicted sentence length is increased by .19 years for each year in age of the offender, and (e) if the offense is sexual assault, the predicted sentence length is decreased by .26 years for each year in age of the offender. This last result may reflect the social perspective regarding this crime, or the nature of the kinds of assaults by younger offenders than older offenders. Sexual assault crimes by older men may be perceived differently.

Similar interpretations are proposed if one interprets a lower numbered step in the Table. Tables 20 and Table 21 repeat the analysis summarized in Table 20 with the total sentence broken into two components; time served incarcerated and time served in community sentence are used as the dependent variables respectively.

Table 20

Results of Stepwise Regression with Time Incarcerated as the Dependent Variable and Using Judges' Public Humiliation and Apology/ Remorse

Step	Variables Entered	*B*	*SE B*	β	*P*
1	Sexual Assault	2.95	.52		<.0001
2	Sexual Assault	2.91	.49		<.0001
	Apology/Remorse	-1.57	.46		.001
3	Sexual Assault	2.72	.46		<.0001
	Apology/Remorse	-1.45	.44		.001
	Judge Public Humiliation (PH)	-1.46	.44		.001
4	Sexual Assault	2.76	.44	.51	<.0001
	Apology/Remorse	-2.60	.56	-.50	<.0001
	Judge Public Humiliation	-2.60	.56	-.50	<.0001

Note. B is the unstandardized regression coefficient and β is the standardized regression coefficient.

In this table it was noted that again the odds of the predicted incarcerated sentence length decreased with either the use of judicial humiliation by 2.6 years or the offender's apology/remorse, by 2.6 years.

Table 21

Results of Stepwise Regression with Conditional/ Community Sentence Length as Dependent Variable and Using Judge's Public Humiliation and Apology/ Remorse

Step	Variables Entered	*B*	*SE B*	β	*P*
1	Sexual Assault	1.02	.35		.005
2	Sexual Assault	1.11	.34	.34	.002
	Judge Public Humiliation	1.02	.39	.27	.011

Note. B is the unstandardized regression coefficient and β is the standardized regression coefficient.

Both Table 20 and Table 21 show patterns of selection of independent variables that are similar (though not identical to) the patterns in Table 19. The interaction of the presence of the Judge's public humiliation and the offense of sexual assault are notable. It is worthwhile to keep in mind that the offense of sexual assault ranges in severity. The kind of offense in this category that would result in a community sentence may be minor, but sufficient for the judge to impose moral influence and punishment. Further discussion of this finding is continued in the discussion in Chapter V.

Logistic Regression Analyses

As part of this exploratory study and in order to approach the analysis of the data from a different direction, two stepwise logistic regressions were performed in which the presence of any public humiliation (yes/no) was the dependent variable and all the other variables were entered in a stepping process as independent variables. While there has been no proposal of a direction for a relationship between public humiliation and sentence severity, a logical argument might be made that the humiliation influences the

judge's determination and the sentence outcome. This reverse analysis is exploring the idea that the probability or odds of the judge using humiliation is dependent on some other factors, for example, the judge's view of the sentence is a factor in the odds of the use or lack of humiliation.

In this logistic regression, the presence of public humiliation (i.e., either judicial humiliation or apology/remorse) was used as the dependant variable and the other reasonable variables (i.e., excluding judicial humiliation and remorse) were used as candidate independent variables, including: Age, Gender, Plea, Incarcerated Sentence Length, Community Sentence Length, and Offense variables that included fraud, and dummy variables for the sexual assault and drug possession categories of the offense. In addition, all sensible interactions between pairs of independent variables were included as candidate variables, which yielded a total of 26 candidate independent variables. Total weighted sentence length was not used as an independent variable because it was possible to treat the components of as separate variables, which allowed the analysis routine more freedom to devise the best prediction equation.

Table 22 summarizes the results of the analysis:

Table 22

Results of Stepwise Logistic Regression Analysis with Public Humiliation as the Dependent Variable and Time Incarcerated as the Independent Variable

Step	Variable Entered	*B*	*SE B*	B	*p*
1	Time Incarcerated	-0.587	.150	-0.83	<.0001

Note. B is the unstandardized logistic regression coefficient and β is the standardized logistic regression coefficient.

The negative sign on the regression coefficient (*B*) for Time Incarcerated in Table 23 implies that the probability that some form of humiliation is used decreased as the length of time in years of the incarcerated sentence increased. The odds ratio for the incarceration independent variable was .56. This implies that the odds of humiliation being present decreased by a factor of .56 for each increase of one year in the incarcerated sentence length.

A goodness of fit test (Hosmer & Lemeshow, 2000, p. 147) was performed to assess the goodness of fit of the model and the resulting *p*-value was .05. Under this test a model is viewed as fitting well if the *p*-value is *greater* than .05. Since the *p*-value is greater than .05, the model appears to fit the data reasonably well.

The preceding logistic regression analysis was repeated except that the judicial use of humiliation was used as the dependent variable and the other forms of public humiliation were ignored. This analysis had 34 candidate predictor variables including all the possible paired interactions listed above. The results highlighted the factors of age and the offense of possession of a listed substance for purposes of trafficking (PPT) as significant. Table 23 summarizes the results:

Table 23

Results of Stepwise Logistic Regression with Judicial Humiliation as the Dependent Variable and the Paired Interaction of Age X Time Incarcerated, and Possession of Drugs for Trafficking X Time Incarcerated as Independent Variables

Step	Variables Entered	*B*	*SE B*	β	*p*
1	Age × Time Incarcerated	-0.0103	0.003	-0.63	.003
2	Age × Time Incarcerated	-0.0111	0.003	-0.68	.001
	PPT × Time Incarcerated	-1.64	0.72	-0.61	.024

Note. B is the unstandardized regression coefficient and β is the standardized regression coefficient.

