

**CROWN COURT OR MAGISTRATES' COURT :
A STUDY OF MAGISTRATES IN ACTION**

by

ANDREW HERBERT

A thesis submitted in fulfillment of the requirements of the University of
Leicester for the degree of Doctor of Philosophy

2002

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ANDREW HERBERT

ABSTRACT This thesis provides a comprehensive analysis of the process by which decisions are made in magistrates' courts as to whether adult defendants charged with either way offences should be tried or sentenced in that court or at the Crown Court. An empirical study of three magistrates' courts in England suggests that a series of piecemeal initiatives geared explicitly towards a policy objective of restricting the number of cases reaching the Crown Court have only had a limited impact because they have failed to become part of the culture of the lay magistracy. It is argued that there is a lack of impetus coming from within magistrates' courts to complete more cases as court participants in general do not appear to acknowledge the validity of that objective. A secondary objective has been the enhancement of consistency between courts when determining which cases can be completed by magistrates in the public interest. The findings of this study suggest that the prime explanation for variations between courts lies in individual court culture and the effect that this has on the working practices of all court participants. It is suggested that most mode decisions are effectively not taken by magistrates, but are the outcome of prior negotiation between lawyers. But this negotiation is conducted within the context of a shared understanding as to which cases that particular court was likely to retain and which were likely to be committed to the Crown Court.

Acknowledgements

I would like to acknowledge the assistance of all those people who have supported or participated in this research project. Gratitude must be extended to four groups of court personnel, in no particular order, for their vital co-operation. First, the Clerks to the Justices of the three sample courts for permitting and facilitating the empirical study and to their personal assistants for administrative help. Second, the magistrates, clerks and solicitors in each court who freely gave their time to be interviewed. Third, the ushers in the three courts who diligently photocopied court lists and patiently advised as to which cases were still to be heard in their court. Fourth, the administrative officers in each court who provided facilities for examination of court registers.

I would like to thank Dr.Anthea Hucklesby for admirably fulfilling her role of supervisor while she was at the Scarman Centre, and for continuing to act as an associate supervisor, gratis of everything except for the pleasure of my company, after her departure for the University of Hull. Her copious application of green ink to chapter drafts was a source of improvement to both content and presentation. I am also grateful to Chris Wilkinson for reading through the draft thesis on behalf of the Scarman Centre and for making a number of constructive observations.

I would finally like to thank my parents for paying the course fees, without which assistance I might now be in penury, a small village located in the heart of academic wasteland.

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Abbreviations

AC	Appeal Cases
All ER	All England Law Reports
CPS	Crown Prosecution Service
Cr.App.R.	Criminal Appeal Reports
Cr.App.R. (S)	Criminal Appeal Reports (Sentencing)
ECHR	European Convention on Human Rights
ER	English Reports
P	Probate Division
PBV	Plea before venue
Precons	Previous Convictions
PSR	Pre-sentence report
RCCJ	Royal Commission on Criminal Justice 1993

INTRODUCTION

Criminal proceedings are commenced against almost two million people every year in England and Wales (Home Office,2001). The decisions made by the courts in this large number of cases can have a profound effect on the lives of the accused and their alleged victims as well as being of social and symbolic importance to the wider community. There might, therefore, be an expectation that the court process would have attracted significant attention from researchers. It is apparent, however, that this is not the case. Law and order has become one of the most compelling social issues for politicians since the erosion of the former bipartisan approach in the late 1970s (Downes and Morgan,1997; James and Raine,1998:4). The sheer volume of criminal justice legislation unleashed in recent years reflects a populist reaction to a growing fear of crime (Taylor,1996:160; Leng and Taylor,1996:ix; Ashworth,1997:1096). Miscarriages of justice or perceived leniency frequently capture the attention of the media. Yet there remains a paucity of empirical investigation into the quality of justice administered by the criminal courts and the exercise of judicial discretion (Ashworth,1997:1131).

This thesis provides a comprehensive analysis of the process by which decisions are made in magistrates' courts as to whether adult defendants should be tried, or sentenced, in that court or at the Crown Court. This process has been relatively under-discussed and empirically largely ignored (Ashworth,1998:vi; Hedderman and Moxon,1992:vi). The issue of venue does, however, have important ramifications, proposals to abolish the defendant's right to elect jury trial having provoked arguably the most emotive debate in contemporary criminal justice. In the Introduction, consideration will be given to the legal classification of criminal offences, the aims and objectives of the research project, the conflict between policy and principle in the question of mode of trial and the significance of court culture to decision-making patterns.

The rules governing the distribution of business between the higher and lower courts distinguish three categories of offence.¹ Those deemed the most serious have to be tried on indictment at the Crown Court. The least serious can only be tried summarily by magistrates. In between lies a large group of offences of intermediate or varying gravity which, while being indictable, can be heard in either court and are consequently referred to as either way offences. Prior to implementation of the Criminal Procedure and Investigations Act 1996 in October 1997, magistrates had to determine the venue for trial of all either way cases without receiving any formal indication of the defendant's plea. Their prime consideration was whether or not their sentencing powers of six months' imprisonment, or a maximum of 12 months for two or more offences, would be sufficient in the event of a conviction (Sprack,1997:110). This decision was supposedly based on the gravity of the alleged offence without reference to previous convictions or any personal mitigating circumstances of the accused.

Since 1997 the procedure, commonly known as plea before venue, has commenced with the defendant being asked whether the intended plea is one of guilty or not guilty. If guilty, the magistrates have to assume jurisdiction and should carry out a sentencing exercise taking into account all available offence and offender information. They can then either finalise the matter themselves or commit the defendant to the Crown Court for sentence if they consider that their powers are inadequate.² If guilt is denied or, as quite frequently happens, the defendant declines to indicate a plea, the mode of trial procedure is precisely the same as that formerly carried out in all cases. A decision by the magistrates to accept jurisdiction in a denied either way case is subject to the absolute right of the defendant to elect trial by jury in the Crown Court. This statutory right is, however, under threat of abolition by the government which has proposed that magistrates should always make the final decision.³

AIM AND APPROACH

The aim of this study is to examine the decision-making process for either way offences in magistrates' courts in England and Wales. This primary aim comprises six associated objectives which are to:

- examine the criteria laid down by statute and Guidelines;
- investigate the procedure adopted in either way cases;
- analyse the factors behind the decision to accept or decline jurisdiction following a denial of guilt;
- analyse the factors behind the decision whether or not to commit a defendant to the Crown Court for sentence;
- evaluate the role and influence of professionals, namely prosecution lawyers, defence solicitors, court clerks and liaison judges, in the decision-making process for either way offences;
- identify the extent of and the reasons for disparity of committal rates between courts.

These objectives give rise to a need to consider the theoretical perspective to be adopted in this research. Studies of magistrates' courts can be broadly divided into two theoretically distinct approaches, positivist and interactionist (Winn, 1986:1). Theories of the causes of crime have evolved from individualistic approaches, biological or psychological, to sociological approaches which view human behaviour as a product of the social environment. Research into the criminal justice process has tended to follow the same developmental pattern. The concentration of positivist empiricism on disparities between individual decision-makers has largely been superseded by an interactionist emphasis on decisions being the outcome of a social process involving all of its contributors (Rumgay, 1995). The dilemma is that replacing

one model of research with another can involve sacrificing the beneficial elements of the former. This study counteracts this potential limitation by employing an integrated, multi-theoretical approach (King,1981:11; McConville et al.,1994:11). It adopts both qualitative and quantitative paradigms as a methodological mix facilitates an understanding of court procedures and outcomes (Lipetz,1980:59; Rossman and Wilson,1985; Creswell,1994:176). The central thrust of the study is interactionist and its central argument is that court culture provides the prime explanation for decision-making patterns. It will not, however, overlook either the fact that magistrates are individuals who are afforded a wide level of discretion or the significance of the provisions of the law. It will broaden the scope of conventional observational studies by emphasising the need for an appreciation of history if modern procedures and the stark differences between the two tiers of justice are to be understood.

POLICY AND PRINCIPLE

This section examines the conflict between policy and principle in mode of trial. One policy objective has dominated consideration of venue for more than a decade. This is the perceived need to restrict the number of cases reaching the Crown Court. An increase of almost 70 per cent in the number of cases committed for trial between 1979 and 1987 gave the issue of venue political significance (Home Office,1980:Table 4.5, 1988:Table 6.4). Crown Court trial is, quite simply, far more expensive (Barclay and Tavares,1999). Dominant values of parsimony and efficiency have inspired an economic and managerial policy argument that the country cannot afford to pay for the continuing expansion of Crown Court trial (Raine and Willson,1993; Ashworth,1998:264). A secondary objective has been to enhance consistency between courts when determining which cases can be completed by magistrates in the public interest.

Policy dictates have prompted a series of piecemeal initiatives geared explicitly towards attainment of these two objectives. The reclassification in 1988 of three either way offences as summary only provided the most direct approach to diminishing the Crown Court workload.⁴ Measures designed to influence magistrates were the issue and revision of national mode of trial guidelines, an extended power of committal for sentence after summary trial and the introduction of plea before venue.⁵ Official statistics suggest that these latter measures have only met with limited success (see figures in Appendix 4). This thesis will advance two core arguments as to why this is the case. The first is that attempts to change procedure cannot afford to underestimate the strength of the culture of the lay magistracy. The second is that individual court cultures which have evolved as a consequence of an implicit belief in the concept of local justice provide the prime explanation for variations in committal rates between courts.

It is apparent that the exercise of magistrates' powers as to the forum for trial can have profound implications for defendants, victims and the rest of the criminal justice system. Decisions on venue have direct and consequential effects for the administration of the criminal process (Ashworth,1998:256). As well as being more expensive, Crown Court trial occasions significantly greater delay in completing cases (Moxon and Hedderman,1994:107). A rise in the number of committals contributes to an increase in the remand and sentenced prison population (Moxon and Hedderman,1994:97).⁶ Defendants committed for trial accounted for 46 per cent of the untried prison population in 2000 (Home Office,2001a:Table 2.1). The sentenced prison population is largely determined by Crown Court sentencing patterns. Research has consistently shown that the higher court passes considerably more severe sentences (Justices' Clerks' Society,1982; Bale,1987; Hedderman and Moxon,1992:37).⁷

Victims are affected by the mode of trial decision. The inherent delay occasioned by a decision to commit a case for trial is likely to prove a source of anxiety for them. They may feel intimidated by the greater formality of the higher court, although these concerns may be partially offset by better support systems and waiting facilities at many Crown Courts (Ashworth,1998:262-3). There is, however, a more tangible disadvantage for victims in a decision to commit a case. It would appear that judges are less likely than magistrates to award them compensation (Hedderman and Moxon,1992:32; Barclay and Tavares,1999:18). This may be partly due to the fact that judges are more likely to impose a custodial sentence, compensation rarely being combined with imprisonment. It may be partly occasioned by magistrates being more used to thinking in terms of financial penalties as these form the great majority of their disposals (Hedderman and Moxon,1992:33).

Defendants committed to the Crown Court face the possibility of a more severe sentence and the prospect of a longer remand in custody awaiting final outcome. It is apparent, however, that the question of mode of trial raises acute conflicts between policy and principle (Ashworth,1998:264). While policy prioritises the completion of more cases by magistrates, many defendants will prefer to be tried in the higher court, despite the disadvantages, because of a lack of confidence in the quality of magistrates' justice (Jackson,1994:262; Ashworth,1998:247; Wadham,1999). The perspective of principle acknowledges that delay is inimical to justice. The essential requirement from this standpoint is, however, that the court hearing a case should be perceived to be capable of fairly handling that particular case in a manner commensurate with the gravity of the offences charged (Jackson,1994:262; Timmons,1986:28). Empirical evidence suggests that in evaluating the justice of their experiences individuals consider factors other than outcome such as whether they had a chance

to state their case and were treated with respect (Tyler,1990). The essence of summary justice is a speedy procedure conducted without the traditional legal formalities (Sanders and Young,2000:485).

There is a widespread feeling that summary justice is too summary, and that magistrates' courts give insufficient opportunity for a full examination of the case.

(Ashworth,1998:265)

A number of research studies examining defendants' motivation in exercising the right of election have highlighted the different perceptions of the two modes of trial (Bottoms and McClean,1976; Gregory,1976; Riley and Vennard,1988; Hedderman and Moxon,1992). These studies revealed a widespread opinion that defendants, and indeed many of their solicitors, did not expect justice to be done in the magistrates' court. The main reason given by defendants, in all of these studies, for choosing Crown Court trial was essentially the increased chances of acquittal brought about by jury trial being perceived as fairer and more thorough. Magistrates, by way of contrast, were consistently depicted as displaying an attitudinal bias towards the police. The limited available research evidence does, indeed, indicate that the rate of acquittal in the Crown Court is significantly higher than in magistrates' courts after evidential factors have been taken into account (Vennard,1982,1985).

Prioritisation of the demands of justice or those of cost and efficiency lies at the heart of contemporary criminal justice debate. The answer to the question of whether or not it is appropriate for magistrates to hear more cases largely depends on the weight given to the values of efficiency and justice (Raine and Willson,1993:213). Common academic opinion is that the system currently places too great an emphasis on the former at the expense of

the latter (Duff,1998:612; cf.Smith,1997,1998). There is, however, wisdom in acknowledging that saving costs and time are now recognised as facts of life in the English criminal justice system (Fionda,1995:62). The extent to which the recommendations of the 1993 Royal Commission on Criminal Justice (RCCJ) emphasised efficiency and productivity considerations is indicative of the degree to which these had become embedded in criminal justice by that time (Field and Thomas,1994). The failure of mode reforms to meet government requirements for a reduced committal rate has resulted in the advancement of more radical and controversial proposals. The Lord Chancellor has intimated that attempts to abolish the defendant's right of election may be superseded by an increase in magistrates' sentencing powers (Rozenberg,2002:1).

There would, however, appear to be scope to assuage this dichotomy between policy and principle in mode of trial by significantly reducing the number of cases committed to the Crown Court by magistrates against the wishes of defendants.⁸ Almost three quarters of defendants denied a choice of venue because magistrates declined jurisdiction told Hedderman and Moxon (1992:21) that they would have preferred to have been tried in the lower court. Arguments that magistrates could have accepted jurisdiction in many of these cases are supported by evidence that the Crown Court ultimately passes a sentence which the magistrates could have imposed in the majority of cases for which jurisdiction had been declined (Moxon and Hedderman,1994:102; Barclay and Tavares,1999:36). Research evidence has shown that the Crown Court is considerably more severe in sentencing and yet somewhat routinely passes sentences within the authority of magistrates. The implication of this apparent paradox is that an allocation system determined primarily by reference to sentencing powers is not working in the way in which it was intended (Royal Commission on Criminal Justice,1993:para.6.12).

INCONSISTENCY OF DECISION-MAKING

The last section concentrated on national issues relating to mode of trial. This section considers reasons for variations in decision-making between courts. Two major criticisms have been levelled against the lay magistracy for a considerable number of years. The first, outside the scope of this study, is its social composition (Baldwin,1976; Burney,1979; King and May,1985; Dignan and Wynne,1997; Morgan and Russell,2000). A frequent complaint is that it is dominated by people from narrow sections of society distanced from the realities of life as experienced by the majority (Wilkinson,1992:16). The second criticism, pivotal to this study, is its perceived inconsistency, resulting in the treatment of defendants at all stages of the court process being influenced by the geographical location of their alleged wrongdoing.

Consistency reflects the fundamental constitutional principle of equality before the law (Samuels,1987:66). Evidence that some offenders' chances of being sentenced to imprisonment or refused bail are far higher in certain parts of the country than in others arouses adverse media attention and erodes public confidence in the quality of justice (Hood,1962:123; Tarling,1979:1; Gibson,1987:521). It is, of course, logical that a court faced with a higher proportion of more serious offences will tend to decline jurisdiction more frequently. Research has, however, repeatedly shown that variations exist between courts in procedure (Baldwin and McConville,1977; Church,1982,1985; Baldwin,1985; Morgan and Russell,2000), bail (Jones,1985; Hucklesby,1997), mode of trial (Riley and Vennard,1988; Hedderman and Moxon,1992) and sentencing (Hood,1962; Tarling,1979; Burney,1985; Parker et al.,1989; Flood-Page and Mackie,1998) which cannot be explained by reference to notionally objective facts such as type of case or court workload.

An objective of this study is to identify whether individualistic or cultural factors are primarily generative of these discrepancies. One perspective is that disparities are endemic in the court process because it is a human system involving large numbers of cases and magistrates (Kapardis,1997:155).⁹ A major contributory factor is the wide level of discretion afforded magistrates. This elasticity has the advantage of enabling a court to determine each case on its merits, an individualised approach to which magistrates are firmly committed (Milton,1967:80; Henham,1986:194; Wasik and Turner,1993:346). The corresponding disadvantage of wide discretion is that different courts are free to deal with similar cases in different ways (Tarling et al.,1985:159). Newspapers have traditionally contained reports of cases heard in magistrates' courts (Jones,1974:8). It was not, however, until the 1950s that research began to be carried out in relation to their decision-making processes.¹⁰ Enquiries by Mannheim et al. (1957) and Hood (1962), conducted at juvenile and adult magistrates' courts respectively, attempted to explain marked variations in the sentencing practices of their sample courts. Both of these studies concluded that individual differences of approach between magistrates provided the essential reason for disparities in sentencing (Hood and Sparks,1970:152).

The concentration of positivist empiricism on disparities between individual arbiters resulted in the traditional model of criminal justice viewing decisions as being the outcome of the facts of the case plus individual discretion plus the law. It presupposes that differences in pattern between courts can be explained by differences in cases and in the practices of individual decision-makers (Paterson and Whittaker,1995:264). There can be little doubt that these practices do vary as there are inevitably philosophical differences between some 30,000 magistrates (Rumgay,1995). It will, however, be argued in this thesis that the model presents as being far too restrictive.

The positivist paradigm has been challenged by interactionist sociology. This perspective suggests that court culture provides the prime explanation for variations in pattern between courts (Hucklesby,1997:140). A significant part of the reason for disparity would appear to lie in the evolution and perpetuation of individual court cultures and policies rather than in differences between individual magistrates or between their interpretation of facts (Pennington and Lloyd-Bostock,1987:6; Rungay,1995:202). The initiative of individual magistrates, emphasised by positivists, is seen as being constrained by the traditions of the court in which they sit, especially as lay magistrates usually sit in groups of three (Tarling,1979:27).

The concept of local justice, of local knowledge providing a form of justice which is in tune with local values and conditions, is central to any analysis of court culture and the working practices of magistrates. It will be suggested in Chapter 5 that most magistrates view their primary responsibility as being to administer the law in a manner which is perceived to be in the interests of the local community whom they represent and serve. The rationale of local justice is that policy has to be uniquely adapted to meet local conditions and patterns of crime (Tarling,1979:27). Local organisation has formed the structural basis of the lay magistracy since its evolution in the thirteenth century. Justices were originally instruments of local government, and as from 1327 parliament insisted that commissions of the peace should consist of locally based people with local knowledge (Burney,1979:46).¹¹ The reality of government for most people was their local magistrate (Raine, 1989:6). Although the functions of magistrates have changed entirely from their historical roots, the value of local experience continues to represent a dominant ideology among the lay bench (Raine,1989:10; Seago et al., 2000:645).

An ideology of localism tends, however, to produce an insular approach. Research has shown that while courts place considerable emphasis on maintaining consistency within their own practices, they fail to take much notice of what other courts are doing (Tarling et al.,1985:166; Acres,1987:61). Concerns about national consistency cannot impinge on the everyday decision-making of lay magistrates as their typical knowledge of the practices and procedures of courts other than their own borders on the non-existent (Tarling, 1979). It will be suggested in Chapter 5 that the implicit belief of magistrates in the concept of local justice renders this lack of knowledge inconsequential to the majority of the lay bench.

Occupational culture has been the subject of a considerable volume of research. The prime example in the criminal justice field is the so-called cop culture of the police (Skolnick,1966; Reiner,1992). It is customary for new personnel to be socialized into the behavioural and ideological requirements of an organisation (Wilkinson,1992). There is no reason why magistrates should be any different. New magistrates account for less than six per cent of the lay bench in any given year (Lord Chancellor's Department,2000). This small minority feels under pressure to become part of a team (Burney,1979:113). They may have been appointed because they appeared likely to fit in with the existing team (Parker et al.,1989:173). It is important to recognise, however, that the organisation into which magistrates are socialized is the bench to which they are appointed and not a national body.¹² There are various core conventions, attitudes and beliefs which are widely held in the national magisterial community, but the remainder of the traditions are essentially local in nature (Wilkinson,1992:257). Consistency of decision-making within an individual court is perpetuated by the socialization of new magistrates into existing norms within that court (Lipetz,1980:51).

Court culture does not, however, evolve solely from magisterial traditions (Rumgay,1995; Hucklesby,1997). Professional court participants influence that culture as they are a part of it (Paterson and Whittaker,1995). As a consequence of the non-professional status of the vast majority of magistrates, the lower courts have conventionally been depicted as providing a system of lay justice. That was, indeed, an accurate description of the original concept. But such terminology represents something of a misnomer in contemporary times. It fails to acknowledge that the past 30 years have witnessed the increased professionalisation of lower court justice or that the character of the court process is governed to a large extent by the values of professionals (Bridges,1992:7; Raine and Willson,1993:181).

An important argument of this thesis is that professionals play an integral role in the so-called system of lay justice. Any explanatory model of decision-making needs to take account of the social processes which exist within the court environment and of cultural norms mediated through the working relationships of all the various participants within that setting (Rumgay, 1995; Hucklesby,1997). The interaction and experience of all criminal justice agencies operating within a particular locality generate a culture which encourages some types of decision and discourages others (Paterson and Whittaker,1995:265). This affects the expectations which all court participants have in relation to which cases will be retained and which will be committed. It will be argued in this thesis that variations in committal rates are primarily caused by court culture and the effect that this has on the working practices of court participants. It will be suggested that most mode decisions are effectively not taken by magistrates, but are the result of prior negotiation between lawyers. But that negotiation is based on the cultural norms of that particular court and the likely attitude of the bench.

ORGANISATION AND STRUCTURE OF THE THESIS

The aim of this study is to examine the decision-making process for either way offences in magistrates' courts in England and Wales. The core issues of this research subject have now been introduced and the two central policy objectives have been identified. Chapter 1 establishes a legal framework for the ensuing empirical study. It considers the formal criteria laid down by statute and guidelines, arguments for and against the right of election, the debate concerning who should make mode decisions, the significance of the charge, the systemic imperative of negotiated justice and the influence of defence solicitors in eliciting guilty pleas. Chapter 2 places venue within a theoretical, historical, social and political context. A comparative analysis of the system of trial by jury and the administration of summary justice by magistrates, both from historical and contemporary perspectives, is offered. Theoretical approaches which have attempted to explain the operation of the criminal justice process are considered. Chapter 3 examines the methodology adopted for the collection of data in this study. It provides an explanation of why particular research methods were used in the light of the study's aim and previous research, how these methods were implemented and what difficulties were encountered. It will reveal that empirical investigation was carried out at three magistrates' courts of varying sizes in different commission areas in England.

Analysis of the data obtained in the empirical study commences in Chapter 4. This examines the plea structure in the three sample courts, their committal rates and exercise of the right of election. Chapter 5 offers an analysis of the decision-making process for either way offences from the perspective of lay magistrates. It is divided into three sections. The first

examines implementation of recent measures designed to achieve the dominant policy objective of reducing the number of cases reaching the Crown Court. The implications of the culture of the lay magistracy for three potential reforms are considered in the second section. The final section examines various specific aspects of the either way process in order to provide a comprehensive analysis of that process and as a means of investigating local justice and court culture.

Chapter 6 examines the role and influence of professional court participants in the either way process. An evaluation of the role of prosecution lawyers, defence solicitors and court clerks is offered. Consideration is given to the approach of stipendiary magistrates¹³ towards the determination of venue and their effect on the decision-making process of the lay bench. The influence of liaison judges in formulating policies that certain categories of offence should routinely be sent to the Crown Court is analysed. The final section considers the responses of court practitioners involved in this study to the question of whether mode of trial should continue to be a judicial decision entrusted to magistrates or whether responsibility for venue determination should be delegated to court clerks or solicitors. Chapter 7 concludes this thesis by drawing together the main empirical findings and discussing their contribution to theoretical and policy debates. It emphasises the argument that attempts to change procedure cannot afford to underestimate the strength of the culture of the lay magistracy in resisting reforms which are not perceived by them to be in the interests of justice.

End Notes

¹ The current tripartite classification of offences was introduced by the Criminal Law Act 1977 in accordance with the recommendations of the 1975 James Committee. There are around half a million either way cases commenced each year in England and Wales. They account for some 80 per cent of the Crown Court's business (Home Office, 2001). A full list of either way offences observed in this study is contained in section 10 of the defendant observation data form reproduced as Appendix 6.

² At the time of this empirical study magistrates' powers to commit a defendant to the Crown Court for sentence were regulated by section 25 of the Criminal Justice Act 1991, which had substituted a new section 38 into the Magistrates' Courts Act 1980. The current law is contained in section 3 (2) of the Powers of Criminal Courts (Sentencing) Act 2000. Both sections are reproduced in Appendix 1.

³ The principle that indictable offences could only be tried summarily with the consent of the accused was established in 1855 as an integral part of the introduction of either way offences (see Chapter 1). The requirement for consent is now contained in section 20 of the Magistrates' Courts Act 1980. Two Criminal Justice (Mode of Trial) Bills 1999 and 2000 seeking to abolish the right of election were introduced during the last parliament. They failed to become law because of the opposition of the House of Lords and a lack of time. Since the General Election in June 2001, the government has announced an intention to introduce similar legislation, but had not done so at the time of writing and it is possible may not now do so. This intention was postponed pending the consultation process in relation to the recommendations of the Auld Review, published in October 2001, and it has recently been intimated by the Lord Chancellor that increasing magistrates' sentencing powers may supersede abolition of the right of election. Although this thesis makes reference to the Auld Review, it should be noted that the empirical study was concluded in the summer of 2000 before the Commission of Lord Justice Auld had made any public pronouncements.

⁴ The Criminal Justice Act 1988 reclassified the either way offences of driving while disqualified, taking a motor vehicle without the owner's consent and common assault as summary only. It further prescribed that criminal damage to a value of not more than £2,000 (£5,000 since the Criminal Justice and Public Order Act 1994) could only be tried as if it were a summary offence. The effect of the 1988 Act was to reduce the workload of the Crown Court by around six per cent (Ashworth, 1998:259).

⁵ National mode of trial guidelines were issued by the Lord Chief Justice as a Practice Note [1990, 3 All ER 979] on October 26th 1990 and revised by the Secretariat of the Criminal Justice Consultative Council in January 1995. The extended power of committal for sentence was contained in the Criminal Justice Act 1991 (note 2 above) which came into force on the 1st October 1992.

6 Committals are more frequently in custody than remands of adjourned cases in magistrates' courts (Ashworth,1998:256; Cavadino and Dignan, 1997:83).

7 Hedderman and Moxon (1992:37) concluded that judges imposed over seven times as much custody as magistrates in cases having similar characteristics. They acknowledged (1992:4), however, that sentencing comparisons between the higher and lower courts were not straightforward. Their findings that judges are considerably more severe than magistrates have been criticised (Bridges,1994,2000). It will be suggested in this thesis that a generalised statement as to severity is simplistic and that judges may be more lenient than magistrates in relation to certain categories of offence.

8 In the 1980s a slightly higher proportion of defendants reached the Crown Court because of exercise of the right of election than because magistrates had declined jurisdiction. The proportion who had elected trial progressively decreased so that by 2000 the magistrates' decision to decline jurisdiction accounted for 70 per cent of either way defendants who were sent to the Crown Court for trial (Home Office,2001:para.6.17). Less than a third now reach the higher court because of exercise of the right of election.

9 There were 30,308 lay justices, 96 full-time stipendiary magistrates and 148 acting (part-time) stipendiaries in England and Wales on the 1st January 2000 (Lord Chancellor's Department,2000). The number of lay magistrates has fallen since the conclusion of this empirical study and stood at 28,735 on the 1st April 2001 (Lord Chancellor's Department,2001).

10 It is generally acknowledged that the first survey made of the functioning of magistrates' courts throughout the country was Spotlight on Justice, a pamphlet produced by the Daily Mirror in 1954 (Williams,1963).

11 Section 6 of the Justices of the Peace Act 1997 provides that, subject to rare exceptions, magistrates have to reside in, or within 15 miles of, the commission area.

12 Magistrates' courts in England and Wales are administered by local Magistrates' Courts' Committees. Local authorities meet 20 per cent of their administration costs, the Lord Chancellor's Department meeting the other 80 per cent. The Crown Court is administered by the Court Service, an agency of the Lord Chancellor's Department (Home Office,2001b).

13 Professional magistrates have been known as District Judges (Magistrates' Courts) since October 2000 in accordance with the provisions of section 78 of the Access to Justice Act 1999. They were still called by their former and longstanding title of stipendiary magistrates throughout the period of empirical study. The latter term will be used at all times in the text in the interests of consistency and clarity.

CHAPTER 1

THE LEGAL FRAMEWORK

This chapter provides a legal framework for the ensuing empirical study. The first section examines the formal criteria for mode of trial decisions and the arguments as to who should make those decisions. The second section considers the role and influence of lawyers and the systemic imperative of negotiated justice. This analysis emphasises that an examination of mode of trial cannot be undertaken in isolation as though it were solely a question of the process involved in reaching a particular decision. Determining where a case should be heard is only one part of the criminal justice process through which a person charged with an either way offence proceeds from arrest to final disposal. The practical operation of the either way procedure requires an understanding of wider aspects of the criminal process.