The negative regression coefficient (*B*) in the second step in Table 23 for the interaction between age and the length of time incarcerated implies that the odds are the judge is less likely to use humiliation if the offender is older and if the time incarcerated is longer. Similarly, the negative regression coefficient for the interaction between Drug Possession and Incarceration Length implies that the judge is less likely to use humiliation if the offence is possession for purposes of trafficking and if the incarcerated sentence time is longer.

The same goodness of fit test (Hosmer & Lemeshow, 2000, p. 147) was performed to assess the goodness of fit of the model and the resulting *p*-value was .002. Under this test a model is viewed as fitting well if the *p*-value is greater than .05. Since the *p*-value is substantially less than .05, the model does not appear to fit the data well

although it was the best fit resulting. This suggests that other variables may be needed in the analysis to obtain a better model fit.

Conclusions of the Analyses and Response to the Hypotheses

The analysis stops at this point. The goal of exploring the relationships using both bivariate tests and multiple regressions indicated that there is potentially more ways of looking at the data, and it is clear from the results that these methods may not be exhausted.

To summarize the findings that have been generated using the analyses performed, there appears to be a relationship between the use of public humiliation and the resulting sentence severity, but that relationship is not simple, and may be influenced by additional factors. The evidence indicates that there is a relation between public humiliation and sentence severity as measured in years of sentence. Both the bivariate analysis and the multiple regressions indicated that the presence of public humiliation in the judges' reasons for sentencing was associated with a reduction in the total sentence length. The analyses also showed there is a relation between public humiliation and the length of incarceration, both in a bivariate analysis and in a linear and logistic regression model. The H_1 #2 hypothesis in this matter can then be accepted. This relation is discussed further in the next chapter.

The analysis showed that there is no relation between public humiliation and community served sentence in bivariate analysis, however in a linear regression model, the presence of judicial humiliation had the probability of lengthening the sentence.

While this is an interesting finding in relation to the other analyses, the interaction of the form of sentencing and the offense of sexual assault may be only relevant to a certain category of crime, as the model selected sexual assault as significant.

The study then turned to examine this question in detail, and the hypotheses that had been generated to examine the kinds of offense were addressed. The analysis showed that there is a consistent relation, in that the presence of public humiliation associated with relatively lower sentence length for all categories of offense, with the exception of extreme cases found in the outliers, where the sentence lengths are well beyond the range, however only the relation between public humiliation and sexual assault was found to be significant, where sentence lengths were significantly longer than the other categories of offense. The logistic regression model also predicted the odds of humiliation being present in the offense of drug trafficking related to the age of the offender. The hypotheses therefore cannot be accepted or rejected at this time and need further breakdown and investigation. The finding seems to indicate a selective approach to the presence of humiliation.

The age of the offender was also examined separately as a possible factor. The bivariate analysis did not indicate any significant relation between the age of the offender and the presence of public humiliation, but reference to the relation in the logistic regression model as indicated above indicates the odds of age influencing the use of humiliation is related to the kind of offense. This too may require further investigation before the hypotheses can be resolved.

The breakdown of humiliation into that imposed by the judge and that self imposed by the offender in the demonstrations of apology and remorse were also examined. The logistic regression model that was generated to test this hypothesis indicated the odds of the judge using humiliation were reduced as the offender's age increased and as the time of incarceration increased. This is an interesting relation which again suggests that judicial humiliation is selectively used for younger offenders, when other punishments are not being used. This does not allow us to accept or reject fully the hypotheses. There are also interesting results in relation to the hypothesis of offender's behavior, demonstrations of apology, and remorse. The linear regression model indicates that apology and remorse are a factor related to a less severe sentence with younger offenders, and that the influence decreases with the age of the offender. This same relation is present in both incarcerated sentences and community sentences. This finding is also not a complete rejection or acceptance of the hypotheses as they were formed, but is worthy of further discussion. The range of ages within the offenses might be a factor that was not explored. Cultural values may have suggested that there are possibly different standards or practices for male and female offenders and this was tested; The analysis illustrated that there was no significant relation between the presence of public humiliation and the gender of the offender, and therefore rejected H_1.#8.

The results from all the analyses are provocative and require further exploration and discussion. The linear and logistic regression models as predictors of sentence outcome and the odds of the use of humiliation in the judges' reasons for sentencing provided more depth and complexity to the picture than the simple bivariate correlations.

The discussion and conclusion to these analyses are found in Chapter 5 with recommendations for further research.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS FOR FUTURE RESEARCH

Introduction

This study was conceived and conducted to explore for any relationship between the public humiliation of offenders in the process of criminal sentencing in court, and the severity of the sentence the offender receives to resolve the offense. There has been an increase in the practice of shaming offenders as a moral sanction attached to the process of administering justice, and this increase has raised the question of its influence and efficacy as a strategy of criminal justice. This study explored to see if there is indeed a relation between these two elements that might shed some light on judicial thinking and actions.

The study used an initial qualitative content analysis of a sample of criminal cases where the judges' reasons for sentencing were drawn from the Provinces of British Columbia and Alberta's Justice Ministries' web accessible databases. The purposeful sample of 80 cases, were analyzed representing three different offenses:, 1) sexual assault, 2) fraud over five thousand dollars and 3) possession of a listed substance for purposes of trafficking, to determine the presence of humiliation in both the form of the judges' imposed shaming of the offender, and the offenders' own self shaming through apologies, and expressions of remorse. These elements were then collected, categorized quantitatively along with other case data, including the length of sentence the offender received and where the sentence was served, either in an incarcerated setting or in the community.

The primary question that was asked in the study was if there is a relationship between the presence of humiliation in the judge's reason for sentencing and the severity of the sentence the offender received. Is humiliation being used to mitigate the sentence or in lieu of other forms of punishment? It was expected that the presence of any form of humiliation in the reasons for sentencing would be accompanied by a relatively lower sentence.

Secondary questions and relationships were explored, expanding on the specific form of humiliation, and further analysis was done on any differences between judge's imposed shaming, as public humiliation, and offenders' apologies or expressions of remorse as self imposed humiliation. As well, other possible factors were added to the exploration to see if there were confounding factors; the age and gender of the offender, the kind of offense, and the plea of the offender in the case were also considered.

The study used a series of tests for correlations between the variables, and a series of linear and logistic regression analyses to identify if there was a model of the relation between the main variables that would fit relatively well. In brief, the findings of the correlation analyses indicated that there is a relation between the presence of public humiliation and the total severity of the sentence as measured in years. There is also a relationship to the length of sentence served incarcerated. The average period of incarceration for offenders where there was some form of humiliation in the reasons for sentencing was 2.6 years less than offenders where there was no humiliation present.

The same analysis did not show a significant relation between humiliation and time served in the community. There was also a significant relation found when the kind

of humiliation was broken down to either humiliation imposed by the judge in shaming the offender, or apology and demonstrations of remorse offered by the offender. Both of these forms of public humiliation were associated with lower sentence severity than cases when they were not present.

The regression analyses were used to begin to tentatively model the relations identified, within the limitations of a purposeful sample used. In the linear regression analyses, the models indicated more complex outcomes; that judges' imposed humiliation was associated with reduced sentence length, and apology and remorse would also have a reducing effect for younger offenders, however apology by the offender would increase the sentence if the offense was sexual assault.

The analysis using logistic regression, where the probability of public humiliation being present or not was tested in relation to the other variables modeled the probability that some form of humiliation is used decreased as the length of time of the incarcerated sentence increased by a ratio factor of .56. Further analyses identified a model that added more information; when the offense was drug trafficking, the probability of humiliation being present decreased the time of incarceration depending on the age of the offender.

A more detailed interpretation of these findings will examine their significance in regards to theoretical models and applied practices, as well as implications for social justice.

Interpreting the Results

These results offer some insight into judicial practices that tie the presence of any form of public humiliation, and particularly the judicial shaming of offenders to the

determination of the offender's sentence, but must be interpreted cautiously, keeping in mind the results are drawn from a purposive sample and the study is exploratory, without intention of indicating any causal relations. In the content of this discussion, where a specific judicial opinion has been quoted, the case name, which in common practice is the name of the offender, has not been used in order not to add additional humiliation. The name of the Judge, the year, and location of the court has been cited.

A Theoretical Explanation of the Results

In the findings of the analyses, there was a significant relation between the presence of public humiliation in the reasons for sentencing and the length of sentence the offender received. It has been proposed earlier in this paper that George Homans's theory of social exchange, (1974) together with Talcott Parsons's theory of equilibrium (1951) might inform possible explanations for the results of this study. The results indicated the humiliation of the offenders was accompanied by reduced length of their sentence. Homans's theory suggested that social exchange requires a give and take of values to achieve a balance that is what Parsons deemed equilibrium. The demeaning of the offender through public humiliation is punitive (Miller, 1993), and it may be a component of the punishment, in lieu of or in exchange for sentence length. Similarly, the movement toward balance is equally achieved in the offenders' apologies and expressions of remorse that are self demeaning. In effect the offender is punishing themselves prematurely, and reducing the need for additional punishment.

That is not to say that public humiliation is by itself a sentence mitigator, in the sense of a reason for a lesser sentence. "An offender's loss of reputation has not

previously been considered a mitigating factor sufficient to justify a significantly lesser sentence for a violent offence such as rape." (The Honorable Judge V. Romilly, 2005).

While ostensibly not considered as reason for reduced sentence, humiliation can still be playing a role in influencing the judicial decision regarding sentencing outcome. The timing of the judges' humiliation or the offender's apology being either prior to sentence being past, or as part of sentencing reasons, reinforces this interpretation that humiliation is in fact mitigating sentence length.

Social exchange, for the purpose of maintaining a social balance or equilibrium in the justice system, is then an important theoretical basis for supporting this interpretation (Fletcher, 2000). Kadri (2005) acknowledged the power of justice in the balancing act, "....the law has ever since asserted the power most proper to gods: the ability to rebalance a cosmos knocked out of kilter (p. xiv). Kadri added, "The balance remains the most potent image of justice in the Western world." (p. xvii).