Plea before venue may be viewed by court participants as a separate and distinct phase of the proceedings against a defendant. It (or mode of trial) will usually be considered in criminal procedure texts by an individual section. Such separatism is, however, merely a matter of practical convenience. From a policy perspective it fails to recognise that changes at any given point in the criminal process have repercussions elsewhere (Pullinger,1985:18). Amendment to charging practices may influence the committal rate. That rate, in turn, may have an effect on sentencing patterns and the size of the prison population. From the standpoint of principle it fails to acknowledge that consideration of the respective merits of the two currently available modes of trial is fundamental to any analysis of venue determination. The allocation of criminal cases between the higher and lower courts has been a subject of intense and longstanding debate amongst those having an interest in the administration of criminal justice largely because the quality of magistrates' justice has traditionally been perceived as inferior to that of trial by jury (Vennard,1985:126; Ashworth,1998; Wadham,1999).

The objective of this chapter and Chapter 2 is to provide a contextual setting for the issues in the mode of trial debate by drawing on existing literature. This presents, however, as a difficult task because there is "a disturbing lack of current, comprehensive or well-based data bearing on the issue" (Auld,2001:para.5.150). This paucity of empirical data is not solely of concern to the question of mode of trial. A source of academic criticism is the dearth of research into the administration of justice by magistrates' courts (Darbyshire,1997,1997a). An inevitable consequence of this scarcity of research studies is a heavy reliance on those which have been published.

The only study which has purported to examine the criteria adopted by magistrates in making mode decisions was carried out on behalf of the Home Office in 1990 by Hedderman and Moxon (1992). This policy-driven and primarily quantitative study investigated a number of issues: the reasons underlying mode decisions, the motivation of defendants in exercising the right of election and the relative severity of the sentencing practices of judges and magistrates. As the current chapter is divided by reference to topics, the findings of Hedderman and Moxon will be considered in a number of different sections. Their research has been criticised for employing an unrepresentative sample (Bridges,2000; Auld,2001:para.5.137). It only involved defendants who were convicted at the Crown Court, the rationale being that the study was not concerned with the trial process (Hedderman and Moxon,1992:vi). Cynics may say that this sampling facilitated conclusions which accorded with official policy. The significance of the findings cannot, however, be underestimated. They were pivotal to the RCCJ's consideration of mode of trial (section 1.1.5), the 1995 Home Office consultation document which preceded the introduction of plea before venue (section 1.1.3), the proposals of the 1997 Narey Review (section 1.1.5) and the rhetoric favoured by successive Home Secretaries.

1.1 MODE OF TRIAL

Authority for magistrates to try certain indictable offences summarily originated in the Criminal Justice Act 1855,¹ which marked a turning point in the history of the criminal process (Manchester,1980:161). Prior to that date misdemeanours had to be tried summarily, while felonies could only be tried on indictment before a jury (Emsley,1996:198). The 1855 Act provided machinery whereby certain felonies, namely cases of larceny to the value of not more than five shillings, might be tried summarily with the accused's consent. The quantitative implications of the Act were considerable even though the range of scheduled offences was restricted. Relevant larcenies constituted at least 60 per cent of all cases dealt with at Quarter Sessions (Radzinowicz and Hood,1986:622). The Act further empowered justices to pass sentence in relation to more serious larcenies if there was a guilty plea. In such cases, however, they had to explain to defendants that they were not obliged to plead as this procedure removed the prerequisite of the accused's consent.

Various explanations have been tendered for this significant reform, all of which have to be seen within the context of an increasingly industrialised and urbanised society. Official rhetoric emphasised the need to reduce expenditure and delay. A sevenfold rise in the number of cases committed for trial between 1805 and 1842 had placed an intolerable burden on the system (Philips, 1977:15). There was an humanitarian argument. Defendants charged with petty larceny frequently spent longer in prison awaiting trial than their ultimate sentence, bail rarely being granted (Winn,1986:353; Emsley,1996:184). An alternative paradigm which is political proposes that the point of criminal policy has always been to reproduce existing social power relations and exert a more effective control over the working class (Ignatieff,1978; Garland,1985). This

perspective argues that the true motivation behind the 1855 Act was to create an efficient system of punishment which consciously eroded the due process of law² by abolishing jury trials for minor property offences (Winn,1986:383).

The procedure enacted in 1855 remains applicable today to the extent that the first stage of the process has always been for the magistrates to decide whether or not the case was suitable to be heard by them. Defendants have never been empowered to compel summary trial, and their right to elect jury trial has only ever arisen once magistrates have accepted jurisdiction.³ There were, however, two significant differences. The first was that in 1855 magistrates were clearly expected to retain jurisdiction over the limited compass of indictable offences triable summarily.⁴ Some 98 per cent of defendants charged with larcenies not exceeding five shillings were dealt with by magistrates in the five years following implementation of the Act (Philips, 1977:98). As the range of either way offences has been progressively extended in quantity and in gravity,⁵ it is now inevitable that a larger proportion of defendants will have to be committed for trial in the public interest.

The second difference was that for almost a century previous convictions were revealed at the mode hearing and there was no power to commit a defendant for sentence, except under the Vagrancy Acts, once summary jurisdiction had been accepted (Emsley,1996). The Criminal Justice Act 1948 abolished the disclosure of previous convictions and introduced a power of committal for sentence on the grounds of antecedents or character. This power was extended by the Criminal Justice Act 1991. This authorised magistrates to commit an either way defendant for sentence after summary trial if they considered that their sentencing powers were inadequate without any requirement to base this decision on the existence of previous convictions.

This extended power of committal for sentence provides a practical example of the conflict which exists between policy and principle in the question of mode of trial. So-called "best practice" continues to indicate that a defendant should not be committed for sentence on the same facts as those on which jurisdiction had been accepted (Watkins et al.,1998:35). Judicial authority has, however, established that the new provision has given magistrates an open textured discretion not tied to a decision on mode of trial (R.v.North Sefton Magistrates' Court Ex p Marsh, 1995,16 Cr.App.R. (S) 401).⁶ Magistrates are, therefore, being encouraged to accept jurisdiction in borderline cases in the knowledge that they can still commit the defendant for sentence if the evidence at trial indicates that to be appropriate. The importance of this power can be ascertained from the fact that magistrates are advised on every page of the mode of trial guidelines to take it into account.

Retention of this power would appear central to a policy objective of having more cases completed by magistrates. Its abolition would logically lead to magistrates becoming more cautious and declining jurisdiction more frequently, an argument developed in Chapter 5. Its existence is, however, a contradiction and an anathema to proponents of principle (Legal Action Group, 1993:5; Wadham,1994:250). It means that defendants might sacrifice the right of election by prioritising the prospects of a lighter sentence over the increased chances of acquittal, only to end up finding that a seemingly rational decision had involved "an element of roulette" (Ashworth,1998:248). This conflict would be intensified were the right of election to be abolished. Defendants deprived of the right to choose Crown Court trial could still be committed for sentence following conviction. Cases which were deemed by magistrates to be insufficiently serious to warrant jury trial could still be deemed too serious to be sentenced by them (Sanders and Young,2000:546).

1.1.1 Criteria for determining mode of trial

Formal criteria for determining the forum for trial are now laid down by statute and national mode of trial guidelines. Section 19 of the Magistrates' Courts Act 1980 stipulates that:

The court shall consider whether, having regard to the matters mentioned in subsection (3) below and any representations made by the prosecutor or the accused, the offence appears to the court more suitable for summary trial or for trial on indictment.

Subsection (3) provides that:

The matters to which the court is to have regard ... are the nature of the case; whether the circumstances make the offence one of serious character; whether the punishment which a magistrates' court would have power to inflict for it would be adequate; and any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other.

Interpretation of the statutory provisions was initially left primarily to individual courts, although some areas such as the East Midlands received written guidance from their liaison judges on the circumstances in which jurisdiction should be declined (McKittrick, 1987). Of more importance to the working practices of magistrates today are national mode of trial guidelines first drawn up by a committee appointed by the Lord Chief Justice and issued by him as a Practice Note [1990, 3 All ER 979] in October 1990. A revised version, taking into account the extended power of committal for sentence, was issued by the Secretariat of the Criminal Justice Consultative Council in January 1995. Although this version contains a commendatory foreword by the Lord Chief Justice, it was not promulgated by him (White, 1996:471).

These guidelines were intended to clarify the relevant considerations for magistrates and to enhance consistency between courts (Hedderman and Moxon, 1992:15). It can be argued, however, that their prime motivation was to encourage magistrates to accept jurisdiction more readily as they incorporated a presumption in favour of summary trial which did not exist in the legislation. The Magistrates' Courts Act 1980 simply required the court to consider whether summary trial or trial on indictment appeared more suitable. The essence of the guidelines was to specify aggravating features in relation to each major offence category and advise magistrates to try cases summarily unless they considered that one or more of those features was present and that their sentencing powers would be insufficient (Hedderman and Moxon, 1992:15). In the interests of consistency between courts, they were being advised that a case which had no aggravating features should be deemed to come within their jurisdiction. The guidelines confirmed the principle which already existed that mode of trial was to be determined by reference to the gravity of the alleged offence without taking into consideration any personal mitigating circumstances of the accused. The general observations of the current guidelines are reproduced in Appendix 3.

It has been claimed by Cavadino and Dignan (1997:84) that the impact of the guidelines on committal rates has been modest because they are only advisory and still confer enormous discretion on magistrates. They do, indeed, specifically state that, "They are not intended to impinge upon a magistrate's duty to consider each case individually and on its own particular facts" (Pg.1). It will, however, be argued in Chapter 5 that a more significant reason for their limited effect is that they have not become part of the culture of some courts. These continue to approach mode of trial on the traditional basis of whether or not they could inflict adequate punishment in the event of a conviction.

This failure to become part of court culture may be partially explained by the extreme wariness traditionally displayed by magistrates towards anything which might be construed as an attempt to control their discretion (Henham, 1986:194). This concern is a manifestation of the doctrine of judicial independence. The underlying principle of that doctrine is simply that governments are not permitted to influence the decision of the courts in individual cases (Home Office,1990:para.2.1; Cavadino and Dignan,1997:87). In England and Wales, however, this principle has been broadened to decree that the legislature should not interfere with the discretion of the judiciary (Ashworth,1983:59). It has been argued that the extended version of the doctrine has no constitutional foundation as parliament has the authority to legislate on any aspect of criminal policy (Ashworth,2000:44). But myth has tended to become reality as governments have traditionally shown reluctance to harness judicial discretion (Cavadino and Dignan,1997:88). Attempts to do so during the past decade have aroused consternation among the judiciary.⁷

Discretion is deemed essential by magistrates because common sense represents a dominant ideology of the lay bench (Worrall,1987; Raine,1989:74; Seago et al.,2000:645). Magistrates place great emphasis on the fact that they are ordinary members of the community over whom they have jurisdiction (Raine,1989:30). They believe that guidance and legislation have to be interpreted in the light of common sense, which primarily means their own views and practices (Parker et al.,1989). It will be argued in this thesis that the proliferation in formal guidance offered to magistrates over recent years has been resented by many as representing an attack on the ideology of common sense. The philosophy that common sense prevails has enabled magistrates to continue to put into practice their own working beliefs which may or may not fit with the wider aims of criminal justice policy (Rutherford,1993).

1.1.2 Systemic factors

An examination is undertaken in this subsection of the argument that systemic factors may provide a partial explanation for the fact that the majority of either way defendants are sentenced at the Crown Court within magistrates' powers (Hedderman and Moxon,1992; Barclay and Tavares,1999). In analysing the reasons for this statistic, this thesis will employ the distinction made by Kipnis (1977:314) between aberrational and systemic faults. The former are incorrect outcomes of a sound system, a result of mistakes or errors of judgement. The latter result from structural flaws in the system itself and not from human error. It would appear as though there are four potential reasons why defendants might be sentenced at the Crown Court within lower court powers without this outcome by itself indicating that the magistrates had made a mistake when declining jurisdiction. One of these reasons, charge bargaining, will be considered in section 1.2.3. The other three are identified below.

The first of these, although arguably one of limited statistical relevance, is application of the sentence discount principle. This provides that a court can reduce the level of sentence by up to one third if a defendant admits guilt. When determining mode of trial magistrates should base their decision on the full sentencing tariff as, at least since 1997, the defendant will have declined to indicate a guilty plea. If that defendant admits guilt at the Plea and Directions hearing at the Crown Court, he or she will usually remain entitled to receive at least some discount. The imposition of a sentence of six months' imprisonment in the Crown Court following a guilty plea implies that the sentence on the full tariff basis would have been in excess of six months. In short, the magistrates would have been correct to decline jurisdiction even though the offender ultimately received a sentence within their powers.

The second reason is that magistrates are advised to ignore any disputed offence mitigation. The advice given in the guidelines is to assume that the prosecution version of the facts is correct for the purposes of determining mode of trial. This provision presents as a pragmatic attempt to enhance consistency between courts by making mode an objective exercise as guessing at what might unfold at trial will result in disparities. It is to be presumed, however, that the Crown Prosecution Service (CPS) will present the worst factual scenario when arguing that a case is unsuitable for summary trial. Reliance on this outline is likely to lead to jurisdiction being declined in some cases where the sentence will not exceed magistrates' powers as the judge will be able to take into consideration any offence mitigation before passing sentence. It will, for example, be seen in Chapter 5 that an unprovoked assault will attract a far more severe sentence than an identical attack committed after the defendant had been subjected to racial abuse (case 321).

The third, interrelated, reason is the total absence of offender mitigation at the mode hearing. Current criteria dictate that the venue for contested cases is determined by reference to the alleged offence and not the alleged offender. Magistrates derive their prime source of information from the prosecution outline of the circumstances of the offence (Riley and Vennard, 1988:11). There will, however, almost invariably be some offender mitigation proposed at the sentencing stage. Research suggests that the availability of pre-sentence reports prepared by Probation Officers restricts the use of imprisonment (Walker and Padfield, 1996:30). It is arguably unsurprising that a defendant, whose alleged offence appeared to merit a sentence in excess of six months' imprisonment on the basis of the prosecution case at its highest, often receives a lesser custodial term or a community order when all available offence and offender information has been taken into consideration.

1.1.3 Introduction of plea before venue

The plea before venue provisions were enacted in the Criminal Procedure and Investigations Act 1996 following the presentation of a consultation document to Parliament in July 1995 (Home Office, 1995).

This consultation paper sets out for consideration a number of options for ensuring that cases which can be properly dealt with in the magistrates' courts in England and Wales are retained there.

(Home Office, 1995:1)

The paper invited comments on three possible reforms. The first was the further reclassification of offences from either way to summary only. The document largely adopted the principles of the 1975 James Committee in this respect and provided a list of offence categories where the sentence imposed in the Crown Court was usually within the powers of magistrates. The second option was abolition of the right of election discussed in section 1.1.5. The third, and clearly preferred, initiative was that defendants should be obliged to indicate a plea before mode of trial was considered. This would enable offenders to obtain maximum credit for an early guilty plea. Section 49 of the 1996 Act inserted a new section 17A into the Magistrates' Courts Act 1980. The essential provision of this section, reproduced in Appendix 1, is that the defendant is to be asked whether he or she would plead guilty or not guilty at trial for the offence. If guilty, the court is to continue as if the proceedings constituted from the beginning the summary trial of the information and the accused had admitted the charge.

There is an argument that the premise of plea before venue, that a significant number of defendants would plead guilty before magistrates, was

founded on flawed evidence. Some 65 per cent of defendants denied a choice of venue because magistrates declined jurisdiction informed Hedderman and Moxon (1992) that they would have been prepared to plead guilty before the lower court. This facilitated a conclusion in the consultation document that in 1992 more than 25,000 defendants appearing before the Crown Court would have been willing to plead guilty in the magistrates' court (Home Office, 1995: para.24). The finding of Hedderman and Moxon is, however, open to doubt on two grounds. The first, already noted, is that the sample of defendants interviewed for that study was unrepresentative. It only comprised offenders who had been convicted at the Crown Court and contained a disproportionate number of people convicted of more serious offences because the interview response rate among lesser offenders was low (Pg.18). It can be argued that these 130 respondents, most of whom were still in custody when interviewed, would have had a greater incentive to say that they would have pleaded guilty before magistrates, namely the hope of receiving a lighter sentence.

The second criticism is that the finding only reveals the expressed opinions of defendants. It takes no account of the role of defence solicitors in determining the plea structure. Yet those solicitors exert a pivotal influence over decisions as to plea (Bottoms and McClean, 1976; McConville et al., 1994). Legal advice may result in some defendants who have acknowledged factual guilt pleading not guilty until adequate disclosure of the prosecution case has been provided. It will be seen in Chapter 4 that the proportion of defendants pleading guilty at the plea before venue hearing both in this study and nationally was lower than the figure suggested in the consultation document.

Despite this, consideration of committal for sentence has become appreciably more important since the introduction of plea before venue.

Defendants committed for sentence accounted for less than nine per cent of those sent to the Crown Court on either way charges in 1996. Within three years this figure had risen to almost 30 per cent (Home Office,1997,2000). The prime objective of the reform was to facilitate the completion of more cases by magistrates by providing them with the opportunity to consider all offence and offender information and apply the sentence discount before determining whether or not their sentencing powers were sufficient (Home Office,1995).⁸ Official statistics suggest that this objective has not been fulfilled. A fall in the committal rate for trial since 1997 has been balanced by a rise in the number of committals for sentence (Home Office,2000:para.6.15).

1.1.4 Gender and ethnic origin

Consideration of venue embraces the issues of gender and ethnic origin. One of the consequences of the discretion afforded magistrates is that it facilitates the potential for such extra-legal factors to influence a decision-making process. Gender bias within criminal justice has been an issue of concern for a number of years (Heidensohn,1997). It has, however, been virtually ignored in research into mode of trial probably as a consequence of the small number of female defendants in samples. Evidence on whether magistrates are more or less likely to commit black and Asian defendants for trial than white accused is inconclusive (Ashworth,1998:264). Research has suggested that defendants from an Afro-Caribbean background are more likely to be committed to the Crown Court than other defendants (Brown and Hullin,1992; Smith,1997a:742). This tendency may, however, be explained primarily by differences in offence patterns (Brown and Hullin,1992:53). The implications of abolition of the right of election to defendants from minority ethnic groups are discussed in the next subsection.

1.1.5 The right of election

An analysis of the arguments for and against the right of election is offered in this subsection. Retention of the statutory right of adult defendants to elect trial by jury in any denied either way case which magistrates have adjudged suitable to be heard by them is a point of principle.⁹ The right was prescribed by the Criminal Justice Act 1855 as an integral element of the introduction of either way offences. As a prerequisite of that Act being passed, the principle was established that indictable offences could only be tried summarily with the consent of the accused (Manchester,1980). The argument of the political paradigm that this Act consciously eroded the due process of law by abolishing jury trials for minor property offences has already been noted (Winn,1986:383). This statement is, however, consequential for its technical inaccuracy. While it is true that jury trials for petty thefts were in practice severely curtailed, they were not abolished. The requirement for the defendant to consent to summary trial enabled the Act to provide a tolerable compromise between easing the pressures of jury trial upon the legal system and meeting what the public generally felt was an accused's constitutional right to trial by jury in a criminal case (Manchester,1980:94).

The then Home Secretary, Jack Straw, indicated in advocating the first Criminal Justice (Mode of Trial) Bill 1999 that the requirement of consent was not a fundamental principle, but a procedure introduced "by accident" in the nineteenth century (Johnston,1999:10). It may be argued that the decision to make consent a prerequisite has to be set in the context of a criminal justice process which extended few of the protections currently afforded to defendants (Narey,1997:34). But the contention that a highly debated political decision was accidental would appear to conflict with historical evidence.

Retention of the right of election essentially incorporates two associated arguments. The first is that it gives defendants the right to have their guilt or innocence determined by their fellow citizens rather than by the state's appointed representatives (Wadham,1999). It can be argued, however, that the conception of the jury as a democratic body representing the defendant's peers is historically idealistic. For centuries juries tended to comprise men of superior status who would prove more receptive to instructions from the bench (Cockburn,1972:119). Jury service was still confined to the middle and upper classes at the time of the Second World War (Jackson,1945:96). The jury franchise cannot be said to have been genuinely democratic until the Criminal Justice Act 1972 abolished the property qualification.

The second argument is that the right of election enables defendants to be tried by the court which they deem most likely to afford them a fair hearing (Bottoms and McClean,1976; Gregory,1976; Riley and Vennard,1988; Hedderman and Moxon,1992; Wadham,1999). Retention of the right becomes fundamental from the standpoint of the protection of individual rights in the absence of sufficient confidence in the quality of magistrates' justice and in their ability to try more serious cases fairly. Indeed, some believe that jury trial should be available in any case serious enough to carry a sentence of imprisonment (Harman and Griffith,1979:29; Wadham,1994:250). Even advocates of the right acknowledge, however, that pressure for its retention would be reduced were the quality, or at least the perceived quality, of magistrates' justice to be enhanced (Wadham,1999). There is an argument that the central issue is not that defendants should always be able to choose the mode of trial. It is that the court hearing the case should be deemed to be capable of fairly handling that particular case in a manner commensurate with the gravity of the offences charged (Jackson,1994:262).

This issue was not appreciated by the 1993 Royal Commission on Criminal Justice, which advocated abolition of the right of election (Ashworth, 1998:265). The Commission's terms of reference were:

(T)o examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources.

(RCCJ,1993:i)

Although the Commission was established as an institutional response to miscarriages of justice, it appeared to elevate the instruction to consider the "efficient use of resources" to become a systemic objective of criminal justice (Bridges and McConville,1994:11; Lacey,1994:31). It failed to consider why the availability of rights such as the right of election created public confidence in the legitimacy of the justice system by assuming that legitimacy equated with accuracy (Nobles and Schiff,1994:44). It appeared to disclaim any interest in magistrates' courts by contending that "convictions of the innocent and acquittals of the guilty in serious cases are always jury decisions" (para.1.8).

The minimalist basis of the Commission's concern for miscarriages of justice as arising solely out of jury trials influenced an unstated policy of decreasing the number of cases in which juries were involved (Bridges and McConville,1994:13). Prioritisation of cost and efficiency led it to recommend abolition of the right of election (RCCJ,1993:para.6.13). The underlying argument was that consequent savings would enable more resources to be devoted to ensuring that cases in the Crown Court were better prepared and more quickly heard (RCCJ,1993:para.6.15). This argument ignores the practical dilemma that there is no guarantee that any savings would have been reinvested in the criminal justice system (Sanders and Young,2000:544).

The Commission worked on election figures of over 35,000 each year. It has been described as outrageous that it should have seen fit to recommend such a potentially substantial increase in the workload of magistrates without giving any consideration to how justice was dispensed in the summary courts (Legal Action Group,1993:14). None of its 22 commissioned research studies related to those courts, which did not even merit their own entry in the Report's index. Its non sequitur in paragraph 6.18 that magistrates' courts should be trusted to try cases fairly because they conduct over 93 per cent of all criminal cases (now some 96 per cent) simply begged the question of the empirical basis for such trust. It ignored the possibility that there may be a problem, or at least a perceived problem, of fairness in those courts (Jackson,1994:259; Sanders and Young,2000:545).

The current Labour Prime Minister, Tony Blair, said as shadow Home Secretary in 1993 in response to the RCCJ recommendation for abolition:

We disagree with the curtailment of the right to a jury trial. ... It is totally unsatisfactory to leave the decision on the right to a jury trial to magistrates. ... Fundamental rights to justice cannot be driven by administrative convenience.

(Tony Blair, quoted by Sanders and Young,2000:544)

The conservative government's final response to the RCCJ report in 1996 adopted a broadly similar tone.

The Government agrees the importance of preventing business going unnecessarily to the Crown Court, but considers that such a fundamental change to the right to jury trial as that proposed by the Royal Commission should not be undertaken unless it is clear that would be the only possible way of achieving the objective.

(Home Office,1996:26)

It can hardly be argued that this proviso has been established. The proportion of either way offences reaching the Crown Court because of defendant election has continued to decline (Bridges,1999; Home Office,2001). There has been no published study into the operation of either the revised Guidelines or the plea before venue provisions. Government policy has, however, undergone an almost total change of emphasis. Abolition of the right of election, the preferred option of a further Home Office (1998a) consultation paper presented in July 1998, is now sought. The problem with the right from the perspective of policy is that it results in cases which magistrates were prepared to hear going to the Crown Court. This is not deemed cost-effective (Home Office,1998a:3). Elections in cases which are trivial in relation to the cost of processing pose a dilemma for the Crown Prosecution Service (Crisp and Moxon,1994:40). Official rhetoric tends, however, to ignore the cost argument and emphasises that abolition of the right is justified because of the alleged practice of many defendants to manipulate the system by demanding trial simply to delay proceedings.

It has long been a source of irritation to police officers and others that defendants in 'either way' cases are able to work a system by demanding a Crown Court trial for no good reason other than to delay proceedings.

(Jack Straw, quoted by Johnston,1999:10)

Government arguments have been strongly influenced by the report of Narey (1997), whose brief was "to identify ways of expediting the progress of cases through the criminal justice system from initiation to resolution, consistently with the interests of justice and securing value for money" (Pg.51). In supporting the case for abolition, Narey felt it appropriate to quote an unnamed senior magistrate on the potential for system abuse.

In considering elections for trial I cannot remember the last time someone elected for reasons of reputation. Inevitably, the ones who elect are experienced defendants, the ones who know how to play the system.

(Magistrate, quoted by Narey, 1997:35)

This is a strong statement. It does, however, raise the question of the source of this alleged knowledge as no reasons have to be given for electing trial and previous convictions are not revealed. The claim that a defendant is "experienced" can only be based on the magistrate's personal knowledge of the accused's criminal background. This is precisely one of the reasons why defendants with previous convictions, especially those commonly referred to as "regulars", may wish to elect trial. They desire to be judged impartially by a body of people who have no preconceived ideas because they have never seen them before.

The manipulation argument implies that the only justifiable reason for electing trial is to have guilt or innocence determined by a jury. The contention that this sole valid reason is being abused relies heavily on the finding of Hedderman and Moxon (1992) that the majority of cases in which the defendant elects trial eventually result in guilty pleas. This contention arguably embraces three flaws. The first is that it incorporates the contested use of statistics. The proportion of defendants who elect trial and subsequently admit guilt is substantially lower than the figure of 82 per cent quoted by government officials (Bridges, 2000:6). This figure is based on the data of Hedderman and Moxon (1992:23) that only 18 per cent of defendants electing trial pleaded not guilty in the Crown Court to all charges. Their sample, however, solely comprised defendants who were ultimately convicted. It took no account of defendants who were discharged prior to committal or who were acquitted at

the Crown Court. It will be shown in Chapter 4 that more than half of the defendants in this study who elected trial had all either way charges against them withdrawn prior to committal and never reached the higher court at all. National statistics indicate that 67 per cent of those denying all counts at the Crown Court are acquitted (Lord Chancellor's Department, 2001:67).

There is, secondly, no empirical evidence to support the argument that significant numbers of defendants elect trial as a delaying tactic. In the most comprehensive study, Gregory (1976:11) found that only six per cent of defendants who elected trial intended to plead guilty to all charges at the time of election. By way of contrast, Hedderman and Moxon (1992:21) found that almost three quarters of defendants denied a choice of venue because magistrates declined jurisdiction said that they would have preferred to have been tried summarily.

The third arguable flaw is that no account is taken of the effects of charge bargaining. This relates to cases where the Crown Prosecution Service either amends the charge or drops some charges in consideration of a guilty plea to the new or reduced number of charges. Research commissioned by the 1993 Royal Commission found that charges had either been reduced or dropped in over 50 per cent of cases in which defendants entered late guilty pleas in the Crown Court (Zander and Henderson, 1993:154). The timing of inter-professional negotiation, considered further in section 1.2.3, may represent a systemic problem. It leads to a large number of cracked trials¹¹ and inefficient use of court time. But timing problems are not an indication of manipulation or bad faith on the part of the accused. It will be suggested in Chapter 4 that only a very small minority of defendants who elect trial ultimately admit all of those offences with which originally charged.

Opponents and proponents of the right of election both quote figures in support of their respective arguments as to the effects of abolition. The former concentrate on cost saving, the latter on the increased possibility of innocent people being convicted. Both sets of statistics are contested. The number of defendants electing jury trial has steadily decreased over the past decade, and now stands at little more than 18,000 per annum as against the figure of 35,000 on which the 1993 Royal Commission worked (Bridges,1999). Defendants would retain the authority given them in the Magistrates' Courts Act 1980 to make representations on mode of trial were the right of election to be abolished. A right of appeal against a decision to accept jurisdiction would be introduced.

Narey (1997:34) worked on an assumption that the proportion of defendants persuading magistrates or judges that their case should go before a jury would be no more than a quarter of those currently electing trial. The government appears to have accepted this assumption. An explanatory note to the Criminal Justice (Mode of Trial) (No.2) Bill 2000, introduced in the House of Commons on the 22nd February 2000, estimated that the Bill would result in a reduction of around 14,000 committals for trial each year. It has to be acknowledged that the diversion of some 14,000 cases annually from the Crown Court, about 15 per cent of its workload, would result in a considerable cost saving. But how Narey arrived at this estimate of a quarter was neither explained nor is it universally accepted. The attitude of magistrates to a situation which they have never faced in their history is quite simply unknown. Cultural features which might increase the proportion of a quarter will be considered in Chapter 4 when the findings of the empirical study are analysed. The abolition of the right of election might divert 14,000 cases annually from the Crown Court. It might have a markedly lesser effect.