Attribution Theory in Practice

The results of the bivariate analysis also revealed a significant relation between the presence of an apology or expression of remorse, and the length of sentence. With denunciation so prominently featured in the guideline reasons for sentencing, interpretation of those guidelines must perplex judges, influencing their personal, moral evaluation of offender behavior in embracing or avoiding the social sanction of public humiliation. The denunciatory aspect of a criminal sanction is the communication of society's condemnation of the offender's conduct.

Weiner's application of attribution theory (1986, 1995), in keeping with Heider, (1958), would propose the judge is using their own personal attributions, and moral relativism, looking for expressions of moral regret through feelings of shame, or adding on the humiliation that is felt to be deserved by one who engages in crime, as an expression of society's moral indignation. Avoiding humiliation might be interpreted as cheating society, as the Honorable Justice in this case indicated in his reasons for sentencing two offenders:

> I think that these two accused in my opinion fall somewhere in the middle. They are humiliated, but they have been trying to maintain their high opinion in the community and have been very, very fearful of being disclosed. They have not told any of their friends or their family, including their children, who today are in some jeopardy, or his father, or their closest friends.
>
> That is, I suppose, one of the steps that are very typical in terms of people understanding that the community can and will denounce their behaviour and that is a major part of stopping people or deterring people from doing this again: the embarrassment and the shame.
>
> I think that both accused understand very well the deterrent effect of the public embarrassment, but I do not think that they have allowed themselves that. They have kept this a secret. I am quite surprised it has not been in the newspapers, but they have managed to avoid, apparently, the community's presumable outrage and offence at this type of offence. (The Honourable Judge J. Gedye, 2005, P.C.B.C)

Judges, representing society in their response to offenders, are aware of their social responsibility, and within the restrictions of sentencing policy must find a means to satisfy their own moral evaluation of just deserts, that integrate social norms and personal moral viewpoints. Apologies and remorse are markers of expected social norms when individuals are in breach of the law that may be attributed to appropriate social behavior.

Denunciation and Judicial Discretion

The discretionary opportunities for the judiciary to reflect both social values and social expectations are contained within the sentencing portion of society's response to crime, yet this is somewhat unstructured. The lack of structure allotted to sentencing has created more of a dilemma and at the same time generated creative solutions that in some cases are open to challenge. Kadri (2005) also noted this in his comment; that secrecy, publicity, and transparency are three dynamics of justice being challenged in today's world.

It is important though to note that denunciation of the offense and denunciation of the offender are two different entities, most clearly delineated in the differences between punitive and restorative justice. The denunciation in the punitive system calls for public exposure of the offender as less than an acceptable member of society, and that exposure is part of the punishment, regardless of the effect on the offender.

Restorative justice models (Braithwaite, 2000) have an alternative approach, in that denouncing the offense can be separated from denouncing the offender. The difference is illustrated in the goals, tools, and processes of restorative justice. To illustrate the difference; denunciation in the punitive model says in effect, someone has committed an offense and society should know the offender and that he or she has been or is being punished. The restorative model says; someone committed an offense and the *community* should know he or she is working to repair the harm that the offense generated. The denunciation associated with the offense is not being transferred to the

individual, as a person. There remains room for respect for the individual's capacity to contribute to repairing harm done.

Offense Type and Public Humiliation

The results of the regression analysis indicated the relation between sentence length and the relative severity of the offense. This would be in keeping with Black's concept of quantitative values for crime, and that the offenses selected for review represented a scale of seriousness, and the relative sentence length increased with severity of the offense. Sexual assault as an offense is a troublesome offense due to the public perception of a significantly serious offense involving bodily injury, as well as the limited success with rehabilitation, and access to supportive programs. It is not surprising therefore to see the significance in the results, as well as the difference in sentence lengths when sexual assault is the offense.

The Interaction of Offender Age and Apology and Remorse

The interaction that was observed between the age of the offender and the apology or remorse, which appeared in the model with the offense of drug trafficking is another finding that is consistent with a trend in sentencing of offenders that was noted by a Justice in relation to all similar cases:

> The defense noted since the decision of the Supreme Court of Canada in *R. v. Gladue* (1999) 133 CCC (3d) 385 and *R. v. Proulx* (2000) 140 CCC (3d) 449 sentencing practices in Alberta and in particular in cases involving drug trafficking have changed considerably particularly to the benefit of a penitent accused. (The Honourable Judge A.A. Fradsham, P.A.P.C, 2005)

The opportunity for moral instruction and education, as well as rehabilitation that is perceived in younger offenders in crimes related to financial gain is reflected both in

the average ages of the offenders and the resulting sentences. Judges may view younger offenders who engage in these kinds of offenses, especially when the offense is the first time they are in conflict with the law, as an opportunity to gauge their moral beliefs, and be influenced by demonstrations of remorse and apology.

Humiliation and Conditional Sentencing

With social exchange as the operating theory, it might have been expected that humiliation would be accompanied by community served/conditional sentences? In terms of sentence severity, as a less severe sentence it might be expected that there would be humiliation present with conditional sentencing as an alternative sentencing package.

However, if judges view shame and humiliation as denunciation in the community, by virtue of serving the sentence in a public forum, there might be an implied punishment already included, as was outlined in the Court Of Appeal varying to a conditional sentence in a case, which was upheld by the Supreme Court of Canada:

> That court concluded that the ruin and humiliation that the accused brought upon himself and his family, the public embarrassment and the loss of respect by his peers and the public from the loss of his professional status could provide sufficient denunciation and deterrence in the circumstances. Justice Lamer stated in the precedent setting, ***Prouix*** case in Canada:
>
> The stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison (The Honourable Judge P.L. De Couto, (2005) P.C.B.C.)