Proponents of the right of election have argued that its abolition could lead to the "possibility" of up to 4,000 defendants each year who are currently acquitted at the Crown Court being convicted by magistrates (Bridges, 1994:27). The principle behind this argument would appear to be supported by the higher conviction rate of magistrates and the findings of Vennard (1982, 1985) that the chances of acquittal were significantly higher in the Crown Court. The quoted figure, which would now be lower as there are less elections, is, however, mere speculation. It may be that those who have a stronger case are more likely to elect jury trial and would still be acquitted by magistrates. It may be that those whose cases are currently withdrawn prior to committal would still be discharged had summary trial been agreed. It may be, however, that the CPS would proceed if magistrates were seised of the case because of the enhanced prospects of securing a conviction. The pressure on the CPS to negotiate, knowing that a judge would scrutinise the committal papers, would be reduced. This may lead to defendants continuing to face, and being convicted of, more serious charges (Bridges et al.,2000).

Abolition may have a disproportionate impact on defendants from minority ethnic groups. Evidence suggests that black people whose families originally came from the Caribbean are more likely than other groups in England and Wales to be criminalized (Smith,1997a:703). Limited evidence that they are also more likely to choose Crown Court trial implies that abolition of the right of election would be perceived by the ethnic minorities to amount to indirect discrimination (Jefferson and Walker,1992; Hood,1992; Ashworth, 1998:264; Bridges et al.,2000). Retention of the right assumes greater importance because research has shown that a considerably higher proportion of black, male defendants than their white counterparts plead not guilty at trial in the Crown Court (Walker,1989; Hood,1992).

1.1.6 Responsibility for the mode decision

Arguments over retention of the right of election epitomise the acute conflicts which exist between policy and principle in the question of mode of trial. Indeed, they provide a prime example of the conflict between the prioritisation of the demands of justice and those of cost and efficiency within the criminal justice system as a whole. They do not, however, constitute the only element in the debate as to who should determine where a case is to be heard. The role of the various court participants within the prevailing ethos of managerialism gives rise to questions as to the nature of the mode decision and who should make that decision. Since the inception of either way offences in 1855 determination of their venue has been deemed to be a judicial decision to be entrusted to magistrates. The past decade has witnessed a challenge to this historical status. This subsection examines that challenge.

The 1993 Royal Commission considered the position in Scotland, where the decision on the mode and venue of trial rests with the prosecuting authority. The Commission noted (para.6.12) that prosecution control did not appear to give rise to controversy in that country. Adoption of this procedure in England and Wales would give the Crown Prosecution Service influence over maximum sentencing powers (Block et al.,1993:63). It would not, however, represent a radical departure from principle because of the longstanding principle of prosecutorial discretion. The advent of summary jurisdiction in the early eighteenth century resulted in private prosecutors being able to decide on how a case should proceed and its maximum penalty by selecting the charge (Emsley,1996:198). The CPS already has an indirect influence on the judicial process of sentencing by means of determining whether the accused should face a summary or an either way charge (Fionda,1995:1).

The position in Scotland is, however, different in that lay magistrates sitting in district courts have a far less extensive jurisdiction than do those in England and Wales. Their sentencing powers are restricted to 60 days' imprisonment and in practice they rarely impose custodial sentences (Morgan and Russell,2000:102). The RCCJ concluded (para.6.12) that extension of the principle of prosecutorial authority to this jurisdiction would not be acceptable "at least for the time being." This proviso might imply a lack of confidence in the work of the CPS rather than a principled rejection of the idea (Ashworth, 1998:258). The notion was, however, summarily dismissed by Narey (1997:33) on the grounds that it "would be greeted with alarm." Precisely why adverse reaction should condemn this idea but not the equally controversial proposal to abolish the right of election was conveniently ignored.

The Royal Commission did, however, recommend change. It came to the conclusion (1993:para.6.13) that magistrates should no longer be concerned with mode of trial when the prosecution and defence agreed. The reasoning behind this efficiency argument was that magistrates were likely to concur in such circumstances. This ignores both the point that justice would no longer be seen to be done and the influence of magistrates on negotiations. It is true that research has consistently revealed a high concordance rate between prosecution representations and magistrates' mode decisions (Bottoms and McClean,1976; Baldwin and McConville,1977; Riley and Vennard,1988). But a partial explanation for this may be that those recommendations and the advice given by solicitors to defendants had been influenced by knowledge of the pattern of decisions in that particular court (Hedderman and Moxon,1992:15). Contested applications become comparatively rare as both sets of solicitors desire to maintain their credibility (Hucklesby,1997). Were the ultimate decision to rest with lawyers, the nature of agreed decisions might be different.

The Royal Commission's recommendation has found no official favour. However, for some 20 years courts have had to embrace new managerialist values and methods which have in many respects proved to be at odds with the conventions and expectations of the justice process (Raine and Willson, 1993:2). It will be seen in Chapter 6 that, as an extension of such principles, some clerks consider that a system of case management requires an allocation procedure which should be delegated to them. This debate illustrates the argument of this thesis that venue determination has to be examined within the context of the criminal justice system. The role of the clerk in mode of trial is but one aspect of a much wider concern. The extent of the clerk's role within the court setting has become a highly contentious issue in the system of lay justice.

The historical principle is that the role of clerks is to advise the bench on law, practice and procedure, while the function of magistrates is to make judicial decisions (Darbyshire,1999:377). This principle has never been as clear-cut as might appear (McLaughlin,1990). Clerks have always possessed considerable authority in relation to judicial decisions because of magistrates' lack of legal expertise. There is a view that it is a legal fiction that lay justices decide points of law as they are normally wholly dependent on their clerk's advice (Darbyshire,1999:380). Magistrates did, however, always make the final decision whatever may have been the influence of others. Recent years have witnessed a blurring of the advisory and judicial role with an increasing number of magistrates' functions being delegated to clerks altogether (Darbyshire, 1999:377). The role of clerks has been extended so that traditionally judicial decisions have become administrative processes (James and Raine,1998:61). An extensive list of delegated powers has been provided by Darbyshire (1999:378).

The Bill preceding the Crime and Disorder Act 1998 would have given clerks even more judicial powers than the considerable extension provided by the Act. Official rhetoric stressed that this would reinforce the lay magistracy.

(R)emoving administrative case management from magistrates' remit ... would do much to increase the quality and attractiveness of the work of the magistracy and increase its efficiency.

(Narey,1997:26)

The Lord Chief Justice expressed a diametrically opposite opinion in the debate on the Bill.

I object to the possibility that some of these powers might by rule be exercised by the justices' clerk because such a rule would erode the fundamental distinction between the justices and the justices' legal adviser and in the longer term ... signal the demise of the lay magistracy.

(Lord Bingham,Hansard HL,December 16 1997,Col.562)

These last few words are highly significant. Giving clerks authority for venue decisions with its sentencing implications would represent a radical departure from principle. Yet the ethos of managerialism results in there being little doubt that the powers of clerks will continue to be extended. Section 45 of the Justices of the Peace Act 1997 provides that most powers which can be exercised by a single justice could be delegated to clerks. At the time of interviews for this study, however, responsibility for venue decisions had far more significant connotations than case management. It formed part of the debate being conducted as to the future of the lay magistracy. The Auld Commission had made no public pronouncements and magistrates viewed the possible loss of mode decision-making as a step on the road towards the formal professionalisation of summary justice in this country.

1.2 THE ROLE AND INFLUENCE OF LAWYERS

This section examines the significance of the charge to mode of trial decisions, the influence of prosecution lawyers, the systemic imperative of negotiated justice and the role of defence solicitors in eliciting guilty pleas. It will provide evidence to support a major argument of this thesis that professional court participants play an integral role in the so-called system of lay justice. They determine charges, exert a crucial influence over the plea structure, shape the information on which magistrates base decisions and make recommendations which are usually followed (McConville et al.,1994; Riley and Vennard,1988:11).

1.2.1 The significance of the charge

Decisions on mode of trial can be influenced or even controlled through the charging practices of the police and prosecution (Ashworth,1998:242).¹² In certain circumstances the CPS can conclusively resolve this issue. By deciding that the accused should face, or continue to face, charges triable only summarily or only on indictment its lawyers remove any venue decision from the magistrates altogether. Stipendiary magistrates may occasionally indicate surprise at the choice of charge or, as happened once in this study, question in open court whether or not it was the correct one. But magistrates have never been empowered to interfere with the principle of prosecutorial discretion and insist upon a different charge being laid. Judicial precedents make it clear that the decision to bring a lesser charge in order to ensure summary trial lies within the prosecutor's discretion (Broad, 1979, 68 Cr. App. R. 281). This discretion extends to dropping an either way charge after the defendant has elected Crown Court trial and preferring instead a summary charge in order to circumvent that election (R.v.Ramsgate Justices,1981,72 Cr.App.R.250).

This does not mean that Crown Prosecutors exercise an unrestricted discretion. The two cases cited above were determined before the Crown Prosecution Service came into existence in 1986. The current Code for Crown Prosecutors (1994) stipulates that a charge should not be changed simply because of the decision of the court or the defendant about where the case will be heard.¹³ There are charging standards and the charge preferred should always be the appropriate one on the facts (Ashworth,1998:253). In many cases there will be no doubt as to the proper charge. In others, especially cases of violence or disorder, there will be a choice between two or more alternatives. This choice may be between a charge of assault occasioning actual bodily harm (either way) and common assault (summary), or between affray (either way) and threatening behaviour (summary). Some CPS lawyers may place undue reliance on the police version of events when considering the appropriate charge (Baldwin,1997:544). Some may continue with the charge laid by the police despite their own feelings that it should be reduced in order to avoid a deterioration in their working relationship (Ashworth,1998:251).

The selection of charge within the either way category may by itself influence the magistrates' decision as to mode of trial. Shea (1974) devised an experimental study whereby two groups of magistrates were given an identical statement of facts but a different charge. His findings suggest that the offence label could influence the choice of sentence without significantly affecting rating of the defendant's moral culpability. This research may indicate little more than a tariff approach to sentencing, especially as one of Shea's offences was a motoring charge. However, if applicable to mode of trial, and this study will present limited evidence to suggest that it is, it would imply that magistrates would be more likely to decline jurisdiction on the basis of the inadequacy of their sentencing powers were the defendant to face a more serious charge.

1.2.2 The influence of Crown prosecutors

Research has revealed a concordance rate of 96 per cent between prosecution preferences and magistrates' mode decisions in cases in which both were known (Riley and Vennard,1988:11).¹⁴ This implies that the Crown Prosecution Service exerts considerable power *de facto* on the decision-making process for either way offences (Ashworth,1998:250). It has inspired an argument that magistrates might almost be said to have delegated their responsibility for mode decisions to the CPS (Cavadino and Dignan,1997:83). There is, however, an alternative view. This is that CPS lawyers might be influenced by the pattern of decisions in a court and adapt their recommendations to accord with their expectations of the decision which the bench was likely to make (Hedderman and Moxon,1992:15; Criminal Justice Consultative Council,1993).

All decisions are influenced by the flow of information to the decision-maker and by the way in which supposed "facts" are selected and presented (Ashworth,1998:301). This is particularly significant in mode of trial procedure as magistrates derive their prime source of information from the prosecution outline of the case which they are advised to assume is correct (Riley and Vennard,1988:11). The influence of the prosecution is, however, strengthened by a perception among magistrates that Crown lawyers are professional experts who provide objective and unbiased information to the court (Brown,1991; Hucklesby,1997). That information should be given in a form which does not disclose previous convictions (*R.v.Colchester Justices*, 1977, 3 All ER 567). Yet magistrates may place considerable reliance on representations for committal because they are aware that Crown lawyers have knowledge of antecedents when formulating their recommendation (White, 1996:472; Hedderman and Moxon,1992:15).

1.2.3 Negotiated Justice

This subsection examines the systemic imperative of negotiation between lawyers. The popular conception of the criminal process is that it is designed around adversarial principles characterised by confrontational rather than co-operative relationships (McConville et al.,1994:10; Mulcahy,1994:427). Yet the single most important feature of criminal procedure in England and Wales is its fundamental dependence upon the guilty plea (McConville and Baldwin, 1981:7). Such dependence is not a universal feature. In order to protect defendants' rights, the guilty plea is unavailable in some continental countries which adopt an inquisitorial system (Damaska,1973). But the court process in this country would effectively be brought to a standstill if all defendants adhered to the presumption of innocence and compelled the prosecution to prove their guilt (Baldwin,1985:55). This has rendered bargaining a characteristic feature of the criminal process (Mulcahy,1994:412). Much time is devoted to exploring the possibilities of compromise and accommodation as it is generally accepted that substantial alterations would be needed to the criminal justice system were bargaining to be eliminated (Baldwin,1985a:109).

Defence solicitors are central to the bargaining process. Those solicitors tend to play a peripheral role in mode of trial hearings as they rarely challenge the recommendation of the Crown (Riley and Vennard,1988:12). They do, however, exert a crucial influence over decisions as to plea and exercise of the right of election, the implications of which defendants often appear to have little true understanding (McCabe and Purves,1972; Bottoms and McClean,1976; Baldwin and McConville,1977; McConville et al.,1994). They are pivotal in the related areas of plea bargaining and charge bargaining. The former relates to cases in which the defendant alters a not guilty plea to one of guilty without any

reduction in the number or level of the charges. This is usually in exchange for the prosecution accepting and presenting to the court a more innocuous, and thus qualitatively different, version of events (Darbyshire,2000:897).

In a review of empirical studies, Ashworth (1984:83-87) strongly argued the case for independent research into the legal profession as the beliefs and practices of defence solicitors had been largely ignored. The seminal work on those solicitors was carried out by researchers at Warwick University in the early 1990s (McConville et al.,1994). The central theme of their book was lawyers' abandonment of adversarial principles in defence work and the need to reassert their importance. It was suggested that the philosophies and working practices of most defence solicitors were founded in the dual assumptions of a presumption of guilt and that the case would most conveniently be resolved by a guilty plea (McConville et al.,1994:137). The conclusion (Pg.137) was that these assumptions were ideological and not the outcome of a legal assessment of the evidence in individual cases. But it can be argued that this sociological analysis displays a lack of appreciation of the complexities of procedural tradition. The research concentrates on describing current practices without recognising that bargaining and compromise are widely regarded as characteristic elements of adversarial systems and not as an abandonment of principles. These elements are generally viewed favourably by legal practitioners (Mulcahy,1994:414). Other research has suggested a requirement for defence solicitors to conform to a court's norms as a basis of attaining status and acceptance within that court (Hucklesby,1997:140). Those solicitors feel the need to co-operate with the prosecution in order to get information and assistance (Carlen,1976:45-48). They foster harmonious relations with the police (Baldwin,1992a:41). They have a need to retain credibility in the eyes of the bench (Hucklesby,1997:139).

Negotiation between lawyers to achieve the agreed resolution of a case is fundamental to all aspects of the court process. The timing of that negotiation is critical to a discussion of mode of trial. There is a tendency for it to take place after venue has been determined (Hedderman and Moxon,1992). One systemic reason why the Crown Court frequently passes a sentence which the magistrates could have imposed is that charges and pleas are often not finalised until after mode of trial deliberations have been concluded (Hedderman and Moxon,1992:17). The charge on which a defendant is sentenced at the Crown Court is frequently a lesser one than that for which the magistrates had declined jurisdiction. Hedderman and Moxon (1992:10) found that between 20 and 37 per cent of defendants sentenced at five Crown Courts for assaults occasioning actual bodily harm had originally been charged with the more serious offence of causing grievous bodily harm.

One reason for this timing may be the inadequacy of the police file provided to the CPS prior to plea before venue and the consequent inadequacy of the advance disclosure supplied to the defence. The consultation document which preceded the plea before venue provisions recognised that,

It will be essential for the prosecution to have its case against a defendant fully prepared and disclosed to the defence in time for an *informed plea* in the lower court to be entered.

(Home Office,1995:para.27)

It will be suggested in Chapter 4 that this condition has not been met. It is essential that defence lawyers are provided with adequate information to establish the strength of the prosecution case prior to indication of plea (Sunman,1998:799). Almost half of the defendants and solicitors interviewed by Hedderman and Moxon (1992:20) indicated that one reason for electing Crown Court trial was a desire to get more information of the prosecution case.

The defence has only had a right to advance disclosure in magistrates' courts since May 1985.¹⁵ The Magistrates' Courts (Advance Disclosure) Rules 1985 obliged the prosecution to provide written statements or a case summary in all either way cases prior to the mode of trial hearing if so requested by the defence solicitor (Feeney,1985a). This measure, intended to alleviate "trial by ambush", provided no panacea for two reasons. The first was that defence solicitors only sought disclosure in a minority of cases (Riley and Vennard, 1988:18). The second was that disclosure by way of the standard procedure of a summary prepared by the police often fell short of what was needed for the purposes of advising on mode of trial and plea (Baldwin,1992:5). Summaries offering the prosecution's version of events could well prove worthless, or even positively misleading, to a defence solicitor (Baldwin and Mulvaney,1987a:813). The police will only prepare a full file when a not guilty indication has been entered. This results in meaningful discussion between lawyers tending to take place after venue has been determined.

Research findings suggest that mode of trial decisions are often taken on the basis of a charge and a plea that are both eventually altered (Hedderman and Moxon,1992:17). The consequence is that "the facts" on which a judge bases sentence can be very different to "the facts" heard when jurisdiction was being declined. Hedderman and Moxon (1992:17) concluded that a fairly substantial change in procedures would be required were decisions which might resolve charge and plea to be taken at a sufficiently early stage to affect mode of trial. Some CPS lawyers fail to subject the evidence supplied by the police to a rigorous or critical examination until a trial is imminent (Baldwin,1997:545). The defence has little incentive to change plea in the absence of an indication that a plea to a lesser charge would be acceptable (Hedderman and Moxon,1992:17).

1.2.4 Reasons for guilty pleas

Research evidence, considered in this subsection, suggests that defence solicitors are primarily responsible for the fact that the majority of their clients ultimately convict themselves by pleading guilty. The legal system provides the opportunity for plea and charge bargaining by its incorporation of various incentives to admit guilt (McBarnet,1983:75). Some of these are inherent in that system such as the prospect of having the case completed there and then in order to avoid the anxiety caused by delay. Others have been introduced. The most transparent of these is the sentence discount principle (Sanders and Young,2000:398). The pressure on defendants to admit guilt may lead to prosecutors being tempted to over-charge as a tactical means of inducing a guilty plea to a lesser charge (Ashworth,1984:35). It has to be acknowledged that the systemic imperative of guilty pleas substantially erodes the standards for guilt and undermines the principle that the burden of proof rests on the prosecution (Kipnis,1977:317). It leaves only the factual basis for the plea to serve as the foundation for conviction. It is true that a court can refuse to accept a guilty plea if a defence is revealed. But it is one thing to show to a court that there are facts which support a plea of guilty and quite another to prove guilt beyond reasonable doubt to 12 jurors or three magistrates in an adversarial proceeding (Kipnis,1977:317).

Whatever the ideological concerns about eroding the standards for guilt, charge bargaining would arguably be acceptable to many people if it could be presumed that only those admitting criminal activity ultimately pleaded guilty. Research has, however, repeatedly shown that this is not the case. An American study revealed that some 51 per cent of a sample of 724 defendants who had pleaded guilty asserted their innocence to an interviewer (Blumberg,

1967:91). English research supports this principle, while indicating lower figures. Bottoms and McClean (1976:120) identified some 18 per cent of defendants as having pleaded guilty to at least one charge which came into the category of possibly innocent. Baldwin and McConville (1977:62) found that 37 per cent of 121 guilty plea defendants strongly protested their innocence of at least one charge. These studies were, however, based on defendants' own accounts. Defence barristers told Zander and Henderson (1993:139) that they believed that their client had pleaded guilty to a charge of which they were innocent in six per cent of 846 Crown Court cases. Even this lowest percentage figure would have represented some 1,400 Crown Court cases each year if reproduced nationally.

This begs the question of why anyone who protests their innocence should admit to a criminal offence with all the inherent stigmatic consequences. Specific reasons have been identified as police pressure, the perceived futility of challenging police evidence, the sentence discount, avoidance of the greater publicity attendant on a full trial and having the case completed without delay (Ashworth,1984:73). The prime reason given by defendants for changing their plea to guilty has, however, been legal advice, which may, of course, have taken into account some of the specific reasons noted (Blumberg,1967; Bottoms and McClean,1976; Baldwin and McConville,1977; Hedderman and Moxon,1992). It is usually the defence solicitor who takes the initiative to seek a plea bargain and is most instrumental in eliciting a guilty plea (McConville et al.,1994:198). Although it is ethically wrong for a lawyer to advise anyone who maintains their innocence to plead guilty, the system as it is provides inducements which a conscientious lawyer must bring to their client's attention (Ashworth,1984:76). There are competing explanations for lawyers' advice to plead guilty. One is that they assess the evidence in individual cases and

come to the conclusion that the combination of the sentencing discount and the difficulty in challenging police evidence renders it in the best interests of their client to admit guilt (Ashworth,1984:80-81). The other is that the culture of defence solicitors is more concerned with processing clients than with invoking an adversarial system (McConville et al.,1994). Trials are viewed as unnecessary as defendants are largely perceived as morally culpable and substantively guilty by both sets of solicitors (Mulcahy,1994:412). This leads to defence lawyers seeking to negotiate a charge which their client can be persuaded to admit (McConville et al.,1994).

1.2.5 Court culture

This subsection develops the concept of court culture introduced on page 14. A number of studies have shown the existence of informal rules and norms which regulate the work of the courts and have suggested that these can help to explain and understand variations in court practice and in the decisions which they make (Lipetz,1980; Church,1982,1985; Mulcahy,1994; Paterson and Whittaker,1994; Rumgay,1995; Hucklesby,1997). It was shown in the Introduction that this perspective challenged the traditional, positivist explanation that differences between individual decision-makers were primarily generative of inter-court variations. The culture of the lay magistracy is clearly of central importance. It has to be emphasised, however, that court culture does not equate to magisterial traditions. The culture of a court evolves and is perpetuated through the beliefs and practices of all court participants.

Court culture is a set of informal norms which are mediated through the working relationships of the various participants (Hucklesby,1997:130). It has been defined by Church (1985:451) as "practitioner norms governing case

handling and participant behaviour in a criminal court." The interaction between the various individuals and agencies in the criminal justice system generates a localised criminal justice culture. It is this culture which formulates the basic assumptions from which people work when they operationalise the formal rules for considering cases (Paterson and Whittaker,1994:12).

Court culture is based upon a shared understanding between participants of the way in which remand hearings should be conducted. It is produced by the interaction of the law and policy, the responsibilities of each individual and agency, their particular views and actions, the relationship between individuals and agencies and local environmental factors.

(Hucklesby,1997:141)

Court culture affects the expectations which all court participants have in relation to likely decisions and, thereby, influences the applications made by both sets of solicitors. The assessment of probable outcome is an important way in which court practices influence decision-making prior to a hearing (Paterson and Whittaker,1994:69). Contested applications are minimised by a shared understanding of likely outcome. The concept of a co-operative courtroom workgroup is central to court culture (Lipetz,1980:58). There is a perceived requirement for co-operation between the various individuals and agencies which constitute the criminal justice system (James and Raine, 1998:50). The influence of the workgroup to individuals is underlined by the need of prosecution and defence lawyers to maintain credibility (Hucklesby, 1997:140). This emphasises the centrality of negotiation to the criminal process. Much of the case settlement which is conducted in the name of the accused has a strongly co-operative and non-adversarial nature (Baldwin, 1985a; Mulcahy,1994:421; McConville et al.,1994:188-198).

1.3 CONCLUSION

The prime consideration for magistrates in determining mode of trial is whether or not their sentencing powers would be sufficient in the event of a conviction (Sprack,1997:110). The complexity of the issues to be tried might very occasionally render a relatively minor case more suitable for trial on indictment, but the converse has never been true. Magistrates have never been empowered to hear a case which falls outside their sentencing powers because it presents as being straightforward. Justice is concerned with ensuring a fair trial. Conceding that saving costs and time are now recognised as facts of life in the English criminal justice system (Fionda,1995:62), there is an argument that an allocation system based on the complexity of the issues rather than purely on the seriousness of the alleged offence would result in a better use of scarce resources. This argument was pressed by the Justices' Clerks' Society in its evidence to the 1993 Royal Commission (Ashworth,1998:265).

It has been shown in this chapter that current criteria for mode of trial result in a number of defendants being sentenced at the Crown Court within magistrates' powers without this outcome by itself implying criticism of the way in which individual benches interpret national guidance. This is not to suggest that the criteria are necessarily flawed. It does suggest that the sentencing test provides an inappropriate yardstick. The deliberations of magistrates as to likely sentence are supposed to be conducted solely on the basis of the gravity of the alleged offence and not to take into account any personal mitigating circumstances of the defendant. They are advised to assume that the prosecution version of events is correct. Later consideration of offence and offender mitigation, quite possibly in relation to a lesser charge and following an amended plea, will often serve to reduce the level of sentence imposed.

Insufficient confidence in the ability of magistrates to deal with more serious cases generates arguments of principle concerning venue. Diverse perceptions of magistrates and juries, and of their attitudinal biases, are crucial issues in contemporary criminal justice debate and provide a focal point for the next chapter. The RCCJ failed to appreciate the significance of the perceived inadequacy of the quality of magistrates' justice. A policy objective of restricting the number of cases reaching the Crown Court will remain subject to critical examination until there is a widespread feeling that magistrates are able to handle more serious cases fairly. There are implications for the erosion of the presumption of innocence if reforms such as abolition of the right of election relegate some defendants to a form of justice which inclines unfairly in favour of conviction (Lacey,1994:32; Ashworth,1998:265). These implications are strengthened in relation to minority ethnic groups who display greater faith in the fairness and demographic mix of juries (Bridges et al.,2000).

The next chapter will reveal that magistrates' courts were designed around an ideology of guilt (Jones,1974; McBarnet,1983). It would appear that this ideology extends to many professional court participants. Some CPS lawyers share a common value system with the police (Baldwin,1997:551). The working practices of many defence solicitors would appear to be founded on an assumption that their clients are guilty (McConville et al.,1994:137). The past thirty years has witnessed a professionalisation of lower court justice (Bridges,1992:7). A substantial increase in the number of criminal legal aid orders granted in magistrates' courts has been accompanied by a nationwide extension of duty solicitor schemes (McConville et al.,1994:273). Research suggests that this trend may have contributed more to negotiated outcomes than to protecting the rights of defendants in a theoretically adversarial system (Baldwin and McConville,1977; Baldwin,1985; Mulcahy,1994).

End Notes

1 The Criminal Justice Act 1855 had no short title, nor has it ever formally been given one. Its long title was, "An Act for diminishing Expense and Delay in the Administration of Criminal Justice in certain cases." Some texts refer to it as the Administration of Justice Act 1855.

2 Packer's models of crime control and due process are discussed in Chapter 2. The due process of law essentially means the fair treatment of defendants through the normal judicial system. A major tenet of the due process model is the existence of a trial to determine whether or not guilt can be established beyond reasonable doubt.

3 It can be argued that reference to a right of election is erroneous. The Criminal Justice Act 1855 did not as such introduce a right of election. It established the principle that indictable offences could only be tried summarily with the consent of the accused. This may explain why the first stage of the proceedings has always been for the magistrates to reach a decision and not for the defendant to declare whether he/she intended to be tried by a jury in any event. The current law, contained in section 20 of the Magistrates' Courts Act 1980, provides that, "The court shall ask him whether he consents to be tried summarily or wishes to be tried by a jury."

4 Magistrates were obliged to try relevant larcenies unless a previous conviction made the offence punishable by transportation or penal servitude, or the charge was fit to be made the subject of prosecution by indictment. No guidance was given as to the latter. Until 1879 magistrates had to hear the whole of the prosecution case before reaching a mode of trial decision. Prior to the Criminal Law Act 1977 either way offences were formally known as indictable offences which were triable summarily.

5 The first Act to extend the range of indictable offences which were triable summarily was the Summary Jurisdiction Act 1879. This extension was taken further by the Criminal Justice Act 1925.

6 The North Sefton decision resolved previous conflicting authorities and established that magistrates had an open textured discretion to commit for sentence which was not tied to a decision on mode of trial. It is, however, somewhat difficult to reconcile it with the later decision of the Divisional Court in *R.v. Wirral Magistrates' Court Ex p Jermyn* (2001, 1 Cr.App.R.(S) 485). This held that the defendant could not be committed for sentence in the absence of new material if given an expectation at mode of trial that the magistrates would finalise the case. This case may be distinguished on the grounds that the defence solicitor had indicated that his client (who had declined to enter a plea) would plead guilty if jurisdiction was accepted and in so doing gave up a possible defence.

7 Examples of legislative provisions designed to restrict the scope of judicial discretion include the introduction of unit fines in the Criminal Justice Act 1991 and measures relating to mandatory sentences for certain repeat offenders enacted in the Crime (Sentences) Act 1997. These provisions met with hostility from the judiciary. Unit fines remained on the statute book for less than a year. Mandatory sentences evoked the comment from Lord Taylor that, "Judges ... must be free to fit the particular punishment to the particular crime if justice is to be done" (Macintyre et al., 1995).

8 There has, historically, been no established principle in magistrates' courts that a reduction in sentence should be offered to defendants who admit guilt (Baldwin, 1985:76; Henham, 1990:133). The concept, established by authority of the Court of Appeal in the Crown Court, was formally introduced in the 1993 version of the Magistrates' Association sentencing guidelines. The only relevant statutory provision, section 48 of the Criminal Justice and Public Order Act 1994, is reproduced in Appendix 1.

9 Youths aged under 18 years have no right of election.

10 Women were not eligible for jury service until 1919.

11 These are cases listed for trial where the matter is resolved on the day of hearing and the defendant is disposed of in some other way (Sanders and Young, 2000:396). In 1999 there were 16,502 cracked trials in the Crown Court, three quarters of which involved a guilty plea (Lord Chancellor's Department, 2000:66). This figure is very nearly as high as the number of cases in which juries have to reach verdicts (see note 10 to Chapter 2).

12 The police lay the charge. A CPS lawyer will, however, now often be located at the police station to offer pre-charge advice on a systematic basis (Baldwin and Hunt, 1998). The expectation is that the file will have been reviewed by the CPS prior to plea before venue so that by that stage of the proceedings the CPS should have deemed the charge to be appropriate or to have amended it. The Auld Review (2001:399) has recommended that the CPS, and not the police, should determine the initial charge in all either way cases.

13 Paragraph 7 of the Code for Crown Prosecutors (1994), which deals with charges, is reproduced in Appendix 2. Charging standards for offences of violence are now laid down in Crown Prosecution Service, Offences Against the Person Charging Standard Agreed by the Police and Crown Prosecution Service (1996).

14 The research of Riley and Vennard (1988) was based on records and interviews and did not adopt the methodology of court observation.

15 The government was given authority to require advance disclosure by section 48 of the Criminal Law Act 1977. As a consequence of concerns about cost, this provision was not implemented until May 1985.

CHAPTER 2

THE WIDER CONTEXT

This chapter provides a contextual setting for the ensuing empirical examination of venue determination. The first section presents a comparative analysis of the system of trial by jury and the administration of summary justice by magistrates both from historical and contemporary perspectives. The second section considers theoretical approaches which have attempted to explain the operation of the criminal justice process as these will contribute to an understanding of the findings of this study and of the wider debate concerning the relative attributes of the two modes of trial.

Overseas visitors to the criminal courts in England and Wales would no doubt be struck by two facets of the judicial process. The first is the centrality of lay people to both tiers of justice (Morgan and Russell,2000:1). The second is the existence of marked differences in formality and procedure between the higher and lower courts. Both can be explained, if not justified, by reference to history. The former is due quite simply to the longevity of two institutions, the jury and the justice of the peace. These two ancient roots of modern procedure have provided the only available mechanisms for trying criminal cases in this country for some eight centuries (Lieck,1968:33).¹ The latter can be located in the reasons behind the formalisation of summary courts in the mid nineteenth century. The contradictory nature of contemporary magistrates' courts as a system of crime control with a veneer of due process considerations reflects the accommodation that was reached at that time between the interests of the bourgeoisie and the gentry (Winn,1986:374). The structures of legality inherent in jury trial were sacrificed on the altar of expediency at a time when the number of offences prosecuted showed a dramatic increase (McBarnet,1983:140). Summary justice, an unintended irony, was precisely that, a speedy procedure conducted without the traditional legal formalities (Cornish,1978:57).

2.1 JURIES AND MAGISTRATES

The perceived fairness of jury trial and lay magistrates' justice is pivotal to the mode of trial debate. This section offers a comparative analysis of three aspects of those institutions. The first is consideration of their respective evolution over the centuries. The second comprises the arguments for their retention in an increasingly professionalised society. The third is evaluation of the limited research into their trial procedures and deemed accuracy in determining guilt or innocence. The jury and the lay magistracy have both enjoyed longevity. Therein ends any similarity, however, for perceptions of these two bodies could hardly be more diverse. Praise of the magistracy is as rare as pro-jury rhetoric is common (Darbyshire,1997a:861).

Juries have traditionally evoked extreme views (Baldwin and McConville, 1979:1). The very conception of a jury appears absurd to some.² The tendency, however, has been for a eulogistic approach over the centuries, a depiction by the majority of a democratic institution acting as a shield against state oppression. The magistracy, an organ of that oppression, has never completely divested itself of the mantle of suppression engendered by its former exercise of propertied class interest (Burney,1979:51). The cornerstone of a democratic society which epitomises fairness and due process values contrasted with an undemocratic body exerting social control over the working class (Wadham,1999; Winn,1986:353). But this comparison has to be assessed within the context of the declining practical importance of the jury and the progressive extension of summary jurisdiction. Lay magistrates in England and Wales have a judicial significance which would appear unique. In no other country do lay judges deal with offences of the seriousness dealt with by magistrates in this country (Morgan and Russell,2000:110).

2.1.1 Historical Perspectives

Inherent in any explanation of English criminal procedure is a recognition that the machinery of justice has to be seen in its peculiar historical setting rather than as a logical structure designed around basic principles (Spencer, 1989:24). Nowhere is this more of a truism than in the emotive area of juries. We have a jury system because of political circumstances many centuries ago and not as a consequence of reasoned debate. The origins of that system, be they English (Cornish, 1968:11) or Frankish (Pollock and Maitland, 1895:121), are unclear, and it may have evolved from a variety of sources (Cornish, 1968:11). What is clear is that it was initially an administrative device, a body of neighbours summoned by a public officer to answer questions upon oath (Pollock and Maitland, 1895:117). The origins of this device being employed in a judicial capacity lie deep in the political struggles of mediaeval England rather than being occasioned by any principled argument relating to the administration of justice (Blake, 1988:140; Spencer, 1989:24).

It was this emergence as a replacement for trial by ordeal, retaining the requirement for unanimity in the verdict,³ which brought the jury system esteem and constitutional significance (Manchester, 1980:87). There can, therefore, be no denying the longevity of the institution of the jury even if it is "bad history" to trace it back to Magna Carta (Cornish, 1968:12). The case for retention frequently comprises an historical argument, namely that abrogation requires compelling reasons because the so-called right to jury trial has existed for so long. Not simply existed, but identified as one of the key rights of the free-born Englishman [sic] inviting accolades clothed in robust imagery (Emsley, 1996:198; Cornish, 1968:126).⁴ In the famous words of Devlin (1956:164), "The lamp that shows that freedom lives."

The significance of the evolution of the jury system to indictable proceedings is beyond dispute. The institution of the jury has moulded the whole of English criminal procedure (Blake,1988:140). Its existence goes a long way to explaining many of the procedures which continue to fashion the trial process (Baldwin and McConville,1979:1). It provides an explanation for the existence of the adversarial theory of trial in which the judge acts as an umpire and the prosecution has to prove guilt. Its emergence was a prime factor in the retention of this common law procedure at a time when continental neighbours were adopting an inquisitorial system (Spencer,1989:19). The rules of evidence and the substantive law itself have been moulded over the centuries so that cases could be presented in a fair and intelligible way to a tribunal of lay people (Blake,1988:140; Cornish,1968:10).

The existence of a longstanding right to jury trial is, however, open to dispute despite the acknowledged longevity of the institution (Narey,1997:31). Longevity by itself does not establish a right. The essence of a right is a power of acceptance or waiver (Feinberg,1992:155). The majority of citizens in this country have a right to vote in a general election because they are freely able to cast a vote without being compelled to do so. Being told or obliged to do something constitutes an order and not a right. No right to jury trial can be said to have existed prior to the introduction of either way offences in 1855 as defendants formerly had no choice in the matter (Darbyshire,1991:744). Since that date, compulsion has continued to prevail if an offence is indictable only or if magistrates decline jurisdiction. The right to jury trial only genuinely arises when magistrates regard a denied either way offence as being suitable for summary trial (Doran and Jackson,1997:156). Even that right of election is a statutory provision and neither a constitutional right nor one embodied in the European Convention on Human Rights (Ashworth,1998:256).

The portrayal of the magistracy as an undemocratic body exerting social control over the working class can be supported by historical evidence (Winn, 1986:353). The roots of lay justice can be traced back to the thirteenth century with the appointment of keepers of the peace in the shire counties (Burney, 1979:46).⁵ It is important to recognise, however, that for centuries their function was very different from that of today. Justices were the main instrument of local government with power to control people's lives through economic and social legislation such as the Poor Laws (Burney, 1979:48-9). For the majority of the population they represented the reality of government (Raine, 1989:6). A deep resentment among sections of the community was unsurprising. The advent of legislation in the early eighteenth century bringing criminal cases within the remit of magistrates acting without a jury did nothing to enhance their standing as erosion of jury trial was an anathema to many (Emsley, 1996:198).⁶ This feeling of antagonism was intensified by the arbitrary, informal and sometimes disreputable exercise of lay power (Morgan and Russell, 2000:3). Hearings frequently took place before a single justice in his own home or in the back room of an inn (Manchester, 1980:161).

These informal tribunals were, however, deemed inappropriate in an increasingly industrialised and urbanised society which witnessed rapidly rising crime rates and placed emphasis on bureaucratic formality (Emsley, 1996:201). Professional magistrates had effectively replaced the lay bench in inner London from around 1740 and were appointed to reinforce lay benches in other major areas of population from 1813 as a response to the increasing volume of court work (Seago et al., 2000:632-3). Political need demanded a substantial increase in the summary jurisdiction of the justices in order to combat delay and spiralling cost. The economic requirement for the introduction of either way offences dictated the formalisation of summary courts (Manchester, 1978:113).

The Summary Jurisdiction Act 1848 was the first general Act to impose a uniformity of practice and procedure upon the justices in the exercise of their summary jurisdiction (Freestone and Richardson,1980:13).⁷ It is generally accepted as the beginning of the magistrates' modern jurisdiction (Jones, 1974:32). Not until then did justices begin acting as umpires rather than as keepers of the peace (Jones,1974:26). Only then did proceedings have to be held in public. The plaudits given the Act by historians, "a veritable charter of the law" which was "a stupendous achievement" (Osborne,1960:225-6), are, however, open to debate. Criminal law and policy have an inescapably sociocultural dimension (Wiener,1990:7). A challenge to the traditional assumption that criminal policy constitutes a more or less straightforward response to the objective problem of crime can be located in a paradigm which is political (Ignatieff,1978; Garland,1985). This argues that the historical roots of the lay magistracy as a body established to suppress social disorder were now being perpetuated within a modernised forum which assisted in the maintenance of structural social inequalities (Wilkinson,1992:15).

The quality of justice administered by the lower courts received virtually no attention for decades (Jones,1974:86). Interest in summary proceedings was, however, to be aroused by technology in the form of the internal combustion engine as the advent of the motor car resulted in a fundamental change in the cross-section of defendants appearing before magistrates (Burney,1979:54). The more affluent motoring classes employed lawyers, accustomed to the higher courts, who deemed the standards of procedure and proof to leave much to be desired (Jones,1974:85). Their criticisms led to the appointment of a Royal Commission (1948). A minority of commissioners favoured the universal substitution of paid magistrates. The majority ensured that the system of lay justice remained unscathed (Burney,1979:54-5).

2.1.2 Arguments for the retention of lay involvement

This subsection considers the arguments for and against the retention of juries and lay magistrates. Lay judicial institutions may appear to be an anachronism in a highly professionalised society (Raine,1989:1). One of the prime arguments for the retention of both juries and the lay magistracy is that they involve the participation of ordinary people in the criminal justice system. Both are viewed as providing a counterbalance to the increasing professionalisation of the legal world, sensitising an otherwise impersonal system to community values (Duff and Findlay,1988). They are, paradoxically, criticised for opposite selectional features. The stereotypical view of the magistracy is that it is too middle class and middle aged (Wilkinson,1992:19). Juries concern the police and others because their composition is too inclusive (Jackson,1994:257).

It is apparent that arguments for the retention or abolition of the jury are essentially political in nature (Baldwin and McConville,1979:19). The ability of jurors to reach "correct" verdicts might appear to represent the key concern. Proponents of the jury system do not, however, consider the relative objective accuracy of the two modes of trial to be the central issue. Their argument is that the jury is a more democratic body than the magistracy and makes the criminal justice system more integral to society by facilitating the participation of ordinary people who are randomly selected (Wadham,1999). Their contention is that juries keep the criminal law in touch with current social values and the community's sense of justice and, thereby, enhance public confidence in the judicial process (Lyons,1999:109; Gobert,1997:23). Juries are deemed to protect the rights of ordinary people when confronted by the oppressive use of state power (Wadham,1999). This last claim may, however, be largely rhetorical in modern times despite its historical validity (Ashworth,1998:257).

These arguments raise a fundamental question as to the proper ambit of juries. This is whether they ought to return a verdict true to the evidence in all cases or whether it is legitimate for them to apply a form of equity and acquit against the weight of evidence in cases where they believe that a conviction would produce an injustice. This question inspired the Auld Review (2001) to recommend that juries should give reasons for their verdict.⁸ The jury's role has traditionally been depicted as involving determination of the facts and application of the law to those facts (Gobert,1997:9). An alternative view, central to the arguments of jury proponents, is that jurors must also become engaged with issues of justice. This involves consideration of the defendant's moral culpability and whether or not there are any additional aspects which need to be taken into account if justice is to be achieved (Gobert,1997:9).

This latter view was frequently adopted by juries in capital cases. The severity of the law could be mitigated in practice by juries acquitting defendants facing the death penalty. The propensity to acquit has always been less marked when adjudicating on non-capital offences (Cornish,1978:57).⁹ Recent cases provide conflicting evidence as to how jurors perceive their function. Support for the conventional view of their role comes from the conviction of the Earl of Hardwicke in 1999 for supplying cocaine to two undercover journalists. The jury applied the law to the facts and returned a verdict of guilty, passing the judge a note stating, "Had we been allowed to take the extreme provocation into account we would undoubtedly have reached a different verdict" (Born,1999). A contrary implication can be drawn from the acquittal of Lord Melchett a year later on a charge of criminal damage of genetically modified crops. The jury seemingly accepted a defence of lawful excuse despite the fact that the defendant acknowledged the destruction of six acres of maize belonging to another (Brown and Sapsted,2000).

The case for the jury comprises one final and extremely important argument. This is the apparent perception of the public that it provides the fairest means of trial. Judges and magistrates are perceived by the majority of the public to be out of touch with what ordinary people think (Mattinson and Mirrlees-Black, 2000:7). A theme of the opposition of the House of Lords to the Criminal Justice (Mode of Trial) Bills 1999 and 2000 was that further erosion of the right to jury trial would undermine the trust and support which the criminal justice system appeared to command among the general public. This viewpoint reiterates the conclusion of the James Committee (1975:30) reached a quarter of a century earlier. This consideration may be of particular significance to minority ethnic groups. Defendants from these communities may perceive further marginalisation of juries to amount to indirect discrimination as they tend to display greater faith in juries than in magistrates (Ashworth, 1998:264; Lyons, 1999:109; Bridges et al., 2000).

Proponents of jury trial have, however, to confront a statistical trend. The symbolic function of the jury now outweighs its practical significance (Darbyshire, 1997:627). Less than one per cent of defendants to all criminal charges and less than four per cent of those facing indictable charges now have their guilt or innocence determined by a jury.¹⁰ Despite arguments that jury trial should be available for all offences carrying a sentence of imprisonment (Harman and Griffith, 1979:29; Wadham, 1994:250), a reversal of this trend is politically unrealistic. Critics rarely advocate the complete abolition of the jury system (Duff and Findlay, 1988:211). The increased workload of magistrates may, however, prove to be a more decisive indirect attack (Gobert, 1997:116). This attack would be intensified were the recommendation of the Auld Commission (2001) for a three tier system of justice to be implemented or were magistrates to be given increased sentencing powers.

The issue for deliberation in relation to the lay magistracy is whether it is now an anachronism or an institution for which there remain strong principled arguments. Media attention has, however, given the general public a greater awareness of jury verdicts than of magistrates' functions. The link between the extent of public knowledge and society's perception of magistrates' courts, identified earlier in this chapter as being crucial between the Wars, constitutes an important introductory element in the contemporary debate. Proponents of a lay magistracy have argued that the system would not have survived had it not been acceptable to the public at large (Skyrme,1983:6). The converse argument is that its survival has owed much more to the dearth of public knowledge and, therefore, to the unquestioning and naive acceptance of its place in society (Raine,1989:3). Many magistrates appear to adopt a third course. They contend that a little knowledge, the current situation, has led to them being maligned, and that enhanced awareness of their functions might remove some public misconceptions (Parker et al.,1989:78).

Lay magistrates are arguably an important manifestation of the concept of participatory democracy (Morgan and Russell,2000:6). They can be seen as an embodiment of the doctrine that true democracy requires the active engagement of ordinary people in the key areas of decision-making (Pateman,1970). Amongst the vaunted features of magistrates' courts are their involvement of lay people and their proximity to the local community (Seago et al.,2000:631). Magistrates place great emphasis on the fact that they are ordinary members of the community over whom they have jurisdiction (Raine 1989:30). The system requires the absence of legal expertise, common sense representing a dominant ideology and being seen as the champion of freedom and the check on expert power (Worrall,1987; Raine,1989; Parker et al.,1989; Seago et al.,2000:645).

Theory does not, however, always equate with practice. The theoretical model of lay justice which is typically advanced as its justification is that lay magistrates represent a microcosm of the local community (Skyrme,1983:67; Cooke,1986:70). An important dimension of the rationale of lay justice is that magistrates are ordinary people who are representative of all sections of the local community whom they serve (Raine,1989). Yet there is considerable evidence to suggest that the bench as a whole has a narrow social composition more reflective of a social elite (Hood,1972; Baldwin,1976; Burney,1979; King and May,1985). A gender imbalance has now been rectified and the lay magistracy is approaching ethnic representativeness. But local benches remain unrepresentative of the wider community in most other respects. Magistrates are much more likely to be financially well-off and to come within the professional/managerial occupation category than the general population. Very few are aged under 40 (Morgan and Russell,2000:14-16).

There is, however, a competing theoretical model of lay justice. This views the magistracy as a meritocracy rather than a microcosm of the local community (Dignan and Wynne,1997:184). While jurors are randomly selected from the electoral roll, magistrates are appointed from applicants considered able to perform the tasks required of them on the bench.¹¹ Qualities deemed suitable for recruitment limit the right of democratic participation (Doran and Glenn,2000). Magistrates tend to adopt elements of both popular justice and professionalism when discussing their role although these concepts are essentially contradictory (Wilkinson,1992:262). The current emphasis on the importance of training and of recruiting people who have the potential to benefit from such training may conflict with traditional arguments for lay justice (King and May,1985). Since training first became compulsory for new justices in 1966 (Baldwin,1975), enhanced and on-going programmes have been viewed

as the prime response to criticisms of the quality of lay justice and its inconsistency between areas. It can be argued that the demise of the lay magistracy will be expedited should improved training fail to produce higher quality and greater consistency. A conflicting viewpoint is that the increasing professionalisation of magistrates in everything but remuneration negates most of the conventional arguments for the retention of a lay bench.

Arguments for the retention of the lay magistracy may also be weakened by the managerialist policy of increasing efficiency by rationalising the number of court buildings.¹² There is nothing to suggest that a policy of court closures was intended to undermine the ability of magistrates to perform their traditional functions (Raine and Willson,1993). But the establishment of large courts covering contrasting geographical areas and sizeable populations might have that effect. The community scale of the lay system is seen by many as its greatest asset (Raine,1989:29). The local expertise of justices has remained their rationale throughout the many centuries of their history (Burney,1979:46). The concept of local justice is fundamental to an understanding of court culture. Yet localism has been diluted in contemporary times by the closure of small courts (Seago et al.,2000:648). Magistrates' perceived function to meet the needs of the local community involves two presuppositions. The first is that they have a reasonable knowledge of the area and of the attitudes of people within their jurisdiction. The second is that the local community has identifiable and agreed, or at least similar, needs. There is no logical reason, however, why magistrates living and working in urban conglomerations should be in tune with the conditions prevailing in rural communities, which used to have their own court, some miles away. The community of an increasingly widespread area would now appear to be a number of often competing sections of society rather than a unitary entity (Willmott,1987,1989).

2.1.3 Acquittal rates and research

This subsection examines the limited research evidence on the factors which influence the outcome of contested cases. This is a requisite for this thesis as a widespread perception that jury trials are fairer forms a pivotal element in the debate as to whether or not a policy objective of magistrates hearing more cases is appropriate. It is apparent from the standpoint of verdicts which mode of trial favours the prosecution and which favours the defence (Ashworth,1998:257). In 1999 magistrates convicted 73 per cent of defendants after trial. Juries only convicted 57 per cent (Home Office,2000). The chances of acquittal remain significantly higher in the Crown Court after allowing for important features in the evidence (Vennard,1985:142).

There is, however, no reliable evidence on the relative accuracy of the verdicts reached by the two modes of trial (Ashworth,1993:833). The higher acquittal rate in the Crown Court may be partially attributable to numerical factors. It may simply be that convincing at least ten people of guilt is more difficult than convincing two (Sanders and Young,2000:538). The apparent willingness of some juries to acquit against the weight of evidence on the grounds of justice presents as a factor. The question from the perspective of the administration of the criminal justice system would appear to be which mode of trial, existing or potential,¹³ affords the greater objective accuracy. The dilemma is that it is inherently difficult to establish such a comparison. There is no foolproof method of determining whether or not a verdict was true to the evidence. It may be that the judge's view of a jury's verdict is a more valuable indicator than that of other professional court participants (Baldwin and McConville,1979:32). It may be that the jury's collective perception of the facts is the most accurate (Gobert,1997:10).

The vigorous political and theoretical discussion of the role of the jury in criminal trials has not been matched by any great volume of empirical research (Ashworth,1984:103). This dearth of evidence has led to a highly emotive debate being conducted primarily by reference to conflicting ideologies. This lack of research would appear to have been occasioned by four factors. The first is that practical difficulties are caused by the prohibition contained in section 8 (1) of the Contempt of Court Act 1981 on interviewing actual jurors. The second is that the declining practical significance of juries in terms of the number of cases involving them may have rendered them a less attractive subject for researchers (Ashworth,1984:103). Thirdly, it may be partly due to the fact that some of the questions at issue, such as whether juries are protectors of liberty, do not lend themselves to scientific enquiry (Baldwin and McConville,1979:3). Finally, it may be felt that empirical evidence on those issues which are capable of scientific enquiry might not affect the strong and somewhat entrenched views of many for or against the jury system.

In an attempt to give the debate a more evidential basis, a number of experimental projects were devised to consider various aspects of jury deliberations. Given public concern over recent notorious miscarriages of justice, it is significant to note that the impetus for jury research in this country came largely from police opinions that their acquittal rate was too high (McCabe,1988:32). The extension of the jury franchise brought about by the Criminal Justice Act 1972 abolishing the property qualification caused disquiet among the higher echelons of the police force (Mark,1973,1978). Juries could no longer be relied upon to lean instinctively towards upholding the exercise of state authority (Sanders and Young,2000:560). The competency of jurors from the lower occupational classes has since been a persistent theme of the crime control lobby (Jackson,1994:257).

Research has concentrated on the significance of jury composition and the prevalence of allegedly perverse verdicts.¹⁴ Lawyers have held the belief that the composition of a particular jury may have an important bearing on the verdict it returns (Baldwin and McConville,1979:88). There is, however, little empirical evidence that verdicts are related to the social or demographic characteristics of juries (Ashworth,1984:104). It would not appear that the random selection of jurors from the electoral roll has influenced the conviction rate. Sealy and Cornish (1973), using simulated juries, found no apparent relationship between verdicts and the predominance of any group on the jury. The one exception to this was that younger jurors showed a greater tendency to acquit. Even this exception was not supported by Baldwin and McConville (1979:102), who had been provided with information concerning actual jurors. These findings would appear to suggest that most juries are sufficiently heterogenous groups that no individual or single set of characteristics can exert a disproportionate effect (Ashworth,1984:104). There has not, however, been any recent research on this subject.

Research into the deemed accuracy of jury verdicts has faced the problem that it is inherently difficult to establish whether or not a verdict was true to the evidence. The people who are in the best position to judge that proposition would appear to be the members of the jury themselves, but the law prevents any interviews with them. There is limited evidence to suggest that juries may have a perceived tendency to acquit against the weight of evidence. McCabe and Purves (1974) approached the problem by arranging for shadow juries to sit in court and hear actual trials. They found full agreement between real and shadow jurors on the verdict in 21 out of 28 cases, but substitute juries convicted more readily. The researchers did, however, acknowledge that there was an element of artificiality in their experimental approach.

An alternative approach has been to solicit the opinions of professionals involved in a case. The leading study which employed this method of evaluation was conducted by Baldwin and McConville (1979). Contrary to the finding of Zander (1974) that the number of acquittals deemed perverse by lawyers at two London courts was very low, Baldwin and McConville found that judges, solicitors and police expressed dissatisfaction with a number of verdicts, especially but not exclusively acquittals. This finding may, however, have been influenced by a flawed sampling strategy. The four groups of interviewees were the police, prosecution lawyers, defence solicitors and judges. The definition of a questionable verdict was one doubted by at least two respondents. It can be argued that the professional interests of the police and prosecution in obtaining a conviction made it more likely that two respondents would doubt acquittals than convictions. This assumes particular relevance as the authors were unable to offer any explanatory theory which could distinguish the doubted acquittals from other cases which resulted in a conviction, a sympathy or equity verdict appearing to be extremely rare. The approach of Baldwin and McConville is also open to enquiry. There is a viewpoint that professional disagreement with verdicts is essentially meaningless in the absence of consensus as to a jury's function (Mungham and Bankowski, 1976:209). Statements about outcome presuppose that there is such a thing as a correct verdict which can and should always be reached (McCabe, 1988:32).

There is an inherent problem in the current system of trial in the lower courts in that magistrates, unlike jurors, are arbiters of both law and fact. Any confession or other evidence deemed inadmissible in the Crown Court will be totally unknown to the jury. Magistrates will have adjudicated on this and must then try and put it out of their minds. This is not, however, the crux of the perceived problem. Underlying criticisms of the quality of justice dispensed in

the lower courts is a belief that magistrates fail to abide by the principles on which the criminal law is based, namely the presumption of innocence and its corollary of the burden of proof being on the prosecution (Vennard,1982:3). The argument is that magistrates are disposed to believe that the police only charge those against whom they think the evidence is sufficient to establish guilt (Wootton,1978). The legal foundation of magistrates' courts in the nineteenth century may facilitate this. McBarnet (1983:124) concluded that a high conviction rate was "the product of the heavy hand of legislation simply wiping out the rules as neither necessary nor relevant for the lower court at all."

Magistrates might now dispute any tendency to ignore the principles of law given the considerably enhanced focus on training, although there is no recent empirical study to substantiate this. The standard of proof and the weight attached to different forms of evidence or categories of witness may, however, provide reasons for variations in the conviction rates of the higher and lower courts. The standard of proof in criminal cases that guilt must be established beyond reasonable doubt, albeit a subjective one, might give the impression that, at least in principle, all courts have to be satisfied to the same extent. There is, however, an argument that magistrates are entitled to convict on a lesser degree of proof than juries. There has been judicial authority over the centuries for the proposition that stronger proof is required for a conviction in more serious cases (Eggleston,1983:117).¹⁵

Research which sought to remedy the "total neglect of magistrates' decision-making in contested cases" was conducted on behalf of the Home Office in 1979 by Vennard (1982:1). Her conclusion (1982,1985) was that two factors helped to account for differences in verdict between the two courts. The first was their respective interpretation of the amount of evidence needed

to sustain a conviction. Magistrates were prepared to convict on less evidence than juries. The second was reliance on the type of evidence adduced. Magistrates had informed Burney (1979) that they had little occasion to doubt the reliability of police evidence as officers were trained to memorise events and were fortified by contemporaneous notes. Vennard's analysis confirmed this tendency for magistrates to accept prosecution eyewitness evidence of the defendant's behaviour as against a denial of the alleged conduct or of the requisite criminal intent.

Vennard's analysis should not be taken as being comprehensive. It was a quantitative study which focused on the types of evidence adduced. It is doubtful whether such methodology can ever present a true picture as the overall impression created by the prosecution and defence may determine, or at least influence, outcome. Qualitative data are almost certainly required if the trial process is to be fully understood. Vennard's emphasis on one explanation can be criticised. A contrasting ideological explanation for the effectiveness of prosecution evidence in establishing guilt in magistrates' courts focuses less upon the supposed qualities of evidence emphasised by the technocratic approach and more upon the faith that magistrates have in particular kinds of witness. The prime example of this is the police (McConville et al.,1994:226). Disbelieving police officers has been described as an anathema to magistrates who view themselves as part of a united fight against crime (Lyons,1999:109). Conclusions are conflicting and ideologically based. It may be that the higher conviction rate in summary courts is partly occasioned by magistrates embracing a crime control ideology and displaying an attitudinal bias towards the police (Sanders and Young,2000:597). It may be that jurors are more gullible and prove on occasions to be unduly sceptical of the veracity of the police (Ashworth,1998:256-7).

2.2 MODELS OF CRIMINAL JUSTICE

This section examines two theoretical approaches to the criminal justice system for use in later empirical analysis. These are the models of crime control and due process presented by Packer and the argument of McBarnet which focuses on the law. Both of these approaches arose out of a need to find an explanation for the marked differences between what should happen, the "law in books", and what actually did happen, the "law in action". This analysis will prove to be of particular significance to the wider debate concerning venue as the two modes of trial are theoretically distinct. The section concludes with an evaluation of the more recent rights-based approach of Ashworth which is prescriptive rather than exploratory.