There is substantial debate occurring regarding both the subjective nature of sentencing and the use of conditional or community based sentences, with some expressing concerns that their use is inconsistent resulting in disparate outcomes for offenders with similar charges. The debate is illustrated in The Honorable Justice Howard's case notation, "Incarceration, which is ordinarily a harsher sanction, may provide more deterrence than a conditional sentence. Judges should be wary, however, of placing too much weight on deterrence when choosing between a conditional sentence and incarceration" (The Honourable Judge F.E. Howard, (2005) P.C.B.C.*)*. This issue which has been unsettled for over ten years is yet to be resolved, according to The Honorable Judge Peter Martin Charters, (2004).

Humiliation as Substitute Punishment

There is certainly evidence that rightly or wrongly, judges view the negative publicity from being associated with crime as a form of sanction, and in keeping with the goals of sentencing in providing denunciation and deterrence. This is well illustrated in the reasons for sentencing quoted here:

> In sexual abuse cases where the offender's name could serve to identify the victim, there is usually a publication ban on the offender's name. That publication ban shields the victim from further shame and embarrassment, but also shields the offender from shame and embarrassment. No such ban was necessary to protect the victims here. Accordingly, [offender's initials] face has often been prominently displayed on television, and his name has been mentioned many times in the newspaper and on radio.
> Several events can, in my view, be linked to the media exposure. While [offender's initials] was on judicial interim release (on bail), he was unable to maintain employment - he would lose the job when his identity was discovered. L.P.G. has received death threats from fellow inmates at the Remand Centre. Also [his] wife was confronted in the parking lot of the Remand Centre and threatened with physical harm when she went to visit him on [date] and because of the

> threats, she is reluctant to visit until he is transferred to a federal prison. Accordingly, I find that L.P.G. has already received, and will continue to receive, punishment from this publicity. The publicity in these circumstances is serving as both denunciation and as a deterrent. (The Honourable Mr. Justice J.S. Moore, (2000) ABQB)

Judicial Decision Processes and Public Humiliation

It is an important consideration in our discussion whether in fact judges are capable of neutrality, objectivity, and superhuman detachment from their own emotional and moral values. Shaming is a human response, not a judicial one, and emotional responses can be triggered not only by events that occur to an individual but by events that are observed to have occurred to others (Brigham, Jackson, Kelso, & Smith, 1997).

Judges too are reflecting the social sanction of their community in response to crime. Two parties must be discordant to each other, in order for shame to be effective, and it is posited here that the shamer, whether in the form of a justice, the family, or the community is one of the parties to shame (Brigham et al., 1997). This too suggests social exchange theory in an effort to restore social equilibrium. When the offense is abhorrent to society, the message sent by a penitent offender in their self degradation promotes additional sanction, as Solomon (2006) noted, "The concept of repentance is a moral precept that requires self punishment and invites and welcomes external retribution; anything to make up for a disrupted balance of values" (p. 1).

The imbalance in power and unfairness generated by an offender's criminal act may generate a sense of both hostility and envy in the judge or their surrogate, for the

offender's seeming ability to bypass, ignore, or flagrantly violate the law and thereby gain some undeserved advantage.

These emotions can elicit a sense of pleasure in the ability to influence that offender's subsequent bad fortune, through the directed shaming of the offender. The punishment of shame, as a manipulated misfortune to the offender may, according to Brigham and her colleagues (1997), create a sense of pleasure that "justice is now better served" (p. 365). Their important study also resulted in their observations that the invidious comparison between two parties increased when the subject was disliked. This study also examined the differences in emotional response of schadenfreude to those perceived to have deserved and those perceived to have undeserved their misfortune, and found that those perceived to have gained more advantage, and some superior status by an ill gotten gain elicited more schadenfreude, but not more sympathy. The amount of sympathy grew with the less advantage to the other person, regardless if the misfortune was felt to be deserved (Brigham et. al, 1997).

The Ecstasy of Sanctimony

This sense of moral superiority, referred to in German as "*schadenfreude*" (Miller, 1993), or the "ecstasy of sanctimony" as eloquently described by Philip Roth (2001), is an emotional driver in our social evaluation of others, and explains our unspoken, politically incorrect, but inescapable enjoyment and sense of vindication of seeing someone who is perceived to be abnormally lucky, talented, or wealthy brought low through public humiliation. The same emotional rush, and "persecuting spirit" as

depicted by Hawthorne (2000) that people can experience from reading tabloid news coverage of celebrity follies is at play in the public humiliation of criminal offenders, who are perceived to have broken social rules, taken unfair, and unwarranted advantage of society, and gained unreasonably by their criminal actions. The use of shaming as an expression of piety and higher moral grounds is, according to Roth, "America's oldest communal passion, historically perhaps its most treacherous and subversive pleasure" (2001, p. 3).

This attraction of shaming is perhaps the most difficult ethical issue to argue with, because of the repugnance of the idea that one enjoys others' suffering, and because it destroys any discussion of retributive value or even restorative value of shaming.