An integral argument of this study is that venue determination requires consideration of theoretical perspectives of the criminal justice system as a whole. Official data reveal that 17.9 per cent of defendants charged with indictable offences in 1997 were committed for trial, but fail to tell us whether this is a high or a low figure in the absence of any theoretical underpinning. The vigorous debate as to the allocation of cases between the higher and lower courts provides evidence of the considerable differences which exist within a criminal process which lacks any coherent philosophy as to its overriding objectives (Baldwin and Bottomley, 1978:3; Nobles and Schiff, 1994:43). The justice system, which is arguably only systematic in the sense that its various agencies enjoy practical interdependence, is characterised by a plethora of conflicting opinions (Feeney, 1985; Rock, 1990:39; Cavadino and Dignan, 1997:6; Ashworth, 1998:23). There is no universally agreed framework for the evaluation of the system. The choice of framework inevitably affects the kinds of questions asked about criminal justice (Sanders and Young, 2000:2).

It is generally acknowledged that the overall purpose of the criminal justice system is the repression of criminal conduct (Duff,1998:611; Smith, 1997:319). Even commentators who consider that the organisation and operation of the system unduly favour the prosecution concede that its *raison d'être* is to control crime (McConville et al.,1997:355). This function has, however, been obscured by formulating the aim as being to convict the guilty and acquit the innocent (Home Office,1992). The latter strand of this supposed definition is really in the nature of a fundamental element of the system rather than being its primary justification. We do not have a criminal justice system in order to acquit the innocent as the best means of guaranteeing the protection of the innocent from wrongful conviction would be not to prosecute anyone at all (Sanders and Young,2000:10). It cannot even be said that the existence of criminal proceedings benefits the innocent by enabling the restoration of their reputation. There is no verdict of "conclusively innocent" in English law and much adherence to the philosophy of "no smoke without fire".

We do, however, have a criminal justice system and not a crime control system (Sanders and Young,2000:2). Argument centres on the types of values and principles which have to be considered and weighed in determining the appropriate mechanisms which society may adopt in its attempt to achieve the goal of the repression of crime (Duff,1998:614). It may be unduly simplistic to state that the sole objectives of the criminal process are to convict the guilty while acquitting the innocent. There is an argument that an inseparable part of any statement of purpose should be the protection of human rights and the moral integrity of the system (Choo,1993; Ashworth,1996,1998). But there is nothing controversial in stipulating conviction of the guilty and acquittal of the innocent as objectives, subject to the proviso that the latter should embrace acquittal of those who may in law be innocent (Bridges and McConville,

1994:11). Yet even this apparent platitude conceals an inherent and fundamental conflict which lies at the very heart of the system. It is impossible to offer any guarantee against miscarriages of justice occurring.

(A) compromise has to be struck between procedures which allow the effective prosecution of suspected offenders whilst reducing the risk of wrongful conviction to an acceptable level.

(Sanders and Young,2000:10)

Value judgements permeate all aspects of the criminal process as decisions often involve awkward choices between competing interests (Ashworth, 1998:26). Two value systems were identified and presented in the late 1960s by the American writer Packer (1968). His models represent the best-known theoretical framework for evaluating the criminal process (Ashworth,1998:26).

2.2.1 Packer's Models

Packer's approach, according to King (1981:3), constituted an attempt to "develop a framework for the understanding of the relationship *between rules and behaviour* within the criminal justice system" (emphasis added). Packer (1968:153) suggested that tendencies in criminal justice might be evaluated by means of the two models of crime control and due process, which he presented as "two separate value systems that compete for priority in the operation of the criminal process." ¹⁶ It is perhaps unfortunate that Packer chose the nomenclature "crime control" for one of his models as this gives rise to confusion between the purpose of the criminal justice system and the set of values which influences that system (Duff,1998). Packer's crime control model relates to the latter, and in the current managerial climate could arguably more realistically be called the efficiency model. Indeed, Packer (1968:159) acknowledged at the time that it was an "almost managerial model."

The two models, artificial constructs which represent normative positions at opposite ends of a spectrum and do not correspond to reality, are determined by different sets of values (Duff and Findlay,1988:209). The values underlying the crime control model give prominence to the repression of criminal conduct because a high crime rate adversely affects public order and the cohesion of society (Duff and Findlay,1988:210). The model emphasises the efficient processing of cases, particularly through the disregard of formal legal controls which are seen as providing obstacles to the production of a high conviction rate (Henham,1998:592). Proponents of crime control do not, however, believe that an emphasis on efficiency will lead to the conviction of the innocent. The model holds that formal adjudicatory processes are less likely to produce accurate fact-finding than the expert administrative processes which precede them (Smith,1997:337). The innocent should theoretically be screened out at an early stage by the police and prosecution, who are deemed to be reliable indicators of probable guilt.

Adherents of due process are sceptical of the ability of state agents to reliably determine guilt or innocence. This model demands that administrative fact-finding is checked by a legal finding of guilt, with all the formalities (legal representation, standard of proof, rules of evidence) which this requires (Duff and Findlay,1988:210). It stresses adherence to courtroom procedure and protection of the individual (Henham,1998:592). Although this model views delay as inimical to justice, a loss of efficiency is inherent in the formalities demanded. It has to be acknowledged, however, that the practical effect of the model in this country is severely curtailed by the fundamental dependence of the criminal process on the guilty plea (McConville and Baldwin,1981:7). A major tenet of due process is the existence of a trial to ascertain whether or not guilt can be established beyond reasonable doubt.

It has been argued that Packer's project was not intended to possess a dichotomous quality (Henham,1998:593). Smith (1997:335) asserts that the two models cannot be seen as alternative accounts of the criminal justice system as Packer viewed the only justifiable system as being one which pursued the objective of crime prevention while being limited by the requirement that only the blameworthy should be punished. Packer's only justifiable kind of system was, therefore, one that incorporated elements of both models. In specific circumstances, however, viewpoints are diametrically opposed. Adoption of the so-called integrity principle is one example. An acknowledged aim of the criminal process is to convict the guilty. This raises the question of whether or not it is legitimate to obtain a conviction on the basis of illegally acquired evidence. The due process model provides a negative answer as that model is concerned with the upholding of moral standards as a matter of principle. The argument is that the values attached to dignity and freedom must be respected in the course of bringing an offender to conviction (Choo,1993:13). The integrity of the criminal justice system is seen as a higher objective than the conviction of any individual (Zander in a note of dissent to the RCCJ, 1993:235). Adherents of the crime control model oppose convictions being set aside because the rules have been breached. They deem it intolerable that credible evidence should be ruled inadmissible simply because the methods used to obtain it were improper (Sanders and Young,2000:23). This view was supported by the majority opinion of the RCCJ (1993:paras.10.48-50).

Packer's models have the merit of emphasising the irreconcilability of many of the goals of criminal justice. They have, however, met with a number of criticisms over the years. Arguably the foremost is that Packer presents ideological assumptions about the nature of the criminal justice system so that his models are only relevant to a limited conception of the substantive function

of criminal law, namely prevention and retribution (Griffiths,1970:366). Other objections have been adequately documented by Ashworth (1998:27-28) and need only be outlined here. The first is that there is no clear explanation of the relationship between the models, although it is acknowledged that neither is normatively acceptable in itself in that neither represents an ideal to which to aspire. The second is that by using the term crime control Packer assumed that the system of pre-trial justice was capable of affecting the crime rate. Evidence suggests that this is not the case (Hough,1987).

Thirdly, Packer underestimated the importance of resource management as an element in the criminal process, although this may have assumed greater significance in more recent times as governments have brought increased fiscal pressures to bear on criminal justice agencies (cf.Bottoms and McClean, 1976). Fourthly, his models make no allowance for the interests of victims. This may be because consideration of victims has historically played a negligible part in the judicial process (Shapland et al.,1985). It does, however, reduce the value of the models today as they cannot accommodate this perspective. Finally, various internal critiques can be made such as the premium on speed in the crime control model, but no mention of its relevance to due process.

Despite the criticisms, contemporary debate continues to employ Packer's models. Much discussion gives a central role to the notion of balance, a rhetorical device favoured by both the 1981 and 1993 Royal Commissions. Debate focuses on the correct balance to be struck between the interest of the community in the prevention and prosecution of crime and the interest of the individual defendant accused of committing an offence. There is a measure of agreement among academics (cf.Smith,1997,1998) that the crime control model aptly describes the English criminal justice system in practice.

It is seen as giving too much weight to the values of efficiency at the expense of due process (Duff,1998:612). The systemic imperative of negotiated justice substantially erodes the standards for guilt (Kipnis,1977:317). The system tends to play with the rights and freedom of defendants (Sanders and Young, 2000:482). This standpoint has, however, met with trenchant opposition from politicians, most forcibly from Michael Howard as Home Secretary in the mid 1990s. Their emphasis, as epitomised by the arguments of Jack Straw for the abolition of the right of election quoted in section 1.1.5, has been on the law enabling defendants to manipulate the system.

Packer's models have clear implications for the debate as to the prioritisation of policy or principle in the question of venue as the two modes of trial are theoretically distinct. These implications will be considered in the analysis of the arguments of McBarnet below. Current mode of trial procedure is underpinned by crime control objectives. Magistrates derive their prime source of information from a prosecution outline which they are advised to assume is correct. They almost invariably reach decisions which accord with prosecution preferences (Riley and Vennard,1988:11). The plea before venue provisions reinforced this crime control ideology by increasing the pressure on defendants to plead guilty (Sanders and Young,2000:542). A due process model would incorporate more information from defence solicitors and greater importance being attached to those representations. The ultimate reflection of this model would be for the defendant to choose venue in contested cases. Even this might not equate with the ideology of due process. It assumes the provision of adequate advance disclosure to enable an informed decision to be made. It assumes that defendants comprehend the implications of choice of venue. Research suggests that these assumptions are naive (Bottoms and McClean,1976; Baldwin and Mulvaney,1987a; McConville et al.,1994).

2.2.2 McBarnet's Approach

Packer's project was used from the outset to explain the gap between the law in action, perceived to be crime control biased, and the law in books, perceived to be due process biased. This classical distinction became an axiom of the sociological study of the subject (Low,1978:7). The gap between theory and fact, precept and practice, has been described by Low (1978:8) as being "more acutely embarrassing" in the area of criminal justice than in any other field. In reaching a conclusion that the rules of due process were being undermined by bureaucratic, crime control considerations and by the working practices of criminal justice practitioners, researchers such as Bottoms and McClean (1976) assumed that the criminal justice system in England and Wales was based on the due process model (Winn,1986:59).

This presumption was challenged by McBarnet (1978,1983). The genesis of her analysis arose from the paradox that:

The whole flavour of the rhetoric of justice is summed up in the idea that it is better for ten guilty men to go free than for one innocent man to be wrongly convicted. Why then the paradox that the vast majority of cases processed through a criminal justice system so geared to favouring the accused results in a finding of guilt?

(McBarnet,1983:1-2)

McBarnet argued (1983:6) that the law had to be analysed as it could not be assumed to incorporate the principles of due process. In effect, she turned the law from a background assumption of interactionist research into a central sociological problem in itself. Her thesis was that the traditional view of a gap between the law in action and the law in books was misinformed. The practical operation of the law was not a subversion of its principles, but exactly what

one would expect the substance of the law to produce as due process was for crime control (McBarnet,1978:31). Whereas Packer saw the tension between the two value systems as being present throughout all aspects of the criminal justice process, McBarnet viewed the clash between the models as manifesting itself only in the gap between the substance of the law and due process ideology (Duff,1998:613). The gap was between the values underpinning the rule of law and the actual rules. She cited as an example the core concept of criminal justice that a person is deemed innocent until proven guilty. Yet the legal system, while it does not determine motives, provides the opportunity for plea and charge bargaining by means such as the sentence discount.

It may be a 'golden thread' of justice that the defendant has the right to make the prosecution prove his guilt, but should he exercise that right and be found guilty he will be given a heavier sentence.

(McBarnet,1983:75)

This analysis has been deemed by some to be rather simplistic. Duff (1998:613) has argued that criminal law and procedure inevitably facilitate the suppression of criminal conduct because that is their purpose. Smith (1998:617-618) has acknowledged that the values of due process have not been unequivocally incorporated into the law, but neither are they irrelevant. The provisions of the law in his opinion represent a compromise between the values of crime control and the constraints of due process. McConville et al. (1991) acknowledged McBarnet's line of reasoning, but argued that she failed to give sufficient emphasis to those due process rights that were enshrined in law. They contended that the high level of discretion afforded workers at each stage of the criminal process enabled the law to be subverted. Trials are permitted in law. But many lawyers consider them to be unnecessary because defendants are presumed substantively guilty (Mulcahy,1994:412).

The two current modes of trial are theoretically distinct. The argument of McBarnet that summary courts evolved as a form of crime control is pivotal to the debate as to whether or not magistrates should hear more cases. She contended (1983:140) that the law had deliberately created two very distinct tiers of justice. One was geared in its ideology and generality to the structures of legality. The other, quite simply and explicitly, was not. Trial by jury is the epitome of the due process model (McConville and Baldwin,1981:7). The institution of the jury is seen as embodying the ideology of due process within a modern professionalised criminal justice system (Duff and Findlay, 1988:215). The perceived ability of juries to acquit against the weight of evidence presents a particular problem for adherents of crime control.

Summary courts were designed in the mid nineteenth century around an ideology of guilt as tribunals to efficiently punish offenders rather than to determine guilt in accordance with due process principles (Jones,1974:33; McBarnet,1983:153). The long title of the Summary Jurisdiction Act 1848 was, "An Act to facilitate the performance of the Duties of Justices of the Peace out of Sessions, within England and Wales, with respect to summary *Convictions and Orders*" (emphasis added). Even the presumption of innocence would appear to be negated by the requirement under section xiv that the defendant "shall be asked if he have any Cause to show why he should not be convicted." This implies a tacit assumption that a conviction was to be the usual and expected outcome of summary proceedings (Jones,1974:32-33).

Between them the ideologies of triviality and legal irrelevance accomplish the remarkable feats of defining 98 per cent of court cases not only as exceptions to the rule of due process, but also as of no public interest whatsoever.

(McBarnet,1983:153)

McBarnet's historical perception of jury trial might be idealistic. Most trials in the mid nineteenth century were completed in a matter of minutes, often without the jurors leaving the courtroom to deliberate (Emsley,1996:196). Some of her complaints as to the lack of due process in magistrates' courts may have been partially met by the introduction of duty solicitors and the increase in legal aid ensuring that there are fewer unrepresented defendants in those courts (Darbyshire,1997:633). McBarnet's overall thesis, however, remains. The essence of summary justice is speed and efficiency. Contemporary magistrates' courts are still essentially crime control institutions with a veneer of due process considerations (Winn,1986:374; Sanders and Young,2000:548). Defendants continue to question their neutrality and do not expect them to achieve justice (Bottoms and McClean,1976; Gregory,1976; Riley and Vennard,1988; Hedderman and Moxon,1992). There is a widespread opinion that trial by jury is fairer and more thorough.

2.2.3 Ashworth's Rights-Based Approach

The notion of balance between competing interests in the criminal process remains pervasive in official rhetoric. It is still influential in academic discussion despite having been subjected to criticism by some commentators (Maher, 1984; Jackson,1990). Ashworth (1996,1998) asserts that this balancing metaphor should be removed from the criminal justice debate. This leads to him doubting the continued utility of Packer's models as a satisfactory theoretical framework for analysis of the criminal process. He argues (1998:29) that those models fail to propose any normative or evaluative criteria. His stance is to develop a prescriptive theoretical framework which is essentially normative rather than descriptive. One which is, however, reflexive in that it responds to the practical problems of operating a criminal justice system at

any given point in time. In his words,

(T)he purpose is not to devise a theory which is apt to rationalize the practices that actually take place in the name of criminal justice in England and Wales, but rather to construct principles by which one can assess whether or not the rules and practices are justifiable.

(Ashworth,1998:29)

Ashworth's approach is primarily concerned with the identification of ethical principles of substantive and procedural fairness which should underlay the criminal process. He suggests a chronology for the adoption of a rights-based approach to that process (Henham,1998:596). This can be summarised as follows: ascertainment of the aim of a given part of the criminal process; ascertaining what rights ought to be accorded to suspects, defendants and victims; establishing the foundations for rights (for example, the European Convention on Human Rights); establishing the proper ambit of the right; and observing the principle of maximum respect for rights in cases where choices must be made without neglecting wider issues such as public accountability and the exercise of power (Ashworth,1996:229-230).

Writing over two years before implementation of the Human Rights Act 1998, although in the knowledge of the Bill, Ashworth claims (1998:40) that the obvious starting point for an authoritative statement of rights to be upheld by the criminal process is the European Convention on Human Rights (ECHR). This might appear self-evident, but with the prioritisation of efficiency the 1993 Royal Commission did not make a single mention of the ECHR (Jackson, 1994:257). Ashworth (1998:66) views the protection of human rights as needing to form part of the fundamental justification for the criminal process, although

he acknowledges that it cannot be the sole or even the primary justification. The goal of convicting the guilty would be authoritatively constrained by human rights principles rather than merely compromised to varying degrees by conflicting due process considerations (Sanders and Young,2000:34). Ashworth's principles are detailed at length in his book, *The Criminal Process* (1998:43-61). The focus is on seven articles in the ECHR. Some rights, such as the prohibition of the use of torture, are absolute rights. Such methods for controlling crime are strictly forbidden irrespective of whether they might bring benefits within a particular context. The majority, however, including the right to a fair trial, are strong but not absolute rights. Any derogations from these should be reasoned and minimal, although they can be justified in limited circumstances.

This weighting of rights leads to an acknowledgement by Ashworth (1998:29) that his normative structure is not comprehensive and its principles cannot be expected to supply answers to all the issues arising in the criminal justice process. His enumeration of principles sets an important benchmark by which to assess that process and his method for seeking to resolve justice issues has particular strength. This is not to say that everyone would agree with his normative starting point (Sanders and Young,2000:35). It has, however, been argued by Henham (1998:593-4) that Ashworth's rights-based approach should be viewed as complementary, rather than as an alternative, to Packer's typology as the two are conceptually and analytically distinct. He suggests that philosophically and sociologically derived positions address different aspects of the same problem. The rights-based approach is concerned to postulate a number of normative propositions which have moral rather than empirical validity. Packer's theoretically grounded models are specifically designed to be exploratory tools of social science explanation (Henham,1998:594).

2.3 CONCLUSION

This chapter has shown that the machinery of criminal justice in England and Wales has to be seen in its particular historical setting (Spencer,1989:24). Juries and lay magistrates play a central role in the criminal process because of political circumstances many centuries ago and not because of principled argument relating to the administration of justice. Their historical roots were, however, markedly different. Juries were eulogised as protectors of liberty. The lay magistracy evolved as an organ of state oppression. The stark differences in the procedure and formalities of the two modes of trial originated in the mid nineteenth century. The essence of the modernised summary courts was speed and efficiency, with little if any concern for the due process values epitomised by jury trial (Jones,1974). The law had quite deliberately created two very distinct tiers of justice (McBarnet,1983:140).

Evidence suggests that overriding philosophies and values have not significantly changed. The essence of summary justice remains different from the characterising features of trial by jury. There is a widespread feeling that summary justice is too summary. Jury trials are perceived to be fairer and more thorough (Ashworth,1998:265). The ideology, formalities and personnel of the two courts are fundamental to the wider debate concerning mode of trial. Magistrates' courts are essentially geared towards the crime control objective of the efficient processing of cases. Magistrates are more likely than jurors to embrace crime control ideology and, as this thesis will confirm, present as being prosecution-minded (Sanders and Young,2000:533 and 597). The trend, however, has been to marginalise juries as magistrates have been given a progressively expanded jurisdiction. The quality of justice administered by the summary courts requires examination as this trend is likely to continue.

End Notes

- 1 Subject to limited exceptions such as Ecclesiastical Courts.
- 2 One conception of the jury has been depicted as follows:
We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyse or unable to remember, ... then lock them up until the most obstinate of their number coerce the others into submission or drive them into open revolt.
(Oppenheimer,1937:142, quoted by Baldwin and McConville,1979:2)
- 3 The requirement for unanimity of verdict remained until the Criminal Justice Act 1967 allowed a majority verdict by ten out of the 12 jurors if the jury had failed to reach a unanimous verdict after a minimum of two hours' deliberation. This change may have undermined the requirement that the prosecution proves guilt beyond reasonable doubt as it is difficult to reconcile that principle when one or two jurors have sufficient doubt to dissent from the verdict (Freeman,1981:69). Some 21 per cent of defendants convicted by juries are convicted on a majority verdict (Lord Chancellor's Department,2001:67).
- 4 A number of arguments have been advanced questioning the eulogistic approach and suggesting that for centuries juries did not conform to the present notion of a fair trial for the accused.
 - (a) Until the eighteenth century jurors could sit on cases of which they had previous knowledge (Cornish,1968:12).
 - (b) Jurors were frequently punished for returning not guilty verdicts contrary to instructions from the bench (Cockburn,1972:114, Williams,1963:257).
 - (c) Acquittals in non-capital cases were less frequent than imagined (Cornish,1978:57).
 - (d) Until the last century most trials were over in a matter of minutes, often without the jurors leaving the courtroom to deliberate (Emsley,1996:196).
- 5 The term Justice of the Peace first appeared in a statute in 1361 (Raine, 1989:4).
- 6 Magistrates already sat in Quarter Sessions with a jury.
- 7 The Summary Jurisdiction Act 1848 did not in fact bear that title at the time of enactment, having no short title at all. It was formally given its said title by the Summary Jurisdiction Act 1879.
- 8 The Auld Commission expressed a very firm opinion that juries should always return a verdict true to the evidence.

I recommend that the law should be declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly.

(Auld,2001:176)

9 Support for the argument that juries may acquit if they believe that the sentence would be excessive comes from the belief of Home Office researchers that juries have been reluctant to convict so-called "date rapists" because of the lengthy prison sentences imposed (Harris and Grace,1999).

10 Latest figures indicate that criminal proceedings are commenced annually against some 1.9 million people, of whom around half a million face indictable charges. In 2000, juries had to reach verdicts in 16,942 cases (Lord Chancellor's Department,2001:Tables 6.9 and 6.10). There were a further 2,959 cases in which the judge directed the jury to acquit (Table 6.10).

11 Lay magistrates are selected for appointment on the basis of six key qualities. These are good character, understanding and communication, social awareness, maturity and sound temperament, sound judgement and commitment (Morgan and Russell,2000:1).

12 There were 680 magistrates' courts in England and Wales in 1975 (Tarling,1979:6). By 1999 this figure had dropped to 436 (HC Written Answers, col.415-6, October 31 2000).

13 Doran and Jackson (1997) have argued the case for judge only trials. The Auld Review (2001) has recommended that defendants are given the right to elect trial by a judge alone. That Review further recommended that jurors should be given a list of written questions to take with them into the retiring room. Judges would be empowered to require juries to provide their agreed answer to each of those questions in open court. This would enable a verdict which appeared to conflict with the weight of the evidence to be challenged.

14 A perverse verdict is generally taken to be one perceived to be contrary to the law and the evidence.

15 Eggleston (1983:117-118) cited the examples of Holroyd J in R.v.Sarah Hobson (1823) 168 ER 1033, Lord Denning in Bater.v.Bater [1951] P.35 and Lord Pearce in Blyth.v.Blyth [1966] AC 643.

16 Packer's two models relate to the operation of the criminal process as a whole and not solely to the court process. The detail of the recent debate between Smith (1997,1998) and McConville et al. (1997) relates to police powers.

CHAPTER 3

METHODOLOGY

This chapter describes the methodology adopted for the collection of data in this study. Choice of methods is dependent upon the objectives of a research project. This chapter will, therefore, provide an explanation as to why particular methods were used in light of the study's aim and objectives detailed below and previous research. It will incorporate an outline of the research design, the criteria for selecting the sample courts, a description of those courts, an explanation of each method of data collection, the plan for data analysis and a discussion pertaining to the reliability and validity of the research as a whole. Guidance for this is, however, limited as published studies of courts have tended to provide scant information about methods and sampling procedures and to largely ignore the problems encountered (Baldwin,2000:239).

3.1 AIM AND OBJECTIVES

The aim of this study is to examine the decision-making process for either way offences in magistrates' courts in England and Wales. This primary aim comprises six associated objectives which are to:

- examine the criteria laid down by statute and Guidelines;
- investigate the procedure adopted in either way cases;
- analyse the factors behind the decision to accept or decline jurisdiction following a denial of guilt;
- analyse the factors behind the decision whether or not to commit a defendant to the Crown Court for sentence;
- evaluate the role and influence of professionals, namely prosecution lawyers, defence solicitors, court clerks and liaison judges, in the decision-making process for either way offences;
- identify the extent of and the reasons for disparity of committal rates between courts.

3.2 RESEARCH STRATEGY

Subject to time and resource constraints, it was determined to use as wide a variety of methods as possible, providing both quantitative and qualitative data, in order to permit a wide-ranging analysis of the either way process. This accords with the assertion of Lipetz (1980:59) that, "A methodological mix is desirable for understanding the operations and outcomes in many courts." There is a diverse range of methods of research and it is not to be assumed that these are objective tools immune from matters of theory.

Research methods are never atheoretical or neutral. ... They act as filters through which the researcher selectively experiences the research environment. By using one's knowledge of how each research method may selectively bias or distort the scientist's picture of "reality", the researcher may select combinations of methods that more accurately represent what is "out there".

(Smith,1991:485)

The concept of methodological triangulation, which involves the use of a combination of methodologies in one study, was deemed appropriate as the perspective adopted by this study was to examine the criteria used in mode decisions and the complexity of socio-legal relations within the court setting (Denzin,1978; Tindall,1994:145-149). There are two forms of such triangulation, within-method and cross-method (Jupp,1993:72). The former involves the application of differing analytical strategies within a broad research method, such as the use of structured and open-ended questions in an interview. The latter refers to the procedure of using dissimilar methods of research to examine the same phenomenon. This study embraces both of these techniques, although it is the latter which is of greater significance.

The notion of triangulation, a term borrowed from navigation and military strategy, was founded on the supposition that utilising a combination of methods would counterbalance any bias present in individual methods, sources or researchers (Denzin,1978; Jick,1979). It owes much to the concept of combining research designs in all phases of a study (Creswell,1994:174). The value of cross-method triangulation is, firstly, that it balances the strengths and weaknesses of different methods (Jupp,1993:74). As all research methods comprise a number of methodological weaknesses, the use of a combination of techniques helps compensate for these individual deficiencies. Secondly, the intersecting of various methods maximises the theoretical value of any research by revealing aspects of phenomena which the use of one method alone would miss (Greene et al.,1989). It facilitates the presentation of a more balanced view of the subject, adding scope and breadth to a study. Thirdly, the use of different methods assists in seeking convergence of results (Greene et al.,1989). It provides a check on the validity of data obtained by any one method, establishing the means to help substantiate findings and ensure consistency (Hood,1972:39).

This study of magistrates' courts used four methods of data collection. These were statistical analysis, court observation, analysis of a sample of court registers detailing either way decisions and semi-structured interviews. A triangulation of data sources was also employed: secondary data from previous research and statistics; analysis of actual decisions from court observation and records; and responses of magistrates, clerks and solicitors in interview. Individual methods provided data unavailable from other methods. Official statistics, for example, can provide information, which observation cannot, about whether or not a particular court's committal rate has remained consistent over a period of time. But they do not indicate why magistrates

behave in a particular manner or illuminate the factors taken into consideration when determining whether or not to accept jurisdiction. This is not to imply that all methods were of equal significance. Any research project involves one or more major methodologies fundamental to the subject being analysed and one or more secondary methodologies which act as a check on the findings.

Three models of how combined research designs may be weighted have been advanced by Creswell (1994:177) following an extensive review of methodological literature. He terms these the two-phase design, dominant-less dominant design and the mixed-methodology design. The first, which involves two distinct phases for the collection of qualitative and quantitative data, was not suitable for this study due to the simultaneous use of qualitative and quantitative methods of data collection within one overall method. In the second, the study is presented within a dominant paradigm, but includes an element of an alternative paradigm. The mixed-methodology model represents the highest degree of mixing paradigms, with aspects of the qualitative and quantitative elements of the study being combined at all or many methodological steps in the design (Creswell, 1994:178). The major methods employed by this study, observation and interviews, involve a qualitative and a quantitative element both in data collection and in the way the material has been analysed. An integrated use of method exists (Rossman and Wilson, 1985). There is, however, an argument that two paradigms can never be evenly weighted in one study (Morse, 1991). It can be argued that the design of this study best fits the dominant-less dominant model as it is primarily qualitative in nature while containing a significant amount of quantitative data in relation to the majority of the study's objectives. It does not, however, fall precisely into Creswell's (1994:177) categorisation as the quantitative element forms more than a "small component" of the study.

It is important to establish that, although quantitative data were obtained and analysed, this study was not based on the positivist model of research whereby an hypothesis is tested and method is seen as something to assist in the verification of theory. The aim of this research is to examine a specific decision-making process in magistrates' courts and to contribute to a broader understanding of those courts. It is not to test an hypothesis that a high committal rate was caused by a particular factor. It accordingly employed the discovery-based approach of Glaser and Strauss (1967). This treats theoretical generalisations as the product of empirical investigation, or at the very least as the outcome of a flexible and continuous interchange between theory and data (Jupp,1993:7). The concept of "grounded theory" is, in effect, theory which is grounded in data. In short, this study is data led. The approach adopts three phases of enquiry. These are the formulation of a broad research interest (mode of trial and committal for sentence), specific empirical investigation (observation and records) and focused investigation (interviews).