Public Humiliation as a Violent Act

There is also an argument to be made that public humiliation is by its nature abhorrent and unacceptable as a strategy of justice because it is in fact a form of violence. Violent behavior is not conducive to generating an enduring social order. "Violence is perspectival" according to Miller (1993, p. 55). Miller continued, "For often what is at issue in many kinds of interactions is the very definition of the activity as violent or not" (p. 55). Miller outlined the structure of violence involving a play of three perspectives: the victim, the victimizer, and the observer. All these three roles are necessary for public humiliation within the justice system. Unlike some other forms of punishment, one is humiliated in front of an observer or observers, and even when two of the three positions in this triad are nonhuman, such as when the social institution is the victimizer, the basic

structure is still intact. Miller identified the complex interdependence of these three roles in violence, and what he calls their permeability. He posited that it is less likely for victimizers to see their actions as violent, and they will often categorize them as discipline, or justice, or just doing a job (p. 57).

The justice system has not been limited in its use of violence in sentencing, with goals of retribution and deterrence, however, operating with limited vision in viewing various strategies as violent. Foucault's larger definition of violence (as cited in Miller, 1993) seemed to appreciate this possibility:

> Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination. (p. 91)

The Ethics of Institutional Shaming

The results of this study and the direction set by Brigham and colleagues (1997) is important to inform an ethical discussion of the role of the shamer, and their response to the one being shamed. Should society's institutions engage in shaming? The examination of the ethics of using shame is an examination for the right conduct in this matter, where institutions have the opportunity to take on roles and relationships in lieu of individuals.

One of the key reasons used to explain the need for a criminal justice system is to detract from the individual urge to take revenge on an offender and make punishment a larger social responsibility, as described by Montero's aim (Walker, 1969). Society institutionalizes and systematizes these activities with the goal of enhancing social welfare. Shaming offenders would come under this social responsibility.

A second reason for supporting the use of shame would be its success as a strategy in crime management. Yet there has been no study that can point to that success as a component of the retributive system. Book (1999) outlined that there was no empirical evidence that shame punishments were efficacious, just as there has not been sufficient evidence to support any other form of punishment currently being used by the justice system. Efficacy is not justification, but even if it was, it has not been demonstrated.

If we examine shaming exclusively against the four goals of sentencing, we see that shaming is in fact punishing in how it puts limitations on the offender's ability to access moral acceptance in society. It is not a way of generating safety; in fact shame will provoke anger and aggression as a response (Tangney et al, 1996). It can be reformative under the circumstances of restorative justice when in fact it takes the shaming out of the hands of the criminal justice system and returns it to the immediate family and community of the offender (Braithwaite, 1999). The deterrent value of shaming, the desire to evade crime in order to avoid being exposed, is too transitive and individual to be able to judge its efficacy, when our current cultural norm is using public humiliation as a form of entertainment on television talk shows every day, and the officials of the criminal justice system are seen as anything but benevolent members of one's own local social network one would be concerned with.

The sentencing guidelines of the Criminal Code in Canada highlight the denunciation of the criminal activity as one of the purposes to be achieved in the sentence determination. Here there must be differentiation between what is meant in the guideline

as social denunciation of lawbreaking and how Judges interpret the guideline in practice, similar to what Braithwaite (1999) identified as the difference between retributive shaming and reintegrative shaming. The former is condemnation of the individual, while the latter, the method he recommended, outlines that while the action or behavior of the offender is socially unacceptable the person is not.

Consider the dilemma of society playing a role in setting the standards for social behavior, requiring citizens not to shame or humiliate each other, under provisions and protection of human dignity in the Human Rights Code, the Canadian Charter of Rights, the American Constitution and other documentation civil societies enact to protect their citizens, and at the same time imposing shame and humiliation as a strategic initiative. What role, if any, should society play in using shame as a legal strategy?

Are there other options open to criminal justice administrators? Stryker (2005) cited Markel's comments on this issue, and stated that he is concerned that too much attention is being paid to oddball shaming punishments, ignoring or obscuring larger issues in a highly flawed system of crime and punishment. Stryker quoted Markel in an interview as saying

> We need alternatives to locking up more and more people for longer periods. Looking for sentencing alternatives makes sense, but the choice is not between locking people up and putting their pictures on billboards. There is a whole range of other possibilities that do not involve humiliation or degradation. (Markel as cited in Stryker, 2005, p. C-3)

Is shaming an effective sentencing strategy in managing crime? Looking again at the purposes of sentencing and shaming as a component of the criminal justice system, there

are four frequently espoused reasons for sentencing offenders: punishment, safety, reform and deterrence. In relation to these goals, evaluations of shame sentencing that have been documented are disjointed and confusing, and offer no real evidence to support their use (Posner 1998). While certain programs receive rigorous evaluation, there is a paucity of evidence-based practice to draw on for sentencing policy, and the political climate has more direct effect on sentencing strategies than empirical research (Book, 1999). In that regard the use of shaming as a strategy has not been substantiated.

The Implications for Social Change and Social Justice

Humans as social animals do not institutionalize well. Our social institutions have developed as economic substitutes for services that become more and more difficult to provide on an individual basis. Education, health care, childcare, trade, labour, crime management, all of these are examples of our collective efforts to organize for mass access and use. For each of the economic benefits that arise from institutionalizing social services and responses, there are individual human costs. Applications of policies across broad populations must be based on mean or median expected values, and are usually based on bell curved distributions. This form of service provision does not take into account sufficiently those who are outside of the normal distribution. Our current social economic focus has systemically tried to direct institutions to respond to macro human needs, and breaks down where individuals are concerned.