Research studies can be broadly divided into three purpose-related categories: descriptive, explanatory and exploratory. The former, accounting for most studies of courts, aim to provide a detailed description of a situation or procedure (McNeill,1990:9; Baldwin,2000:240). The driving force behind explanatory research is a motivation to address questions of how or why. Exploratory research is appropriate when the available literature or knowledge base is poor and the need is to establish the variables involved (Yin,1998: 235-6). This study commenced as an exploratory project because, as indicated in Chapter 1, there is a lack of data on the issue of mode of trial. It developed, however to become primarily explanatory once a pattern of data had been revealed in the early stages of data collection and analysis. Quantitative data assumed greater significance than had been envisaged in the initial design.

3.3 SELECTION OF COURTS

This empirical study was conducted at three magistrates' courts in England. These are referred to throughout as City Court, Town Court and New Court as a condition of their Chief Clerks granting facilities to the researcher was the preservation of anonymity. Some previous studies of magistrates' courts have concentrated on a single court (Brown and Hullin,1992; Rumgay,1995; Dignan and Wynne,1997). The majority, however, have focused on a few or several courts (Hood,1962; Tarling,1979; Bankowski et al.,1987; Riley and Vennard, 1988; Parker et al.,1989; Hedderman and Moxon,1992; Hucklesby,1997; Flood-Page and Mackie,1998). This choice is dependent on the objectives of the research project. This study could not achieve its objective of identifying the extent of and the reasons for disparity of committal rates between courts without involving more than one court. Investigation was limited to three courts as a consequence of time restraints and not theoretical considerations.

A number of criteria appeared relevant when selecting courts for empirical study. The first was that the courts should ideally be of varying size in order to achieve a balanced view of the magisterial system of justice. However, each needs to generate enough business for meaningful analysis and comparison. Over a third of the petty sessional divisions in England and Wales conduct less than 500 indictable proceedings each year (Home Office,2001). Even large-scale Home Office studies such as that of Tarling (1979) eliminated the 500 smallest courts from any consideration before selecting a final sample of 30 from the other 180. A minimum of 1,500 indictable proceedings annually was deemed a prerequisite for this study. The second criterion was to choose courts with traditionally different committal rates from each other. A significant difference in these rates would suggest either the adoption of a different

attitude towards accepting jurisdiction or a marked variation in the gravity of offence patterns, or a combination of the two, factors which are clearly relevant to a balanced analysis. Courts to be visited were divided into four groups, high, medium, low-medium and low, on the basis of their committal rates.

A third criterion was to select one court with a resident stipendiary magistrate. This would enable an analysis to be made of any differences in the exercise of venue powers between professional and lay magistrates and a consideration of the effects, if any, of a stipendiary on the either way decision-making process of the lay bench. Previous research has suggested that a stipendiary may have an important influence on a court's culture (Hucklesby, 1997:137). A fourth criterion, which does not appear in previous research, was to choose one court situated at some distance from its Crown Court in order to ascertain whether or not this factor was of any significance in such aspects as the level of involvement of the liaison judge or magistrates' knowledge of sentencing patterns in their Crown Court. Nearly all large magistrates' courts are situated in close proximity to their Crown Court. This is not, however, invariably the case as some Crown Courts remain located in county towns which are no longer major centres of population and might not even have their own magistrates' court. The final criterion was geographical consideration. Riley and Vennard (1988) found marked variations in committal rates between two courts situated in the North East and two in the East Midlands. This would suggest that an ideal would be for the three chosen courts to be located in totally different parts of the country. This had to remain as an ideal, however, given the resource and travel constraints which almost invariably accompany a sole researcher. It has to be borne in mind when considering generalisation of the data obtained that the three sample courts were located within 70 miles of each other, although they were in different commission areas.

Seventeen courts of varying size were visited during late 1998 as a preliminary stage towards selecting those which would be approached for empirical study. The main purpose of these visits was to ascertain the atmosphere, approach and level of daily business of each court rather than to focus on venue issues. They did, however, provide an introductory insight into the different plea before venue procedures adopted by different courts. Ten of these courts were observed again in March 1999, these intentionally being of different size and having traditionally different committal rates from each other. Detailed notes were taken of all cases in which plea before venue occurred. The most recent Annual Reports were sought from each of the relevant commission areas. The three chosen courts were approached by letter in June 1999 and all agreed to provide research facilities without any problems.

Previous research has emphasised that the actions of people may be influenced by their knowledge that research is taking place and that the presence of a researcher can have an effect on observational research (Zander and Henderson,1993:xiii). The suspicion with which strangers are treated by court participants has been well documented.

To go to these courts as a member of the public is to become an object of curiosity; to sit there taking notes is to invite paroxysms of paranoia.

(McBarnet,1983:144)

Levels of suspicion rise as soon as an outsider has been in attendance long enough for it to become apparent that their interest exceeds one particular case. It was evident to the researcher that the presence of an unknown person with a notebook was a source of concern, producing whispering among bench members and between them and their clerk. This served as a reminder of the potential influence of an outsider on court procedure.

3.4 SAMPLE COURTS

The information provided in this section is of necessity brief and somewhat generalised in order to preserve the anonymity of the three sample courts. City Court is one of the larger magistrates' courts in England, serving a population of some 450,000 people and dealing with over 5,000 indictable proceedings each year. The existing jurisdictional area was formed in the early 1990s through an amalgamation of the former city and county benches, moving into purpose-built premises which are already considered too small. It has around 300 lay magistrates and two resident stipendiary magistrates. It does not, however, have an historical tradition of professional magistrates. The first was appointed in 1994 and the second during the period of this empirical study.

Town Court is an old county town bench serving a population of around 250,000 people and currently handling almost 3,000 indictable proceedings annually. It has 140 lay magistrates and no resident stipendiary. It is by far the largest court in a county which is a single clerkship area divided into six petty sessional divisions. Cases are occasionally transferred between these divisions for trial in order to reduce delay. Town Court sits in ageing premises with only one large courtroom and extremely poor facilities, although these were renovated and updated to an extent during the period of this study.

By way of contrast, New Court serves an expanding new town comprising slightly more than 200,000 people. It conducts just over 2,000 indictable proceedings each year. It has 130 lay magistrates and no stipendiary. Its jurisdictional area has increased considerably over recent years with the closure of a number of outlying courts in more established residential areas, moving to purpose-built premises some ten years ago.

The three sample courts largely conformed to expectation in relation to the gender and ethnic origin of their bench members. All three accorded with the lay magistracy nationally and comprised an approximately equal number of male and female magistrates (Morgan and Russell,2000:14). It would appear that the lay magistracy overall is now approaching ethnic representativeness. It is recognised, however, that in some areas there remain substantial variations between the composition of the bench and the number of black and Asian inhabitants in the local community. Benches serving areas with ethnic minority composition at or below the national average tend to have achieved above average representation in their membership. Benches in areas with large minority ethnic groups remain disproportionately white (Morgan and Russell, 2000:14). The ethnic minority population in the areas covered by Town and New Courts was around the national average of six per cent, while some eight per cent of their magistrates came from that population. The proportion of non-white inhabitants in the jurisdictional area of City Court was over 20 per cent, while less than 18 per cent of their magistrates came from the ethnic minorities.

The three courts were selected from three of the four categories based on committal rates. City Court was in the high category, its rate consistently being some two per cent above the national average, which stood at 17.9 per cent in 1997 (Home Office,1998). New Court came from the low-medium group with a rate consistently some four per cent below the national average. Town Court came from the low category with a committal rate considerably below the national average, being less than 10 per cent in 1997 (Home Office,1998). City and Town Courts are situated within walking distance of their Crown Courts. New Court is located some 20 miles away from the Crown Court to which its defendants are committed, although it is the largest court in its county. The Crown Court continues to be situated in the county town.

3.5 METHODS

3.5.1 Official statistics

Information about committal rates was obtained from the Official Criminal Statistics for all courts in England and Wales. This indicates a range of 0.7 to 33.7 per cent in 1998 in the committal rates of those courts hearing a minimum of 500 indictable proceedings (Home Office,1999). These statistics represent a valuable source of secondary data, providing information as to the level of consistency of a particular court's rates and helping to identify courts for empirical investigation. It has to be acknowledged, however, that they form a very crude basis for study. Variations in rates do not by themselves indicate inequality of consideration of objective factors (Hood,1962; Tarling,1979). A potential reason for statistical variations might be gleaned from the fact that the courts with the highest committal rates in 1998 were Dover, a Channel port, and Crawley covering Gatwick Airport (Home Office,1999).

Statistics were also examined in relation to the specific either way offence categories listed in the Supplementary Tables. This more detailed analysis indicated that it was simplistic to say that an individual court had a high or a low committal rate. Differences between courts could vary in relation to particular types of offence. City Court's committal rate in 1998 for assault occasioning actual bodily harm was almost four times as high as that in the other two sample courts. Its committal rate for receiving stolen goods was, however, the lowest of the three, being less than half the rate in New Court (Home Office,1999). Evidence that an individual court might adopt a different jurisdictional stance towards particular types of behaviour emphasised that this study had to analyse data in relation to each major offence category.

3.5.2 Court Observation

Emphasis has already been placed on the interactionist requirement to consider the working relationships of all court personnel as a decision is viewed as the outcome of a social process involving all of its contributors (Rumgay,1995:201). Virtually all recent empirical studies of magistrates' courts have employed the observational method because of the patent inadequacy of records to evidence social processes. It should be noted, however, that the two Home Office studies into mode of trial were based on records and interviews and did not adopt the methodology of court observation (Riley and Vennard,1988; Hedderman and Moxon,1992). A number of researchers have commented that observational studies of specific courts can reveal the influence of court culture, or of the working group norms of court personnel, on decision-making (Burney,1979; Parker et al.,1989; Rumgay,1995; Hucklesby,1997). According to Lipetz (1980:59), "The strength and importance of the courtroom workgroup can best be demonstrated through the use of observational data." Observation enables the researcher to appreciate more fully the context within which an event occurs and to note events which may escape awareness among regular court participants (Patton,1990:203-4). The method does, however, have important limitations. It does not illuminate the crucial pre-hearing negotiations which may determine outcome or the private deliberations held in the magistrates' retiring room (Baldwin,2000:245).

Recording instruments, reproduced as Appendices 5 and 6, were designed prior to the commencement of court observation. One of these relates to each court sitting and the other to each individual defendant. Several areas of information were required in order to fulfil the objectives of this study. Some of these, such as the defendant's sex and age, were quantifiable. Others,

such as the strength of prosecution and defence representations, were more descriptive. The recording of observational data needs to be "factual, accurate and thorough without being cluttered" (Patton,1990:202). Two visits were made to each of the three courts on different days of the week during the summer of 1999 in order to pilot the draft forms. A number of amendments were made as a consequence of these six attendances. Each proforma contains a section for comments not covered by any of the other sections.

Court observations were the first part of primary data collection, although examination of records took place simultaneously within the latter weeks of observation. The objective was to observe 100 plea before venue procedures carried out by a lay bench in each court and an additional 50 such procedures conducted by a stipendiary magistrate in City Court. Any larger sample would have been excessively time consuming and may have strained the co-operation of the participating courts. It was decided to spend one week at a time in each court. This enabled ongoing comparisons to be made and facilitated pursuance of points of interest which arose in one court in the other two. It also meant that each court was observed over a period of at least six months rather than for a block period of only two months, and consequently minimised the possibility of data being affected by seasonal variations in offence patterns. Observation commenced in late September 1999 and was scheduled to take eight weeks in each court. The problem with any time schedule was that there was no way of knowing how many plea before venue procedures would be observed in any individual sitting. Lists were provided on a daily basis in all three courts so that a decision could be made as to which courtroom to attend. A promising list was, however, quite capable of producing nothing but adjournments. Clerks were consulted before sittings, but did not usually have information as to which cases would proceed to plea.

Town Court had three courts sitting in which potential plea before venue cases were listed. One of these was not observed as it was an early first hearing court which only listed a few minor either way cases, such as shoplifting, to which a guilty plea was anticipated. This lack of observance of a guilty plea court may explain why the proportion of not guilty pleas in the observation sample was some 18 per cent higher than in the data extracted from court registers. Court 1 was only observed occasionally as most of its time tended to be devoted to bail issues or defendants remanded overnight. Court 2 was the one primarily observed as this listed cases adjourned for legal advice and plea. The problem was that this courtroom was small and the allocated seat faced the magistrates. This heightened the possibility of the process being influenced by the presence of an observer and meant that defendants could not be seen during the proceedings as the dock was situated behind the researcher. A total of 100 lay cases were observed in 35 courts during eight weeks between September 1999 and March 2000.

New Court had two courts dealing with relevant cases, one essentially dedicated to first hearings and defendants in custody and the other to adjourned cases. Both were observed, but with an emphasis on the latter. The advantage of this division of business was that the observation sample more accurately reflected overall offence patterns and plea structures. The corresponding disadvantage was that a higher proportion of the sample involved guilty pleas to charges such as shoplifting and possession of cannabis which provided little insight into the venue process as they were obviously within magistrates' sentencing powers. Facilities were vastly superior to Town Court so that all court participants could be observed without being so obtrusive. A total of 100 lay cases were observed in 36 courts during eight weeks between September 1999 and March 2000.

City Court was by far the largest and busiest of the three sample courts, but this did not facilitate the number of plea before venue cases observed on any particular day as business was divided between a number of courtrooms. Four courts were observed during the first four weeks, although attendance was primarily in two of these. As from the beginning of February 2000 City Court changed its sitting pattern in accordance with the recommendations of the Narey Report (1997), plea before venue cases essentially being listed in two afternoon courts. The early first hearing court was only observed twice as it primarily listed anticipated guilty pleas within magistrates' powers. The proportion of not guilty pleas observed was some 10 per cent higher than the rate obtained from court registers.

The aim of the senior clerkship in City Court was for the early administrative hearing court to be conducted by a stipendiary magistrate whenever possible. This rendered the objective of observing 100 lay procedures and 50 stipendiary procedures impractical. A total of 75 lay cases in 27 courts and 65 stipendiary cases in 16 courts were observed during nine weeks between October 1999 and April 2000. The higher average number of pleas being taken in an individual court when a stipendiary magistrate was sitting was partly occasioned by a greater insistence on progress being made by way of the charge being put and partly by the structure of the courts from February 2000. Observation was completed prior to Easter 2000 in accordance with the projected time schedule. The data collected from both observation and court registers were coded and analysed using an SPSS statistical package. This enabled data to be analysed in detail rather than relying on broad conceptions of what had been observed. This was particularly significant as this study was data led. Observational research is not, however, an entirely objective exercise and broad conceptions remain important.

3.5.3 Court Registers

An analysis was undertaken of a sample of court registers. This method forms part of the quantitative element of the study's methodology. A number of previous studies which have considered various aspects of magistrates' courts have incorporated an examination of records (Riley and Vennard,1988; Diamond,1990; Hedderman and Moxon,1992; Raine and Willson,1993; Rumgay,1995; Hucklesby,1997; Flood-Page and Mackie,1998). There are two main types of records held in magistrates' courts. The first comprises computer printouts detailing all cases heard on a particular day. The second are the court files relating to individual defendants. Only the former were examined.

Registers contain limited information. They are essentially restricted to providing a defendant's name, address, date of birth, offence(s), bail or custody status, plea and outcome. Registers in the sample courts gave no indication of a defendant's ethnic origin. This limited scope led to clerks being somewhat sceptical of the value of perusing records. They do, however, serve two functions. The first is convergence of data. The findings are able to act as a control which permits an assessment of the validity of observational data as registers cover all courts and comprise a much larger number of cases (Hucklesby,1997:131). It has already been noted that the plea structure in Town and City Courts would have appeared different had this methodology not been adopted. The second function is the provision of significantly more quantitative data. By following all cases through to ultimate outcome in the magistrates' court it was possible to get more data on a variety of important issues such as the frequency with which magistrates commit a defendant for sentence after having accepted jurisdiction at the mode hearing.

As a matter of practicality, research has to rely on inference from samples to the generality (Baldwin and McConville,1977:ix). There are two broad strategies of sampling (Jupp,1993:37). These are random or probability sampling and purposive or non-random sampling. Previous studies of magistrates' courts have employed different techniques for sampling which records to examine. Some have chosen to analyse particular offences, while others have taken a random sample for a specific time period (Diamond,1990). The former was not appropriate for the objectives of this study. The latter did not appear necessary. It was determined to sample by time and examine all registers over a three month period between September and November 1999.

A meeting was held with an administrative officer in each of the three sample courts to discover precisely what information would be forthcoming from records. A register data form, reproduced as Appendix 7, was drafted after these meetings. Examination of records took place between February and April 2000. Follow-up to ascertain ultimate outcomes was completed in November 2000. The objective was to extract information of all either way cases in which an indication of plea had been entered during the three month period. Time constraints meant, however, that the separate registers for afternoon sittings at City Court, involving proportionately few cases, were not examined. There is no apparent reason why this should have affected the validity of the data obtained. A total of 1,168 cases were analysed. The largest number, 530, were at City Court (425 lay decisions and 105 stipendiary decisions), 350 were at Town Court and 288 at New Court.

A further objective had been to follow up all cases which had been committed for trial or sentence to their ultimate outcome in the Crown Court. This would reveal the proportion and type of case in which judges passed

sentences which magistrates could have imposed. A privileged access agreement was granted by the Lord Chancellor's Department after lengthy correspondence. However, the Crown Court which took committals from Town Court felt unable to co-operate because of staff shortages. New Court received written notification of all results from their Crown Court and these were attached to the court records. This enabled 64 final outcomes to be noted, a further nine cases remaining outstanding when the records were last examined. Access was granted to the registers pertinent to the cases committed by City Court and a sample of 100 cases in which sentence was passed were recorded. This sample included all relevant cases from the observation sample except for three which remained outstanding.

There was a problem with the analysis of court records. There was evidence to indicate that the registers were not always entirely accurate. There was nothing to suggest that they were incorrect in fundamental matters such as which court was to hear a case and its final outcome. Checking observed cases against the record entries did, however, reveal that they were occasionally inaccurate in reflecting two issues. One was whether a defendant entered a not guilty indication or declined to indicate a plea. The other was whether a defendant had been committed for trial because the magistrates had declined jurisdiction or because of exercise of the right of election. The records of New Court, which were routinely checked by the sitting clerk before being filed, appeared to be accurate. The records of the other two sample courts were occasionally erroneous. The level of inaccuracy should not affect the principles of arguments forwarded in the text. It will, however, affect the precise figures. This potential for mistakes is relevant when considering the findings of research studies which employed examination of records as a major methodology and did not utilise court observation.

3.5.4 Interviews

It is apparent that the methods outlined above could not complete a discovery-based approach in relation to the aim of this research as proceedings in court only present the public face of justice (Baldwin, 2000:245). Interviews with a sample of magistrates, clerks and solicitors was the methodology adopted for the final phase of enquiry. Virtually all studies of magistrates' courts have incorporated interviews with certain key personnel. These can expand upon issues raised by the other methods as well as reveal information not otherwise available such as the level of training for magistrates on mode of trial. They enabled the researcher to obtain information about attitudes fundamental to an analysis of court culture.

The essence of the research interview is the guided conversation (Lofland, 1971:76). Semi-structured interviews were employed in order to allow the participants to speak freely using their own concepts. This format involves the researcher using an interview schedule (reproduced as Appendix 8) in the form of a guide while being free to phrase questions as wished and to ask them in the order that seems sensible at the time (Gilbert, 1993:136). Confidentiality was an essential ethical consideration. This was assured at the beginning of each interview and only one or two sought reassurance during the course of the meeting. It was explained to each respondent that any quotations used in the thesis would be anonymous. The discussions were not tape recorded as it was felt that this might induce reticence. Simultaneous notes were taken and these were written up within 24 hours of each interview.

The Clerk to the Justices in each court was asked to provide the names of magistrates, six in Town and New Courts and eight in the larger City Court,

who were willing to be interviewed. It is not certain how they approached fulfillment of this request. It would appear, however, that magistrates in Town and New Courts were contacted directly by or on behalf of the Chief Clerk. In City Court, a list was apparently put up in the magistrates' assembly room seeking volunteers. Sampling was purposive in that the terms of reference were an equal split of men and women covering a range of lengths of service. Both terms were met, the nominated magistrates having been appointed to the bench between 1969 and 1999. The sample was not, however, necessarily representative of the benches as a whole as the availability of free time in which to be interviewed is obviously a factor when deciding whether or not to volunteer. Only nine of those interviewed (47 per cent) stated that they were in employment. But this figure may not be as unrepresentative as might appear. Forty per cent of magistrates responding to questionnaires sent by Morgan and Russell (2000:16) indicated that they had retired.

One of the magistrates in City Court had to cancel their appointment due to an accident. This left a total of 19 lay magistrates, ten women and nine men, to be interviewed between June and August 2000. The male senior stipendiary magistrate at City Court was also interviewed. One interview was conducted at the magistrate's office, four at their homes and the other 15 in private rooms within the court building. These interviews were scheduled to last for an hour and a quarter, although in some cases the discussion had to be tailored to keep within this time limit. All of the magistrates were asked at the beginning of the interview as to their available time. This knowledge enabled the researcher to ensure that each interview reached the end of the interview guide even though some middle sections had occasionally to be truncated. A maximum of three interviews took place in any one day in order to avoid excessive tiredness.

The three Clerks to the Justices were interviewed, one of whom was an acting stipendiary magistrate. Two clerks from each court, one senior and one junior nominated by their Chief Clerk, also participated. Nine defence solicitors, two men and one woman from each court, were approached directly by the researcher. The aim was to involve advocates of different ages and levels of experience. The duration of these meetings was much the same as those with magistrates, although one solicitor could only spare 45 minutes while one interview with a clerk lasted almost two hours. At the end of the meeting all the interviewees were asked to determine jurisdiction in six mode of trial exercises (reproduced as Appendix 9) based on cases observed during the empirical study. The objective was to ascertain whether there were any differences between the responses of practitioners in the three sample courts and any differences between magistrates and lawyers.

The Crown Prosecution Service declined to participate on terms acceptable to the researcher. Its representatives in court had indicated that they could not agree to be formally interviewed without authority, but that local areas were now empowered to make such arrangements. Letters were sent to the three Chief Crown Prosecutors requesting interviews with two of their staff. One did not reply, one provided the name of a person at headquarters and the third forwarded the letter direct to those headquarters. The response was that interviews would only be permitted on an undertaking to supply any thesis or article for publication prior to submission and subject to a right of veto. This latter stipulation was deemed unacceptable as an essential element of this study was its ability to observe and comment on the either way decision-making process from an objective and neutral standpoint. Contact with the CPS was, therefore, limited to informal discussion at court, although two of the interviewed defence solicitors had previously worked for that agency.

3.6 DATA ANALYSIS

The collection of data does not by itself produce research findings. An essential element of any study is a plan for data analysis. The challenge is to make sense of the vast amount of data obtained, an analytical process which is interrelated with the research design and not conceptually separate. The traditional approach in quantitative research has been to divide and engage in the separate activities of data collection, analysis and writing up. It is generally acknowledged, however, that in qualitative studies analysis has to be conducted simultaneously with data collection and interpretation (Creswell, 1994:153; Yin,1998). This is particularly relevant in discovery-based research as the constant exchange between theory and data provides insights that facilitate the collection of further data. The probes for interviews in this study could not have been established without a preliminary analysis of data collected from observation and records.

Data analysis of qualitative research presents three initial problems. The first is that the process is eclectic with few fixed strategies or techniques as guidance. Yin (1998:251) has argued that researchers have to rely on their own style of rigorous thinking combined with the sufficient presentation of evidence and consideration of possible alternative explanations. The second is that the data generated tend to be voluminous (Patton,1990:379). The completed court observation data forms in this study, for example, ran to 2,042 pages. There is, therefore, a need for data reduction. The third is to construct a framework, or means of display, for communicating the data. The empirical chapters of this study are presented by reference to specific aspects of the either way process. There is tabular analysis of quantifiable data, while statements made in interviews and court are quoted as evidence of various arguments.

The unstructured and semi-structured sections of interviews can present the greatest difficulties of analysis as they do not immediately lend themselves to precise categorisation. A systematic process of analysing textual data had to be devised. A thematic, cross-case analysis was adopted whereby answers by different people to common questions or their perspectives on similar issues were grouped together. This involved reading through all of the interview transcripts and making notes of what appeared to be the salient points. A small sample was then randomly selected from each court and more detailed notes taken of themes in those interviews. These themes were coded numerically and their code put against the relevant section in each interview. The transcripts were then scanned to identify sections which had no code in the margin. This may have been general background information elicited primarily to put the respondents at ease, instances of interviewees going off at a tangent or relevant data, to be coded, which had not appeared in the smaller sample. The individual interviewees were identified by a number between 1 and 38. The data were assembled for each theme by referring numerically to those respondents who had commented on that topic. This enabled thematic analysis. Content analysis in the sense of a word frequency count was not possible as the interviews had not been recorded verbatim.

Court observation involved a qualitative and a quantitative element in the way the material was analysed. The quantitative data collected from observation and registers, all of which was coded, lent themselves to tabular analysis which revealed, in particular, variations between courts. Tables are a valuable analytic technique as they show relationships in data, facilitate data reduction and present information in a form which enables it to be seen as a whole. Chi-square tests were carried out on computer in relation to the 13 tables which were of sufficient sample size to render this viable.

Court observation is, however, primarily a qualitative method used to investigate social processes and group norms (Lipetz,1980; Rumgay,1995). It assists to operationalise court culture by providing an overall impression of a court. Data illustrates localised cultures and practices (Paterson and Whittaker, 1994:74). As observation comprised the first chronological stage of the empirical study when the research was primarily exploratory, initial analysis had to be inductive and, as with interviews, was organised within a framework of issues. These categories do not produce frequency counts as in quantitative research, but facilitate comparison and establish patterns. As an example, the relevance of the strength of the prosecutor's address was approached by compiling a list of those cases in which strength was assessed as being above average and analysing whether there was any pattern in the type of case in which this occurred. There had, finally, to be thematic, cross-reference between observational and interview data. For instance, the attitudes of magistrates towards defence solicitors, examined in Chapter 6, were analysed by using and comparing observational data with interview responses.

3.7 RELIABILITY AND VALIDITY

The concepts of reliability, validity and representativeness are central to any research study. The latter, the significance of which was emphasised in the critique of the sampling of Hedderman and Moxon (1992) in Chapter 1, has been considered at various stages in the preceding sections. Reliability refers to the extent to which a study is replicable and indicates that a different researcher using the same methodology would obtain the same results (McNeill,1990:14). Validity refers to the question of whether or not the data collected presents a true picture of what is being studied. Internal validity denotes the ability to rule out alternative explanations and provide strong

evidence that a specific variable really did produce the particular outcome which is being asserted (Campbell,1969; Jupp,1993:54). External validity relates to whether or not the findings can be generalised to a wider setting (Jupp,1993:55).

The importance and difficulties of assessing the validity of research that includes a strong element of interpretive data have been highlighted by Altheide and Johnson (1998). They note (Pg.284) the opinion of Morgan (1983:398) that insufficient attention has been devoted to evolving criteria of assessment. It has, however, been suggested that both internal validity and reliability can be achieved in research which is primarily qualitative by triangulation of data, repeated observation of similar phenomena and explicit awareness of researcher bias (Miller,1991). All of these were present in this study. In particular, it has to be recognised that the qualitative researcher is the primary instrument for data collection and analysis, through whom data are mediated (Creswell,1994:145). Previous experience can generate biases, for example in phrasing interview questions, and lead to a subjective interpretation of data. It also gives rise to ethical considerations as some organisations or individuals may prefer not to be researched by people from certain walks of life. This researcher made his career history of a Probation Officer and solicitor known to the three Clerks to the Justices when seeking research facilities. Subjectivity in the text was minimised by always including quotations expressing minority opinions. External validity can be ensured through the provision of plentiful and detailed description (Merriam,1988). This is provided in the ensuing empirical chapters with the aim of relating the findings to wider aspects of magistrates' courts than the decision-making process for either way offences. The objective of this combination is to enable anyone "interested in transferability" to have a solid framework for comparison (Creswell,1994:168).

CHAPTER 4

THE OPERATION OF MODE OF TRIAL

This chapter commences the analysis of the empirical data. The findings will provide a foundation for subsequent discussion. Drawing primarily on data obtained from court observation and examination of records, consideration will be given to the plea structure in the three sample courts, their committal rates and exercise of the right of election. The first section will reveal that almost half of the defendants in this study denied guilt at the plea before venue hearing. Most of these cases were eventually resolved either by the CPS withdrawing all charges or by the accused admitting the original or an amended charge. It will be argued that a partial explanation for these statistics lies in the failure to meet conditions stipulated in the 1995 consultation document as essential for the satisfactory operation of the plea before venue provisions (Home Office, 1995:para.27). Committal rate data provided in the second section will reveal considerable variations between the three sample courts. Analysis will suggest that part of this difference could be attributed to offence patterns while part could not be explained by reference to notionally objective factors.

The third section will show that the majority of defendants who exercised the right of election had all either way charges against them dismissed prior to committal. This finding has profound implications for the debate on the continuance of the right as it provides a statistical counterbalance to the official argument that the right is being exercised as a means of manipulating the system. The research of Hedderman and Moxon (1992) indicated that the large majority of defendants who were convicted after choosing Crown Court trial had ultimately pleaded guilty. This study supports that finding in isolation. The crucial finding, however, is that only a minority of those exercising the right were ever convicted. The proportion of those electing who eventually pleaded guilty in the Crown Court to an either way charge was small. The proportion admitting all those offences with which originally charged was very small.