As has been posited by key researchers on this topic, shame has a role in interpersonal interaction. Nussbaum (2004) affirmed, “Whether one is young or old, it

seems appropriate to be sensitive to an invitation to shame, and related self-examination, issued by people one loves and respects" (p. 215). Shaming and public humiliation, when used as responses to wrongdoing, no matter how that is defined, are individual, human expressions of emotion, morality, and part of interpersonal interaction. It requires a caring shamer, with a personal stake in the outcome to provide a successful result. Given the risks of shaming being used as a form of punishment or revenge, and the potential underlying emotional enjoyment of seeing offenders diminished and humiliated, there is an even greater danger in making shaming a systemic tool.

The ethical conclusion then would be that shaming cannot be successfully institutionalized, and indeed brings out the worst tendencies of human behavior, particularly when there is an opportunity for the designated shamer to distance that behavior from their own individual responsibility as when playing an institutional role.

Braithwaite's (2000) argument for reintegrative shaming acknowledged this concern, and his carefully orchestrated and selective shaming required a closer relationship and true intimacy between the shamer and the shamed, so that the shamed has concern for their good grace in the shamer's eyes. Karp (1998) supported Braithwaite's argument with a similar caution and Nussbaum (2004) determined that while shame can be constructive, it should be carefully used. Shame has a role in society and in Nussbaum's opinion the person who is shame free is not a good citizen (p. 216). The real danger appears to be when we allow social institutions, through systemic processes, such as judicial sentencing, to take on the role of shaming and humiliating offenders.

Recommendations for Action and Social Change

The results of this study indicate that public humiliation of offenders is engaged in by justice administration as an exchange for other forms of punishment, and is adding a moral dimension to sentencing that is outside of the rule of law. Acorn (2005), Karp (1998), Masarro (1991), Margalit (1996) and Whitman (2003), all concurred that we allow society's institutions to humiliate its citizens at our own peril. Margalit summarized this view, with his belief that human dignity is a central social value that must be upheld by any decent society, and that punishment policies must be constrained by regard for human dignity (Margalit, 1996, p. 266).

The ethics of shame and humiliation in the criminal justice system is an important concern for our Western society. It was only 55 years ago, in Western Europe, when the criminal justice system of a country enabled systemic humiliation and disregard for simple human dignity that disintegrated into genocide. Shaming and humiliation of offenders is potentially a slippery slope, and careful observation of the ongoing developments and the possible codifying of shame punishments, along with the use of public humiliation, are warranted, in order to prevent a repetition of history.

Avishai Margalit (1996) posited that the use of punishment is the litmus test of a decent society, and in fact, he defined a decent society, "is one whose institutions do not humiliate people" (1996, p. 1). He differentiated a decent society from a civil society, which he defined as one where individual citizens do not humiliate each other. He also differentiated between humiliation enacted by law, and thereby integrated into the

activities of the institution, and that generated by institutional behavior so that it takes on quasi official status, without a legitimate legal basis.

Margalit also drew an important distinction in differentiating civilized society as a micro ethical concern that speaks to the relationships between individuals, from his evaluation of decent society, as a macro ethical concept, dealing with how society is structured and functions through its institutions (p. 2). These distinctions are significant for helping to interpret the significance of the results of this study. The ethical considerations of the use of shame punishments as a legitimate sanction in response to criminal offenders falls into Margalit's macro assessment, because it is a systemic and institutional response, but is also a micro assessment in its implementation by judges or their surrogates, representing the justice system, on a case by case basis. It is just that systemic approach, and removal from a simple individual, interpersonal, social connection that is used to justify the legitimacy of shaming as an unbiased, legal, ethical, and socially responsible action, that demands challenge.

There is an overall dissatisfaction with systemic approaches to managing crime, and recognition that the justice system is not working as was summarized by Minnesota State Supreme Court Justice Blatz:

> I think the innovation that we're seeing now is the result of judges processing cases like a vegetable factory. Instead of cans of peas, you've got cases. You just move 'em, move 'em, move 'em. One of my colleagues on the bench said: "You know, I feel like I work for McJustice: we sure aren't good for you, but we are fast." (Blatz as cited in Lane, 2003)

The core of the ethical dilemma of using shame punishments is in the challenge to the right of offenders to be treated equally as others, and their claim to the social right to basic human dignity as defined by Western nations in their declarations of rights. If we believe that by committing an offense, an individual gives up all claim to be treated equally as a human being, then shame punishments are no different than other punishments, and should be evaluated using the same criteria, with a calculation of efficacy, cost, and both individual and social value. Margalit (1996) believed that there is a simple formula for this calculation of punishment. His theory posited that a society is a decent society if it punishes its criminals, even the worst offenders, without humiliating them, and therefore shame which diminishes human dignity, is not acceptable as punishment in any way, or as any other form of institutionalized social sanction in a society that wants to be known as decent (p. 262).

Recommendations for Future Research

Given the results of this exploratory study, there are a number of reasons to put the use of shaming, public humiliation, and apology as part of justice administration, to even further and closer examination. This study focused on the subjective nature of judicial processes and the results have highlighted two concerns that need further attention, that are addressed in Western rights based legislation either as constitutional or charter issues; 1) the right of individuals to be protected from shame and humiliation as unfit punishment that is either abnormally cruel or unusual, and 2) the right of the offender who is charged, and presumed innocent until found guilty, to defend themselves

vigorously against charges by the state, and to resist required or coerced demonstrations of remorse, such as public apologies, as necessary to the resolution of the offense. Both of these issues in their practical implications and effect on judicial policy and practices, as well as their ethics cross the boundaries of law, philosophy, morality, behavior, and sociology. They both need to be explored further in light of the results of this study.