4.1 PLEA STRUCTURE

This section examines the plea structure in the three sample courts and explores possible reasons why the proportion of defendants admitting guilt was lower than had been anticipated in the 1995 consultation document. The plea before venue provisions (PBV) were founded on the crime control assumption that the sentence discount would encourage defendants to admit guilt at the earliest possible opportunity. If they did not do so, precisely nothing changed. Table 4.1 below shows the plea structure in the three sample courts. It was established in the last chapter that the observation sample comprised a disproportionately high number of not guilty indications in Town and City Courts probably because early first hearing courts dealing with routine guilty pleas were rarely observed. The figures supplied in Table 4.1 are restricted to data obtained from court registers as these, covering all courts, would appear to provide the more representative sample of the plea structure.

Table 4.1 Plea structure by court

	Not Guilty		Guilty		Total
	(n=)	(%)	(n=)	(%)	(n=)
Town Court	167	48	183	52	350
New Court	103	36	185	64	288
City Court	298	56	232	44	530
Total	568	49	600	51	1168

$\chi^2 = 31.44, p < .000$

Table 4.1 shows that 51 per cent of defendants in the three sample courts indicated a guilty plea at the plea before venue hearing. This figure approximates with national statistics, which reveal that 55 per cent of either way defendants pleaded guilty in the magistrates' court in 1999 (Home Office, 2000:

para.6.13). The average figure of just over a half does, however, conceal significant differences between the three courts, with a range of 20 per cent between New Court and the much larger City Court. This difference may be partially explained by different offence patterns in these two courts. The proportion of defendants in New Court who faced charges of shoplifting or possession of cannabis, offences which were usually admitted in this study, was 11 per cent higher than in City Court. If those defendants were removed from the sample, the proportion pleading guilty in New Court would decrease from 64 to 52 per cent, the same figure as in Town Court. Another partial explanation for the difference may be the propensity of Asian defendants in City Court to deny guilt. Asians comprised 16 per cent of the observation sample in City Court as against two per cent in each of the other two courts. Guilt was denied by 78 per cent (18 from 23) of these. The proportion of white defendants denying guilt in that sample was only 60 per cent (62 from 103). This accords with previous findings of a higher rate of not guilty pleas among defendants from minority ethnic groups (Walker,1989; Hood,1992).

The proportion of defendants admitting guilt in this study would appear to be somewhat lower than the government had anticipated when introducing plea before venue (Home Office,1995:para.24). The research of Hedderman and Moxon (1992) revealed that some 65 per cent of defendants in their Crown Court sample said that they would have been willing to admit guilt before magistrates. Two reasons present as possible explanations for this lower figure. One, discussed in section 4.1.2, is the practice of defendants to decline to indicate a plea in cases which will inevitably be finalised in the Crown Court. The other is the perceived inadequacy of the initial advance disclosure supplied to the defence. This results in solicitors advising a not guilty indication as the sole mechanism of obtaining sufficient information of the prosecution case.

4.1.1 Advance disclosure

Interviews conducted for this study support previous research findings that advance disclosure can often be inadequate for the purposes of defence solicitors in advising their clients on plea (Baldwin and Mulvaney, 1987, 1987a; Baldwin, 1992). The 1995 consultation document recognised that:

It will be essential for the prosecution to have its case against a defendant fully prepared and disclosed to the defence in time for an *informed plea* in the lower court to be entered. ... Similarly, it will be important for the CPS to finalise charges at an early stage.

(Home Office, 1995: para.27)

Data collected in this study suggest that these conditions have not been met in the sample courts. There is an argument that this failure may be an inherent consequence of plea before venue taking place at too early a stage in the proceedings. Indication of plea is expected as soon as the defence has had the opportunity to consider the advance disclosure. The majority of interviewed solicitors commented that a high proportion of not guilty indications was inevitable as there was inadequate time for negotiation.

It would appear, however, that a more significant reason was that the file supplied by the police to the Crown Prosecution Service and summarised in the advance disclosure provided an inadequate basis for meaningful discussion. The CPS is generally only in possession of an accelerated file of three statements at plea before venue. This would appear in many cases to provide its lawyers with insufficient information to ascertain the strength of the evidence and, hence, finalise charges or reach decisions about dismissal. It will be seen from Table 4.2 that the prosecution withdrew all either way charges against half of the defendants who had denied guilt.

The findings of this study suggest that postponing the timing of plea before venue will have little beneficial effect on reducing the number of unresolved cases unless it is combined with a change in the system of supplying evidence. A prerequisite of meaningful discussion is the availability of adequate information on which to base that negotiation. The apparent inability of the CPS to finalise charges and supply the defence with adequate disclosure prior to plea before venue means that an informed plea often cannot be entered at that stage. At present, however, the sole means of defendants obtaining additional information is to formally deny guilt as the police will only prepare and provide a full file once a not guilty indication has been entered. The police will not provide any additional statements following an adjournment. Meaningful discussions to resolve cases generally only took place after indication of plea following further disclosure of evidence. This negotiation, conducted either at a formal pre-trial review in court ¹ or informally between solicitors, resulted in the resolution of the large majority of cases in which a not guilty plea had been indicated without the need for a trial. Table 4.2 below shows the outcome of cases in the observation and court register samples in which summary jurisdiction had been accepted and the proportion which proceeded to a trial.

Table 4.2 Outcome of not guilty cases heard summarily by court

	Dismissed ²		Plead Guilty ²		Trial		Total
	(n=)	(%)	(n=)	(%)	(n=)	(%)	(n=)
Town Court	72	49	52	35	23	16	147
New Court	35	52	22	32	11	16	68
City Court	76	51	37	25	36	24	149
Total	183	50	111	31	70	19	364

$\chi^2 = 6.07, p < .194$

The figures provided in Table 4.2 suggest that many of the mode decisions made by magistrates have limited practical significance. The purpose of a mode of trial hearing is to determine the forum for trial. Yet Table 4.2 reveals that only 19 per cent of cases deemed suitable for summary jurisdiction after a denial of guilt at plea before venue proceeded to a trial in the magistrates' court. The prosecution withdrew all either way charges against half of the defendants who consented to summary trial. There was virtually no difference between the three sample courts in this respect. The defendant admitted an alternative summary charge in approximately a quarter of these cases. This means that all charges were withdrawn in some 38 per cent of cases. Table 4.2 shows that defendants ultimately admitted an either way charge in 31 per cent of cases in which guilt had originally been denied. The figure was slightly lower in City Court than in the other two courts for reasons which are unclear, although it might be relevant to note that City Court was the only one of the three sample courts not to hold a formal pre-trial review.

In summary, it is suggested that not guilty indications will continue to be entered in a large number of cases which are eventually resolved without a trial until the conditions stipulated by the Home Office (1995:para.27) for the satisfactory operation of the plea before venue provisions have been met. The advance disclosure currently supplied would appear to be inadequate in many cases. The only means of obtaining further information is for the defendant to formally deny guilt. This position was summarised by one interviewed solicitor.

The CPS only has an accelerated file of three statements at PBV. The police will not provide other witness statements until a not guilty plea has been entered. You may have to plead not guilty in order to get information. The only alternative is to postpone PBV until all information is available, but that would slow the system down.

(Defence Solicitor, Town Court)

4.1.2 No indication of plea

This subsection examines the practice of defendants to decline to indicate a plea. Discussion to date in this chapter has assumed, apart from passing reference, that the only alternative to pleading guilty at plea before venue is to enter a not guilty indication. The consultation document discusses amendment to the law "to *oblige* (emphasis added) defendants to enter a plea before the mode of trial decision is taken" (Home Office,1995:para.19).³ It was suggested in a commentary on the Criminal Procedure and Investigations Act 1996 that the ordinary language explanation required might start with the words, "You are shortly going to be asked whether you intend to plead guilty or not guilty at your trial for this offence" (Leng and Taylor,1996:70). There is, however, in practice a third option. This is for the defendant to decline to indicate a plea. In these circumstances, section 49 (8) of the 1996 Act prescribes that mode of trial is to be determined as if a not guilty indication had been given. Table 4.3 below shows the indications given in the observation sample in cases which were not admitted. This table has been restricted to that sample because there was evidence that registers did not invariably provide an accurate reflection of whether defendants had declined to indicate a plea or had pleaded not guilty.

Table 4.3 Proportion of no plea indications in cases not admitted by court

	Not Guilty		No Plea		Total
	(n=)	(%)	(n=)	(%)	(n=)
Town Court	64	97	2	3	66
New Court	24	67	12	33	36
City Court	67	75	22	25	89
Total	155	81	36	19	191

$\chi^2 = 17.74, p < .000$

Table 4.3 shows that no indication of plea was given by defendants in 19 per cent of 191 cases which were not admitted at plea before venue. This proportion varied significantly, however, between courts. A defendant who has declined to indicate a plea will be asked for that plea should summary trial be agreed. No indication of plea is, therefore, most likely to occur when it is anticipated or known, as the right of election will be exercised, that the case will be committed to the Crown Court in any event. Such use would appear to help explain the considerably smaller percentage figure in Town Court as it will be seen in the next section that the committal rate of that court was by far the lowest of the three. There was, however, no procedural difference between the courts. They all deemed no indication of plea to be one of three alternatives. The majority of clerks observed in this study tended, as a matter of routine, to commence by asking defendants whether or not they were prepared to indicate a plea. Only when they received a positive response did they proceed to ask what the intended plea was. Table 4.4 below shows the offences in the observation sample for which defendants declined to indicate a plea.

Table 4.4 Offences for which no plea was indicated

	No Plea		Not Guilty		Guilty		Total
	(n=)	(%)	(n=)	(%)	(n=)	(%)	(n=)
Theft over £50,000	4	100	0	0	0	0	4
Evasion of duty £39,000	1	100	0	0	0	0	1
Supply of class A drugs	7	70	3	30	0	0	10
Dwelling burglary	5	42	4	33	3	25	12
Forgery	2	40	2	40	1	20	5
Supply of class B drugs	5	36	4	28	5	36	14
Violent disorder	2	29	5	71	0	0	7
Wounding	2	25	4	50	2	25	8
Affray/Assault abh	5	7	51	70	17	23	73
Total	33	25	73	54	28	21	134

These figures do not include the three cases in which no plea was indicated prior to electing trial. Categories of offence for which a plea was always indicated do not appear.

Table 4.4 shows that defendants were most likely to decline to indicate a plea when charged with high value offences of dishonesty, the supply of drugs or dwelling house burglaries. In these three categories, no indication was more likely than either a not guilty indication or a plea of guilty. By way of contrast, it was fairly rare in cases of affray and assault occasioning actual bodily harm. In short, it was predominantly employed in those categories of offence for which magistrates were most likely to decline jurisdiction. This interpretation of the figures is supported by the fact that the CPS recommended that jurisdiction be declined in all 33 of the cases identified in Table 4.4 as having no indication of plea. The implication of the figures is that defendants facing serious charges which will inevitably be finalised in the Crown Court are more likely to decline to indicate a plea than to enter a guilty plea before magistrates. Interviews with solicitors outlined below support this contention that guilty pleas are rarely entered in the magistrates' court to very serious charges. This argument is supported by statistical data that, while magistrates declined jurisdiction for 33 defendants in the observation sample following no indication of plea, only 12 were committed to the Crown Court for sentence at plea before venue following a guilty plea (see Table 4.10).

The practice of declining to enter a plea to a serious charge which is ultimately likely to be admitted would appear to conflict with the philosophy behind the plea before venue provisions. One of the aims of those provisions was to ensure that the accused had the opportunity to obtain maximum credit for an early guilty plea (Home Office,1995:para.26). There is clear Court of Appeal authority for the proposition that defendants pleading guilty before magistrates should receive a greater sentence discount than those admitting guilt for the first time when in the Crown Court.⁴ This authority had been predicted by commentators on the 1996 Act (Leng and Taylor,1996:71).⁵

Interviews conducted for this study suggest that declining to enter a plea before magistrates does not affect the sentence discount in the Crown Court. There was a consensus of opinion among defence solicitors that a guilty plea at the Plea and Directions hearing in the Crown Court would normally attract the same sentence discount as one entered in the magistrates' court.⁶ A solicitor in City Court provided the most forthright opinion.

The liaison judge has indicated that full credit will be given for a guilty plea at Plea and Directions. So there's no point in pleading to a serious charge in the magistrates' court.

(Defence Solicitor, City Court)

This attitude was reflected by a solicitor in New Court.

There is no incentive to advise a guilty plea to a very serious charge as no discount is given in the Crown Court for the plea in the magistrates.

(Defence Solicitor, New Court)

A solicitor in Town Court provided a slightly different emphasis, but with essentially the same outcome.

The liaison judge has indicated that some credit will be given for the plea in the magistrates' court, but in practice this does not appear to happen.

(Defence Solicitor, Town Court)

The only stated exception to this general position was that a minority of solicitors commented that where two or more co-defendants were sentenced together in the Crown Court, a greater discount might be given to the one(s) who had pleaded guilty before the magistrates than to the other(s) who had done so for the first time before the judge.

The argument put forward by all interviewed solicitors was that there was no advantage to be gained by advising a client to acknowledge guilt before the magistrates in a case which would inevitably end up in the Crown Court except

that the case would be finalised more quickly. There were, however, benefits to be gained by declining to indicate a plea. If the defendant was on bail, solicitors tended to take the view that it was preferable to reserve their client's position and leave it to counsel to review the evidence and consider the possibilities of charge bargaining. If the defendant was in custody, it was deemed preferable to retain the privileges attached to being an unconvicted remand prisoner. It is acknowledged that such prisoners often experience the worst conditions in the prison system (Stern,1993). But they are more likely to be held in a local prison nearer to their home and enjoy facilities such as more frequent visits (Ashworth,1998:248). The opinion of solicitors was that clients in custody almost invariably wanted to retain their remand status. One solicitor summarised the overall position.

You rarely plead guilty at PBV to very serious charges. You enter no plea if you know it's going to the Crown Court. The question of plea can then be left to counsel. Remand prisoners prefer to remain unconvicted.

(Defence Solicitor, New Court)

The practice of declining to enter a plea rather than admitting guilt before magistrates has detrimental implications for the efficient administration of the court system. It makes no difference to the number of cases being sent to the Crown Court, merely to the status of those defendants being committed. It does, however, increase the number of hearings and the length of time taken to complete a case. A guilty plea before magistrates will typically involve one further hearing and be finalised within a month. In such cases the defendant will be committed directly for sentence at a Crown Court hearing. A pre-sentence report prepared by the Probation Service should be available at that hearing enabling the case to be completed there and then. A no plea case will involve a minimum of two further hearings, one at each court, and take on average at

least 12 weeks to complete. Such a case will be adjourned for a committal hearing. Committal in this study frequently did not take place at the first listed hearing, but involved a second appearance. The average length of time between PBV and actual committal for all the observed no plea cases in this study was exactly eight weeks. The defendant will then attend the Plea and Directions Hearing at the Crown Court in around a month's time. It will be less likely that a pre-sentence report will be available at that hearing as the Probation Service will generally only prepare a report if there is an unequivocal intention to plead guilty. This results in a further adjournment of around four weeks, dependent on bail or custody status, before sentence is finally passed.

It would appear from this study that the practice of declining to indicate a plea at the plea before venue hearing in serious cases is fairly widespread. Some 35 per cent of all defendants committed for trial or sentence in the observation sample had indicated no plea. This practice would appear to have been facilitated by a reported reluctance on the part of judges to grant any increased sentence discount for pleas entered before magistrates. There is an argument that it would be consistent with the current managerialist policy of increased efficiency and cost-effectiveness for attempts to be made to encourage judges to apply the sentence discount principles which underpin the crime control ideology of the plea before venue provisions. This would place an ethical onus on defence solicitors to explain the discount incentive to their clients before determining initial plea (Ashworth,1984:76). But this raises an argument of principle. Solicitors should not be expected to provide unequivocal advice in relation to serious charges which potentially carry a lengthy term of imprisonment unless the advance disclosure supplied is adequate for that purpose (Sunman,1998). The findings of this study suggest that this is not the case.

4.2 COMMITTAL RATES

This section examines the committal rates for trial and sentence of the three sample courts in this study. Official statistics reveal considerable variations in the committal rates of courts in England and Wales (Home Office,2001). An objective of this study is to identify the extent of and the reasons for disparity of those rates. Differences between the sample courts were to be expected as it was established in the last chapter that one of the criteria used when choosing those courts for empirical study was that they had traditionally different committal rates from each other. Town Court was selected from the low category, New Court from low-medium and City Court from the high category. The latest figures available when that selection was made were for 1997. Court observation was conducted for this study between September 1999 and April 2000. Table 4.5 below combines the more detailed information subsequently provided in Tables 4.8 and 4.10 to show the final committal rates of the three courts in the observation and register samples.

Table 4.5 Final committal rates by court and bench

	For Trial			For Sentence			Total		
	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)
Town Court	162	36	18	180	22	11	342	58	15
New Court	82	44	35	186	31	14	268	75	22
City:Lay Bench	138	127	48	170	33	16	308	160	34
Lay Total	382	207	35	536	86	14	918	293	24
Stipendiary	60	37	38	51	11	18	111	48	30
Total	442	244	36	587	97	14	1029	341	25

Three chi-square tests were carried out to establish whether or not the differences between the three lay benches in their trial, sentence and total committal rates were significant. The results of these were as follows:

Trial rates: $\chi^2 = 43.99$, $p < .000$

Sentence rates: $\chi^2 = 2.50$, $p < .286$

Total rates: $\chi^2 = 46.99$, $p < .000$

Table 4.5 reveals three important findings in relation to lay benches which will be addressed in more detail later in this section. The first is that the committal rates of the three sample courts did in fact vary substantially and significantly. The range was from 15 per cent in Town Court to 34 per cent in City Court. The table indicates that the committal rates of the three courts during the period of empirical study were in the same order as they had been in previous years' statistics (Home Office, 1998). This conformity to pattern suggests that the committal rate data collected in this study were representative. The second finding is that the committal rates for trial were considerably higher than the rates for sentence in all three courts. In particular, the former were two and a half times as high in New Court and three times as high in City Court. The third finding is that variations in rates between courts were markedly less in their sentence committal rates, where they were not statistically significant, than in their trial committal rates. The range was only five per cent as compared to one of 30 per cent in the trial rates, although the proportion sent to the Crown Court by each court was in the same order.

Chi-square tests were also carried out in relation to the committal rates of lay and professional magistrates in City Court. The results of these were as follows:

Trial rates: $\chi^2 = 2.74$, $p < .098$

Sentence rates: $\chi^2 = 0.08$, $p < .783$

Total rates: $\chi^2 = 0.86, p < .355$

These tests establish that the small percentage differences between lay and stipendiary magistrates in City Court in their sentence and total committal rates were not significant. Table 4.5 does, however, reveal that the committal rates for trial of stipendiary magistrates in City Court were ten per cent lower than those of the lay bench in that court. The differential between the professional rate of 38 per cent and the lay figure of 48 per cent approaches significance, although it has to be acknowledged that the sample for stipendiaries was considerably smaller. There was no indication from court observation that professional magistrates were faced with a less serious sample of cases. It will be seen in Chapter 6 that stipendiaries were more likely than lay benches to specifically reserve the option of committal for sentence when accepting jurisdiction. The implications of these statistics will be analysed in Chapter 6 when it will be suggested that the two stipendiary magistrates in City Court had not been fully integrated into the culture of that court, which only appointed its first paid magistrate in 1994.

4.2.1 Mode of trial decisions

This subsection examines the mode of trial decisions made by magistrates. If guilt is denied at the plea before venue hearing, or the defendant declines to indicate a plea, magistrates have to determine whether the case is suitable to be tried by them or whether the accused should be sent to the Crown Court for trial. Their prime consideration is whether or not their sentencing powers would be sufficient in the event of a conviction. Table 4.6 below indicates the mode decisions made by magistrates at the plea before venue hearing in the observation and court register samples. A small number of the cases extracted

from court registers were also observed. The combined column comprises the total number of different cases analysed.

Table 4.6 Mode of trial decisions made by magistrates by court and bench

	Observed			Records			Combined		
	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)
Town Court	57	9	14	132	35	21	163	37	18
New Court	17	19	53	65	38	37	76	50	40
City:Lay Bench	17	27	61	108	130	55	118	149	56
Lay Total	91	55	38	305	203	40	357	236	40
Stipendiary	28	17	38	32	28	47	57	41	42
Total	119	72	38	337	231	41	414	277	40

$\chi^2 = 66.42, p < .000$
 $\chi^2 = 5.61, p < .018$

Lay benches
City lay : stipendiary

Combined column figures only tested
Combined column figures only tested

Table 4.6 shows that significant differences existed between the lay benches of the three sample courts in their committal rates for trial at the plea before venue hearing. The range was from 18 per cent in Town Court to 56 per cent in City Court. The figure for New Court was 40 per cent. The difference of 14 per cent between the committal rates of stipendiary and lay magistrates in City Court, 42 per cent compared with 56 per cent, was also significant, although not to the same extent.

There was unanimity of opinion among the 38 court participants interviewed for this study that the majority of mode decisions were deemed obvious. There was no example of a court declining jurisdiction on a charge of shoplifting, and no example of jurisdiction being accepted for a charge of supplying class A drugs for profit. This accords with the finding of Hedderman and Moxon (1992:15) that all of their respondents felt that the mode decision

was clear-cut in most instances. Indeed, it will be seen in later chapters that the transparency of most decisions may provide a reason for many magistrates not viewing the mode of trial process as being either particularly interesting or consequential. It is impossible to provide a precise quantification of the word "obvious" as its definition has a subjective element and might be influenced by the culture of individual courts. A decision which appears obvious in one court may present as being borderline in another. However, majority opinion among interviewees was that the gravity of the alleged offence rendered possibly as many as three quarters of mode decisions as being clear-cut.

If the majority of mode decisions are, indeed, obvious, it would appear as though part of the explanation for the substantial variations in the committal rates of the three sample courts must lie in objective factors. Potential reasons might be differences in offence patterns or in the average number of charges faced by individual defendants in each court. The latter would not, however, appear to be a significant factor in explaining the variations in committal rates between courts in this study. In the observation sample, the majority of defendants in all three courts who denied guilt faced only one either way charge. The proportion facing a maximum of two charges was identical at 89 per cent in Town and City Courts and very similar at 84 per cent in New Court. The proportion facing more than three charges was higher in New Court (11 per cent) than in the other two (three and seven per cent). The number of charges would not, however, appear to be significant in these cases as the three defendants who were sent for trial by New Court on more than three charges would in all probability have been committed had they only faced the most serious allegation.

4.2.2 Offence patterns

This subsection examines offence patterns in the three sample courts and considers whether or not there were differences in the gravity of offences dealt with by those courts which could help to explain the variations in their committal rates. It is logical that a court will tend to decline jurisdiction more frequently if dealing with a higher proportion of more serious offences. A starting point for analysis of offence gravity is to identify the charges faced by defendants in each court. It has to be acknowledged, however, that the charge by itself does not conclusively determine the gravity of the alleged offence. Charges of affray, for example, comprise a wide variety of factual scenarios. Table 4.7 below indicates the charges to which not guilty indications or no plea were entered in the observation sample at the three courts.

Table 4.7 Charges in observed not guilty cases by court

	Town Court (n=) (%)		New Court (n=) (%)		City Court (n=) (%)	
Supply of drugs	4	6	5	14	10	11
Possession of drugs	4	6	2	5	0	0
Theft	13	20	8	22	11	12
Dwelling Burglary	2	3	3	8	3	3
Other dishonesty	6	9	7	20	14	16
Assault abh/Affray	26	39	7	20	27	30
Wounding/Threats to kill	4	6	1	3	4	5
Violent disorder	0	0	0	0	7	8
Indecent assault	2	3	0	0	2	2
Possess Weapon	0	0	3	8	4	5
Others	5	8	0	0	7	8
Total	66	100	36	100	89	100

When a defendant faced more than one either way charge, only the one deemed to be the most serious is included in the table. It was invariably apparent from the prosecution address which charge this was.

Table 4.7 shows that New Court heard a higher proportion of offences of dishonesty than the other two sample courts and a lower proportion of offences of violence. These are, however, categories of offence which comprise widely varying degrees of gravity. The table does not as such indicate any significant overall differences in the gravity of the offence patterns. There are two apparent exceptions to this generalised statement. These provide some evidence to suggest that there was a variation in the offence patterns of the three courts which was pertinent to mode of trial decisions. The first is that the proportion of defendants charged with the supply of drugs, an offence for which jurisdiction was declined in 89 per cent of observed cases, was higher in New and City Courts than in Town Court, being 14, 11 and six per cent respectively. The second is that there were seven cases of violent disorder heard in City Court. There were no such cases in the other two courts. Jurisdiction will almost invariably be declined for charges of violent disorder and in fact was in all seven cases before City Court.

Analysis of offence patterns was complicated by the possibility that the police and CPS in City Court may have adopted different charging practices to the other two courts in relation to offences of violence. It may be that the magistrates of City Court were faced with a higher proportion of more serious charges rather than with a higher proportion of more serious factual allegations. Different charging practices may in themselves, however, provide a partial explanation for variations in the committal rates of the three courts. This study supports the suggestion of Shea (1974) that the offence label by itself could influence magistrates' perception of the gravity of the behaviour and their deliberations as to likely sentence. A charge of violent disorder virtually negates the possibility of summary jurisdiction, whereas affrays are statistically more likely than not to be retained by magistrates.

Table 4.7 established that there were seven observed cases of violent disorder heard in City Court. Registers revealed a further eight cases in that court. There was not a single case of that offence in either sample in Town or New Courts. By way of contrast, there were proportionately more cases of affray and assault occasioning actual bodily harm in Town Court than in City Court. Not one of the seven defendants in the observation sample charged with violent disorder, a charge admittedly difficult to prove, was convicted of that offence. Examples from that sample give credence to the possibility of different charging practices. In City Court, a charge of violent disorder was preferred against two male defendants after a "violent fight" involving a group of drunken youths in fast food premises at night during which considerable damage was caused to a confined area (cases 271, 272).⁷ In Town Court, three male defendants faced charges of affray following "a serious public order incident" during which three members of a group leaving a takeaway restaurant at night were punched in the face, one of them subsequently being kicked in the head and lying unconscious in a pool of blood (cases 010, 011, 012).

It has to be emphasised that offence categories, while significant, cannot by themselves determine the gravity of an offence structure. Charges of theft may result in a conditional discharge (case 303) or 30 months' imprisonment (case 121). A more detailed analysis of the facts of the observed cases as presented by the CPS had to be undertaken. This rendered it apparent to the researcher, a former solicitor, that the magistrates of City Court were faced with a higher proportion of more serious allegations than those in Town Court and a slightly higher proportion than those in New Court. Precise quantification of these differences is impossible and will not be attempted. There was, however, no indication that differences in offence patterns could account for the substantial variations in the committal rates of the three courts in full.

4.2.3 Final committal rates in denied cases

This subsection considers the number of defendants who were actually committed to the Crown Court after an original denial of guilt or no plea. Table 4.6 showed the number of cases in which magistrates declined jurisdiction at the mode of trial hearing. The number of defendants who are actually committed to the Crown Court will almost invariably be different from the number in relation to whom jurisdiction had been declined. There are two reasons why the latter figure might increase. The first is that defendants might exercise the right of election. The other is that defendants might be committed for sentence after jurisdiction had been accepted at the mode hearing. There are likewise reasons why the figure might decrease, although only two were relevant in this study.⁸ The first was withdrawal by the CPS of all either way charges prior to committal. The other was withdrawal of the charge for which jurisdiction had been declined, with the CPS preferring instead a lesser either way charge to which either jurisdiction had been accepted or the defendant had pleaded guilty and been sentenced by the magistrates.

Final committal rates may be less genuinely reflective of magistrates' practices than the rates at mode of trial as the two major statistical factors noted above, elections and withdrawals, are outside the control of magistrates. These factors might alter the proportionate variations between courts as well as influencing the actual figures. The potential difference merits emphasis as the official criminal statistics only provide information of actual committal rates. Table 4.8 below shows the number and proportion of defendants in this study for whom jurisdiction was declined at the mode of trial hearing and the number and proportion who were actually committed to the Crown Court following an original not guilty indication or no indication of plea.

Table 4.8 Mode of trial decisions made by magistrates and number of actual committals by court and bench

	Observed			Records			Combined		
	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)
PBV									
Town Court	57	9	14	132	35	21	163	37	18
New Court	17	19	53	65	38	37	76	50	40
City:Lay Bench	17	27	61	108	130	55	118	149	56
Lay Total	91	55	38	305	203	40	357	236	40
Stipendiary	28	17	38	32	28	47	57	41	42
Total	119	72	38	337	231	41	414	277	40
Actual									
Town Court	54	11	17	128	38	23	158	40	20
New Court	20	16	44	62	41	40	75	51	40
City:Lay Bench	23	21	48	122	114	48	134	131	49
Lay Total	97	48	33	312	193	38	367	222	38
Stipendiary	27	17	39	33	27	45	57	40	41
Total	124	65	34	345	220	39	424	262	38
$\chi^2 = 41.76, p < .000$ Lay benches Combined column figures actually committed									

Five cases (2 at Town Court, 2 heard by the lay bench at City Court and 1 heard by stipendiary magistrates) in which outcome was still pending as warrants had not been executed do not appear in the lower set of figures.

Table 4.8 shows a significant range in the final committal rates of lay benches between 20 per cent in Town Court and 49 per cent in City Court. The figure for New Court was 40 per cent. The table also reveals that the potential for the extent of differences to have varied between the mode of trial hearing and committal has materialised. The difference between the committal rates of Town Court and the lay bench at City Court has decreased from 38 per cent at mode of trial to 29 per cent at committal. This would appear to be almost entirely due to factors beyond the control of magistrates. The prime reason was the higher rate of withdrawal at City Court (see Table 4.14). This may be reflective of the different charging practices previously noted.