This study was exploratory in nature and has only begun to delve into the complexities of judicial behavior. Current Western sentencing practices vary widely, and are influenced by personal judicial opinion, individual state, and provincial policies and national guidelines (Massaro, 1991).

Further research in this area should be conducted, replicating the study, using both more observers in additional court jurisdictions and using random samples, in order to identify how broadly the practices of shaming are used in justice administration. As well additional investigation into the effect of humiliation on recidivism would add greatly to the body of knowledge in this area.

Conclusion

In summary, this study has begun to illuminate the practices of shaming in crime management. The finding of a significant relation between public humiliation and sentence severity is somewhat disturbing. The resolution of the dilemma of whether or not to use public humiliation in justice administration is necessary if there is to be public confidence in a consistent, ethical, and socially relevant program of justice that not only

serves and protects social safety but also protect the rights of each member of society to human dignity.

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APPENDIXES

Appendix A: Ethical Review and IRB approval

The dissertation prospectus and application for approval for conducting research was submitted for review to the Institutional Review Board, (IRB), of Walden University.

The IRB of Walden University granted approval for this study.
The approval was received on 10/17/05.
The approval number is: 10-17-05-0173071

APPENDIX B

Tables of Univariate Analysis of Variables

Univariate Analyses of Variables

The tables below illustrate the distributions of the variables from the 80 cases that were selected for this study.

Table 5 illustrates the distribution of the sample of 80 cases by gender.

Table 5

Sample of 80 Cases Described by Gender

Gender	Frequency	Percent
Male	67	83.75
Female	13	16.25
Total	80	100.00

Table 6 illustrates the distribution of the sample by type of offense in the charge.

Table 6

Sample of 80 Cases Described by Type of Offense

Offense	Frequency	Percent
Sexual Assault	26	32.50
Possession for Purpose of Trafficking	27	33.75
Fraud Over $5k	27	33.75
Total	80	100.00

Table 7 illustrates the presence/absence of any form of public humiliation in the Judge's stated reasons for sentencing, including both that imposed by the judge and self imposed by the offender.

Table 7

Presence of Any Public Humiliation in Judge's Reasons for Sentencing

Tot PH	Frequency	Percent
No	28	35.00
Yes	52	65.00
Total	80	100.00

Table 8 illustrates the absence or presence of humiliation imposed by the Judge in the reason for sentencing.

Table 8

Presence of Judge Imposed Public Humiliation in Judge's Reasons for Sentencing

PH	Frequency	Percent
No	45	56.25
Yes	35	43.75
Total	80	100.00

Table 9 illustrates the absence or presence of any apology or remorse expressed by the offender in the transcript of the reasons for sentencing, or mentioned by the Judge in the reason for sentencing.

Table 9

Presence of Offender's Apology/Remorse in Judge's Reasons for Sentencing

Apology/ Remorse	Frequency	Percent
No	45	56.25
Yes	35	43.75
Total	80	100.00

Table 10 illustrates the distribution of the offenders' plea to the charges.

Table 10

Offender's Plea to Charges

Plea	Frequency	Percent
Not Guilty	37	46.25
Guilty	43	53.75
Total	80	100.00

Table 11 illustrates the distribution of the offenders' ages, with basic statistical measures.

Table 11

Age of Offenders:Basic Statistical Measures

Location		Variability	
N =80			
Mean	36.86250	Std Deviation	11.11020
Median	34.50000	Variance	123.43655
Mode	28.00000 (lowest of 4)	Range	40.00000
		Interquartile Range	19.00000
Lowest	20		
Highest	60		

Table 12 illustrates the distribution of the total sentence length as the measure of sentence severity. The sentence is weighted . Incarceration is weighted on a ratio of 2 to 1 with time served in the community as a conditional sentence or on probationary basis.

Table 12

Total Sentence Length in years: Basic Statistical Measures

Location		Variability	
N = 80			
Mean	5.078750	Std Deviation	5.70935
Median	3.000000	Variance	32.59669
Mode	1.000000	Range	32.25000
		Interquartile Range	5.50000
Minimum	.75		
Maximum	33.00		

Table 13 illustrates the statistical measures of the length of sentence served by all offenders in the sample who served time in incarceration

Table 13

Sentence Length Served Incarcerated Inside a Facility (years))

Location		Variability	
N =80			
Mean	2.087500	Std Deviation	2.57721
Median	1.500000	Variance	6.64199
Mode	0.000000	Range	14.00000
		Interquartile Range	2.90000

Table 14 illustrates the statistical measure of the length of sentence served by all offenders in the sample who served time in the community as a conditional sentence or on a probationary basis:

Table 14

Sentence Length Served in the Community (years)

Location		Variability	
N =80			
Mean	1.078750	Std Deviation	1.54169
Median	1.000000	Variance	2.37682
Mode	0.000000	Range	10.00000
		Interquartile Range	1.50000

CURRICULUM VITAE

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- The role of parents in youth victim/offender conferencing
- Evaluation of court annexed restorative justice conferencing
- Analysis of Sentencing Outcomes with Mandated Apologies.
- Alternative Community Service Programs as Restitution for Young Offenders

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