Data obtained from Crown Court records indicated that 61 per cent of defendants (37 from 61) who were convicted at that court after City Court had declined jurisdiction received sentences which magistrates could have imposed. The figure from a much smaller sample at New Court was lower at 34 per cent (11 from 32). The average for the two courts was 52 per cent: 48 defendants from a total sample of 93. No figures were available for Town Court for reasons established in the last chapter. Analysis of these statistics revealed two noteworthy findings. The first was the offence categories for which defendants were sentenced within magistrates' powers. Almost 57 per cent of those receiving such sentences following committal from City Court (21 from 37) were convicted of offences of affray or assault occasioning actual bodily harm. A further 16 per cent (six from 37) were convicted of supplying class B drugs. By way of comparison, offenders convicted of dwelling house burglaries accounted for 42 per cent of those sentenced outside magistrates' powers (ten from 24), all of these offenders being sentenced to custodial terms of 12 months or more.

The second finding related to the nature of the sentences passed in the Crown Court. Only 31 per cent of those sentenced within magistrates' authority received custodial sentences. Some 59 per cent received community orders, primarily community service orders,⁹ while ten per cent received a fine or a conditional discharge. This sentencing pattern was particularly relevant to offences of violence. None of the 21 defendants who were sentenced at the Crown Court within magistrates' powers for offences of affray or assault occasioning actual bodily harm after City Court had declined jurisdiction were sent to prison. Defendants who were sentenced to custodial terms of six months or less were all convicted of offences of dishonesty or supplying drugs.

4.2.4 Decisions after guilty pleas

This subsection examines magistrates' decisions when the defendant admits guilt. The plea before venue provisions enabled defendants to indicate a guilty plea and obviate the need for a mode of trial hearing. Magistrates have to assume jurisdiction if a defendant acknowledges guilt at the PBV hearing. They are then encouraged to carry out a sentencing exercise based on all available offence and offender information and not a mode exercise based primarily on the gravity of the alleged offence as outlined by the prosecution. The policy objective was to facilitate magistrates passing sentence in cases which would previously have been committed for trial. This does not mean that magistrates are obliged to finalise a case. Three options, ignoring adjournments, are available to them. They can pass sentence at the PBV hearing, order a pre-sentence report (PSR) or commit the defendant to the Crown Court for sentence if they consider that their powers are inadequate. Table 4.9 below indicates the decisions made by magistrates following guilty pleas at the plea before venue hearing in the observation and register samples.

Table 4.9 Decisions made by magistrates at PBV in guilty cases by court and bench

	Observed				Records				Combined			
	Sent (n=)	PSR (n=)	CC (n=)	CC (%)	Sent (n=)	PSR (n=)	CC (n=)	CC (%)	Sent (n=)	PSR (n=)	CC (n=)	CC (%)
Town Court	12	20	2	6	86	81	16	9	92	93	17	8
New Court	21	38	5	8	77	92	16	9	91	113	17	8
City:Lay Bench	12	15	4	13	101	66	20	11	102	78	24	12
Lay Total	45	73	11	9	264	239	52	9	285	284	58	9
Stipendiary	11	8	1	5	14	26	5	11	23	33	6	10
Total	56	81	12	8	278	265	57	9	308	317	64	9

$\chi^2 = 7.87, p < .096$

Lay benches

Combined column figures only tested

Table 4.9 shows that the committal rates for sentence at plea before venue were considerably lower than the committal rates for trial at the same stage in all three sample courts. Rates of eight, eight and 12 per cent for the lay benches of Town, New and City Courts can be compared with trial rates at plea before venue of 18, 40 and 56 per cent respectively (Table 4.6). These figures may appear to suggest that the new provisions are operating successfully and that magistrates are passing sentence in cases which would previously have been committed for trial. Such an interpretation would, however, be contrary to national statistics. These indicate that since 1997 a fall in the trial committal rate has been balanced by an increase in the sentence committal rate (Home Office,2000:para.6.15).

The practice of defendants to decline to indicate a plea in cases which will inevitably end up in the Crown Court may provide a partial explanation for the lower committal rates for sentence. In the observation sample, jurisdiction was declined following no indication of plea for almost three times as many defendants as were committed for sentence at the plea before venue hearing after admitting guilt: the figures were 33 and 12 respectively. If the majority of genuinely serious charges are in effect denied, the number and proportion of cases which magistrates will commit for trial will be increased. Conversely, magistrates will comparatively rarely be faced with guilty pleas by defendants who know that they will be sentenced in the higher court. This argument is supported by the fact that there was only one admitted case in the observation sample, a dwelling house burglary in Town Court (case 016), which was of sufficient gravity for the defence solicitor to acknowledge that committal for sentence was inevitable. The other 11 cases in that sample which were committed for sentence at the plea before venue hearing without a report were all deemed sufficiently borderline by defence advocates to merit stressing

mitigating factors.

Tables 4.6 and 4.9 read together show that the variation between the three sample courts was considerably less in their sentence committal rates than in their trial committal rates. The trial rate of the lay bench in City Court was more than three times that of Town Court at the mode of trial hearing. Its committal rate for sentence was only half as much again. Subject to the plea structure, logic suggests that if the trial committal rate of one court is twice that of another, then the sentence committal rate should also be twice as high. Mode of trial is supposed to be based on sentencing powers. If one court is more punitive than another, it is likely to reach different decisions on mode of trial and committal for sentence.

Cardinal proportionality presents significant potential for disparity between courts. Two courts can consider precisely the same aggravating and mitigating factors and yet come to opposite conclusions as to whether or not to retain jurisdiction simply through taking a different view of the gravity of a particular form of behaviour. This can provide a reason for one court having a higher committal rate than another. It does not, however, explain why the respective variations between the committal rates for trial and sentence are quite considerably different. The notion, yet to be explored, that City Court might have a higher committal rate than Town Court because it is more punitive, especially in relation to offences of violence, becomes open to question. The inference, to be discussed in the next chapter, is that there must be differences between the courts in their attitude towards accepting or declining jurisdiction in contested cases which cannot be explained, or at least fully explained, by differences in the perception of the gravity of particular behaviour.

4.2.5 Final committal rates in admitted cases

The situation after the plea before venue hearing in relation to admitted cases is less complicated than that described above in section 4.2.3 when guilt had been denied. The case has been finalised as far as the magistrates are concerned if they either passed sentence at that hearing or committed the defendant to the Crown Court for sentence. The only cases still to be determined by them are those in which a pre-sentence report had been ordered. This still leaves considerable potential for an increased committal rate as Table 4.9 revealed that pre-sentence reports were ordered in 317 cases. This amounts to 46 per cent of cases in which the defendant had admitted guilt.

This potential did not, however, materialise to any great extent. Only five per cent of defendants for whom a pre-sentence report had been ordered were committed for sentence after magistrates had read that report.¹⁰ Put from a different perspective, magistrates proceeded to pass sentence in the vast majority of cases in which reports had been ordered: 300 defendants from a total sample of 315 (two cases were outstanding when the records were last examined). Detailed figures by court are provided in Table 5.2. This data would suggest that magistrates essentially viewed the decision to order reports as equating to an acceptance of jurisdiction so that they would ultimately finalise the case. Yet defendants committed without reports were often sentenced at the Crown Court within magistrates' authority. Statistics reveal that 51 per cent of defendants (20 from 39) committed for sentence by City Court were sentenced at the Crown Court within magistrates' powers. The figure from a smaller sample for New Court was lower at 37 per cent (10 from 27). The average for the two courts was 45 per cent: 30 defendants from a total sample of 66.

The nature of the sentences passed at the Crown Court followed the same pattern as those imposed after committals for trial. Almost 57 per cent of defendants sentenced within magistrates' powers received community orders. A significant finding, however, was that 80 per cent of defendants who received sentences at the Crown Court which magistrates could have imposed had been committed without a pre-sentence report. The figures for New and City Courts were similar in this respect. The implication of the above statistical data is that magistrates tended to commit defendants for sentence rather than order reports whenever the information available at plea before venue suggested that the appropriate sentence might be outside their powers. This presents as a manifestation of magisterial preference for finality at the initial jurisdictional hearing. This highly significant cultural feature of the lay magistracy will be considered in depth in the next chapter as it presents as being fundamental to an analysis of the operation of the new provisions. It would appear to conflict with the philosophy underpinning the plea before venue provisions that magistrates should consider all available information before determining whether or not their sentencing powers were sufficient.

The consequence of proportionately few defendants being committed for sentence after reports had been considered was that the rates of committal for sentence showed little variation between plea before venue and the final figures. They increased by between one and three per cent in the sample courts. Table 4.10 below shows the final committal rates for sentence following guilty pleas at plea before venue. It reveals rates of nine, 11 and 14 per cent for the lay benches of Town, New and City Courts respectively. These rates are in the same order as those for committal for trial, but remain substantially lower than the latter rates of 20, 40 and 49 per cent respectively shown in Table 4.8.

Table 4.10 Number of committals for sentence following original guilty pleas by court and bench

	Observed			Records			Combined		
	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)	Sum (n=)	CC (n=)	CC (%)
Town Court	32	2	6	166	17	9	184	18	9
New Court	55	8	13	159	22	12	193	24	11
City:Lay Bench	26	5	16	162	24	13	174	29	14
Lay Total	113	15	12	487	63	11	551	71	11
Stipendiary	19	1	5	38	7	16	54	8	13
Total	132	16	11	525	70	12	605	79	12

$\chi^2 = 2.93$, $p < .231$

Lay benches

Combined column figures only tested

It was established in Chapter 1 that there were a number of systemic reasons why defendants committed for trial might be sentenced at the Crown Court within magistrates' powers without this outcome by itself implying that the magistrates had erred in declining jurisdiction. These reasons are not applicable to committals for sentence as magistrates have the opportunity to consider all offence and offender information and apply the sentence discount before determining their jurisdictional powers. The charge cannot change as it quite frequently does as part of the bargaining process following a committal for trial. The logical expectation is that the proportion of defendants receiving sentences at the Crown Court which magistrates could have imposed is likely to be considerably higher among those committed for trial. Yet the findings of this study indicate that there was only a seven per cent differential between the two rates. The figure was 52 per cent among those committed for trial as compared with 45 per cent who had been committed for sentence. Samples were small, but the inference is that magistrates adopt the same principles in relation to jurisdiction when faced with a guilty plea as those traditionally adopted in mode of trial. This highly significant inference will be considered further in the next chapter.

4.2.6 Gender and ethnic origin

Consideration of committal rates embraces the issues of gender and ethnic origin. The general conclusion of research is that women are treated differently to men in the criminal justice system, although it is contentious whether this treatment is more or less lenient (Heidensohn,1997; Kapardis,1997:160; Daly,1987). This study did not make any significant findings as to whether female defendants were more or less likely than males to be committed to the Crown Court for trial or sentence. There were two essential reasons for this. The first was the small number of female defendants involved in the empirical study. Only 14 per cent of defendants in the observation and register samples were women. The second was the type of offence with which the majority of these defendants had been charged. Virtually all of the 19 women in the observation sample who entered a not guilty indication at plea before venue either faced charges of dishonesty which were clearly suitable for summary trial or charges of supplying drugs for profit (often with male co-defendants) which clearly were not. This sample only provided one example of a defence solicitor challenging the recommendation of the Crown as to jurisdiction.

Twenty five of the 29 female defendants who admitted guilt at plea before venue received non-custodial sentences in the magistrates' court. Only two women were committed for sentence. It may be that magistrates are more likely to order reports for women before making a final jurisdictional decision as they did so in both of these cases. A sample of two is not, however, statistically significant and the reasons for ultimate committal are unknown. One of these women was sentenced to nine months' imprisonment in the Crown Court for four offences of deception. The other was placed on probation for an offence of wounding.

There was limited evidence from interviews with magistrates to suggest that female defendants were less likely than male defendants to be committed to the Crown Court. The majority of magistrates indicated that the sex of the accused had no effect on the decision-making process, although two noted that women tended to commit different types of offence. However, three magistrates (two men and one woman) indicated that females were perhaps more likely than males to be dealt with by them. In the words of one,

The sex of the defendant has no effect. To be honest, perhaps it can have. Females are more likely to stay here.

(Magistrate, City Court)

Statistics and research have established that Afro-Caribbean defendants are more likely than white defendants to be tried in the Crown Court (Smith, 1997a:742). This tendency may, however, be explained primarily by differences in offence patterns (Brown and Hullin, 1992:53). This study did not make any significant findings as to whether magistrates were more or less likely to decline jurisdiction in relation to defendants from minority ethnic groups because of the limited size of the sample and the offence structure. The sample was limited to court observation as registers in the three courts contained no information on ethnic origin. Black defendants comprised ten per cent of the observation sample and Asian defendants a further eight per cent, although the latter were almost entirely restricted to City Court. Defence solicitors only challenged the recommendation of the Crown for committal in three cases involving non-white accused. These three were co-defendants. The proportion of defendants from minority ethnic groups committed for trial who received sentences within magistrates' powers was very similar to that for the whole sample: 55 as compared to 52 per cent. Three Asian offenders were committed for sentence, two of them without pre-sentence reports. Two were sentenced within magistrates' powers. The third received 12 months' imprisonment.

4.3 EXERCISE OF THE RIGHT OF ELECTION

This section examines the incidence of use of the right of election, the type of offence for which it was exercised, the rate of withdrawal of elected cases and magistrates' attitudes towards retention or abolition of the right. Erosion of this longstanding right has provoked arguably the most emotive debate within contemporary criminal justice. It was, however, determined at the outset of this study not to examine defendants' motivation in exercising the right. There were two reasons for this. First, it would make the terms of reference of the study excessively wide and the number of interviews involved considerably too time consuming. Second, the government had announced an intention to introduce legislation abolishing the right. As a consequence of the consistent opposition of the House of Lords to the Criminal Justice (Mode of Trial) Bills 1999 and 2000, the right has to date remained in existence. It is, therefore, appropriate to provide data obtained in this study to evidence various aspects of its use, particularly as some findings are extremely significant within the context of the current debate as to abolition.

It has been established that the rhetorical thrust of government arguments for the right to be abolished is that defendants are exercising it as a means of manipulating the system. It has been claimed by Narey (1997:32) that the large majority of defendants electing trial subsequently plead guilty. This contention is based on the statistical data of Hedderman and Moxon (1992:22). The findings of this study do not support this manipulation argument. This section will reveal that the right was exercised in a small minority of cases, most of which involved fairly serious allegations, and that the majority of defendants who exercised the right had all either way charges against them dismissed prior to committal.

4.3.1 Incidence of use of the right of election

Table 4.11 below indicates the number and proportion of cases in which the right of election was exercised. The figures extracted from court registers have been included as the observation sample was of insufficient size to be statistically significant. There was evidence to suggest, however, that the records of Town and City Courts may occasionally have been inaccurate. The numbers electing trial in these two courts may have been slightly higher than appear in the records.¹¹

Table 4.11 Number of elections as proportion of cases in which magistrates accepted jurisdiction by court

	Observed			Records			Combined		
	Sum (n=)	Elect (n=)	Elect (%)	Sum (n=)	Elect (n=)	Elect (%)	Sum (n=)	Elect (n=)	Elect (%)
Town Court	57	7	12	132	11	8	163	14	9
New Court	17	4	24	65	5	8	76	8	11
City Court	45	9	20	140	15	11	175	23	13
Total	119	20	17	337	31	9	414	45	11

$\chi^2 = 1.46, p < .482$

Combined column figures only tested

The Sum column provides the total number of cases in which magistrates accepted jurisdiction.

Table 4.11 shows that only 11 per cent of defendants for whom magistrates accepted jurisdiction exercised the right of election. The range between the courts was not significant at four per cent. This empirical evidence contrasts with the statement of Ashworth (1998:260) that "in most such cases [where the defendant indicates a not guilty plea] one assumes that the defendant will wish to elect for Crown Court trial." Interviews with solicitors suggested that the underlying motivation for the majority of accused to consent to summary trial was the element of security provided by the lesser

sentencing powers of magistrates. As one said, "The Crown Court ups the ante for defendants." The proportion of defendants from minority ethnic groups who elected trial, in the observation sample, was 23 per cent (five from 22). This is slightly higher than the figure of 17 per cent from the same sample for white defendants, but a sample of five is too small to be of statistical significance.

Small proportions from the perspective of magistrates' workload can represent much larger proportions when viewed from the perspective of the considerably smaller number of cases heard in the Crown Court. Table 4.12 below indicates the number and proportion of cases which were committed at mode of trial as a consequence of exercise of the right of election as opposed to the magistrates declining jurisdiction. It shows that the proportion committed in each court due to elections was in inverse proportion to the numbers who refused the offer of summary trial. Town Court had the lowest proportion of defendants who exercised the right of election. But this figure of nine per cent (Table 4.11) became the highest proportion of 27 per cent when the figures were viewed from the perspective of the Crown Court because Town Court had by far the lowest committal rate of the three sample courts.

Table 4.12 Number of elections as proportion of cases committed at the mode of trial hearing by court

	Observed			Records			Combined		
	CC (n=)	Elect (n=)	Elect (%)	CC (n=)	Elect (n=)	Elect (%)	CC (n=)	Elect (n=)	Elect (%)
Town Court	16	7	44	46	11	24	51	14	27
New Court	23	4	17	43	5	12	58	8	14
City Court	53	9	17	173	15	9	213	23	11
Total	92	20	22	262	31	12	322	45	14

$\chi^2 = 6.59, p < .037$

Combined column figures only tested

4.3.2 Offences for which the right of election was exercised

Table 4.13 below identifies the 20 offences for which the right of election was exercised in the observation sample.

Table 4.13 Offences for which the right of election was exercised

Theft involving breach of trust	4
Theft over £100	3
Wounding / Assault abh	3
Threats to kill / Possess firearm	2
Possess class B drugs (value £400)	2
Handling	2
Theft under £100	1
Shoplifting over £100	1
Shoplifting under £100	1
Obscene publication	1

Statistics and observation suggest that the minority of defendants who exercise the right of election usually do so in the more serious cases for which magistrates are prepared to accept jurisdiction. The tenor of the prosecution's address indicated that 13 of the 20 cases in Table 4.13 were deemed borderline or, at least, not completely obvious. The implications of this were the right to be abolished are discussed in section 4.3.4. Arguments for reclassifying further either way offences as summary only continue to be aired (Home Office, 1998a). However, only two, arguably three, of the sample of 20 elections can be said to come within a category of offence which has been mooted for reclassification, namely "small value" offences of dishonesty. The two involved thefts to a value of £9.18 and £94.82 respectively. The third was a shoplifting allegation which involved items to a value of £141.98. The remaining four cases in the sample were allegations of dishonesty which, while unlikely to be committed to the Crown Court by magistrates, were not minor.

4.3.3 Rate of withdrawal of elected cases

Official arguments for abolition of the right of election rely heavily on the statistical evidence of Hedderman and Moxon (1992:22) that the majority of those exercising the right ultimately plead guilty before the Crown Court. This subsection will reveal that the majority of defendants who exercised the right in this study never reached the Crown Court at all as all either way charges against them were dismissed prior to committal. Table 4.14 below indicates the number and proportion of elected cases which were withdrawn by the Crown Prosecution Service prior to committal. It also shows, by way of comparison, the number and proportion of cases in which magistrates had declined jurisdiction which were dismissed prior to committal.

Table 4.14 Number of cases dismissed prior to committal by court

	Observed			Records			Combined		
	CC (n=)	Dis (n=)	Dis (%)	CC (n=)	Dis (n=)	Dis (%)	CC (n=)	Dis (n=)	Dis (%)
Cases in which the right of election had been exercised									
Town Court	1	6	86	5	6	55	5	9	64
New Court	0	4	100	2	3	60	2	6	75
City Court	4	5	56	9	6	40	12	11	48
Total	5	15	75	16	15	48	19	26	58
Cases in which jurisdiction had been declined									
Town Court	8	1	11	30	5	14	31	6	16
New Court	16	3	16	32	6	16	42	8	16
City Court	32	12	27	127	31	20	152	38	20
Total	56	16	22	189	42	18	225	52	19

Table 4.14 shows that the CPS withdrew all either way charges in the magistrates' court in 58 per cent of cases where the defendant had elected trial. This figure does, however, conceal considerable differences between the courts, the reasons for which are unclear. Even the lowest figure, in City Court, was almost a half at 48 per cent. This high average rate of withdrawal can be compared and contrasted with the markedly lower rate of withdrawal in cases in which the magistrates had declined jurisdiction. Table 4.14 shows that the prosecution withdrew all either way charges in the magistrates' court in 19 per cent of cases where jurisdiction had been declined, less than a third of the elected rate, the range between the courts being only four per cent.

There would appear to be three potential reasons why the withdrawal rate of cases in which the defendant had elected trial was so high. The first is the obvious one that defendants who exercise the right of election typically have a firm belief in their innocence. These cases are being withdrawn because the evidence is inadequate to obtain a conviction before any court. The feeling of security provided by magistrates' limited sentencing powers, identified above as the main reason for consenting to summary trial, may no longer be of prime concern. The prospects of acquittal become uppermost in defendants' minds. In the absence of conducting post-hearing interviews with either defendants or their solicitors, this study cannot determine the validity of this argument. It would appear, however, from the observations made by solicitors in court that the obvious reason was the most significant one.

The second potential reason is that the Crown Prosecution Service may make a positive attempt to secure summary trial in borderline cases when it is considered that the evidence is not particularly strong. Legal precedents recognise that summary trial might be preferred by the prosecution in order to

increase the chances of obtaining a conviction (Coe,1969,1 All ER 65). As one Chief Clerk in this study said, "The CPS may want magistrates to keep a case if it is not strong." When the defendant elects, the CPS is aware that the committal papers will be scrutinised by a judge and has to consider whether or not the available evidence is sufficient to provide a realistic prospect of conviction by a forum which has been proven more likely than magistrates to acquit. This argument will be developed in Chapter 6 when the role and influence of the CPS in venue determination are analysed. The final reason is that the CPS may be reluctant to incur the expense of a Crown Court hearing for a minor allegation. Continuing cases which are trivial in relation to the cost of their processing poses a very real dilemma for the Crown (Crisp and Moxon,1994:40). This study does not offer support for this as a significant reason for discontinuance, although the sample was too small to enable any firm conclusions. Fifteen of the 20 elected cases in the observation sample were withdrawn prior to committal (see Table 4.14). Most of these were fairly serious allegations, while one of the shoplifting charges was committed to the Crown Court.

The consequence of a high withdrawal rate of elected cases and a much lower withdrawal rate of cases in which magistrates declined jurisdiction was that the proportion of cases reaching the Crown Court following an election was considerably lower than the proportion adjourned for committal at the mode of trial hearing. Table 4.15 below indicates the proportion at both stages. The proportion adjourned for committal at PBV as a consequence of electing trial was 14 per cent. However, only seven per cent of defendants who were actually committed to the Crown Court following an initial indication of not guilty had exercised the right of election. Put from the alternative perspective, 93 per cent were committed because magistrates had declined jurisdiction.

Table 4.15 Number of elections as proportion of cases committed at PBV and actually committed by court

	Observed			Records			Combined		
	Mags (n=)	Elect (n=)	Elect (%)	Mags (n=)	Elect (n=)	Elect (%)	Mags (n=)	Elect (n=)	Elect (%)
At PBV									
Town Court	9	7	44	35	11	24	37	14	27
New Court	19	4	17	38	5	12	50	8	14
City Court	44	9	17	158	15	9	190	23	11
Total	72	20	22	231	31	12	277	45	14
Actually committed									
Town Court	9	1	10	33	5	13	35	5	12
New Court	16	0	0	38	2	5	49	2	4
City Court	34	4	11	132	9	6	159	12	7
Total	59	5	8	203	16	7	243	19	7

The significance of this study is that it negates the conclusions drawn from the findings of Hedderman and Moxon (1992:22) that the majority of convicted defendants who exercised the right of election had eventually pleaded guilty before the Crown Court. It would be inappropriate to criticise those findings. The authors made it clear that their sample solely comprised defendants who had been convicted at the Crown Court. Indeed, this study supports those findings in isolation. Some 83 per cent of defendants convicted at the Crown Court after electing trial had pleaded guilty to those charges of which they were convicted. It should be noted, however, that some charges had been dropped before admission in half of these cases. The crucial point is that the sample of Hedderman and Moxon was not representative. Defendants who were acquitted at the Crown Court or whose cases never reached that court were not included.

The criticism is of opponents of the right who have taken the findings out of context and generalised the statistics so as to present a distorted picture in support of their argument. Proponents of the right have had to rely primarily on ideological or historical arguments to endorse their case rather than challenge the statistical evidence. This study provides an empirical basis for such a challenge. It has revealed that the majority of defendants who exercised the right were never committed to the Crown Court at all. For reasons established in Chapter 3, not all elected cases could be followed through to ultimate outcome. The limited information available suggests, however, that at the most some 12 per cent of defendants who elected trial eventually admitted all of those charges for which the right of election had been exercised. This figure is substantially lower than that of 82 per cent quoted by government officials in support of the case for abolition.

4.3.4 Magistrates' attitudes towards the right of election

This subsection examines the expressed opinions of magistrates towards the right of election and the possible implications of these attitudes were the right to be abolished. Some 18,000 defendants are currently committed to the Crown Court each year in England and Wales as a consequence of electing trial (Bridges, 1999). In advocating abolition of the right, Narey (1997:34) made an unexplained assumption that the proportion of cases which magistrates would be persuaded by defence arguments to send to the Crown Court would be no more than a quarter of current elections. In other words, three quarters of those now electing jury trial would be obliged to have their cases tried in the magistrates' court were the right abolished. It will, however, be argued in the next chapter that policy initiatives frequently do not have the anticipated effect because magistrates are inclined to adhere to tradition and prove resistant to

changes which are not deemed by them to be in the interests of justice (Parker et al.,1989). Magistrates may continue to grant defendants their wish for jury trial if they consider that abolition of the right of election was solely an economic measure. Table 4.16 below indicates the expressed attitudes of lay magistrates interviewed for this study towards the current right and its proposed abolition.

Table 4.16 Lay magistrates' expressed attitudes towards the right of election

	(n=)	(%)
Right should be retained	7	37
Retained but with more summary offences	7	37
Right should be abolished	4	21
No opinion	1	5
Total	19	100

Table 4.16 reveals that the majority opinion among magistrates was clearly in favour of retaining the right of election, although not necessarily in relation to the entire range of offences currently classified as either way. This finding was applicable to all three sample courts. A minority of approximately a fifth favoured outright abolition of the right.

The right of election should go. The court should decide on the basis of the offence and it should not be a question of the defendant's desire.

(Magistrate, Town Court)

There were, however, more magistrates who thought that it should remain in its present form.

The right of election is a fundamental right. There should be no more summary offences.

(Magistrate, New Court)

This viewpoint was reiterated by a magistrate in a different court.

The right of election must be retained. It is only being abolished to save money.

(Magistrate, City Court)

A group of equal size thought that it should be retained in relation to more serious cases. A magistrate in Town Court noted that, "There should be more summary offences. But you should keep the right in more serious cases." A magistrate in City Court agreed.

The right of election is fine in principle and should be retained for more serious offences. But in certain circumstances, minor offences, it can be an abuse of process. There should be more summary only offences.

(Magistrate, City Court)

Establishing the opinions of individual magistrates, however decisive they might be, does not by itself determine the response to future legislation. The culture of a particular court and the emphasis given in training will be highly influential. Clerks are central to training. Those interviewed for this study were almost equally divided on the desirability of the right. Five, including one Chief Clerk, favoured its retention. Four, including two Chief Clerks, thought that it should be abolished. The attitudes of CPS lawyers, who are part of court culture, will likewise be important, but could not be ascertained in the absence of interviews. The views of magistrates are, therefore, not definitive of court practice. It is suggested, however, that the findings of this study at least cast doubt on Narey's somewhat bald assumption and imply that abolition of the right might not produce the forecast decrease in the number of defendants committed to the Crown Court. Were magistrates to follow their philosophical beliefs and grant defendants' wishes in more serious cases, the attitudes expressed in interview infer that more than a quarter would continue to be sent to the Crown Court.

4.4 CONCLUSION

This chapter has comprised three sections: the plea structure in the sample courts, their committal rates and exercise of the right of election. Important findings were made in all three sections. The first suggested that not guilty indications would continue to be entered in a large number of cases which were eventually resolved without a trial until the conditions stipulated by the Home Office (1995) for the satisfactory operation of the PBV provisions had been met. A withdrawal rate of 50 per cent among defendants denying guilt implied that the CPS had not finalised charges at plea before venue. The inadequacy of advance disclosure led to defendants sometimes being advised to enter a "holding plea" of not guilty as the sole mechanism of obtaining adequate information on which to base an informed plea. The plea structure was also influenced by the practice of defendants to decline to enter a plea in serious cases which would inevitably end up in the Crown Court. It would appear that this practice was facilitated by a reported reluctance on the part of judges to grant any sentence discount for the plea entered in the lower court.

The second section established that considerable differences existed in the trial committal rates of the three sample courts. Analysis suggested that these variations could not be fully accounted for by differences in cases heard. The next chapter will expand on two issues raised in this section. The first is that the markedly lower variations between courts in their committal rates for sentence imply that there are attitudinal differences between benches towards accepting or declining jurisdiction which cannot be explained by differences in the perception of the gravity of particular behaviour. The second is the apparent reluctance of magistrates to order reports in cases which might prove to be outside their sentencing powers.

The third section revealed that the right of election was only exercised in a small minority of cases, most of which involved comparatively serious allegations, and that the majority of defendants who exercised the right had all either way charges against them dismissed prior to committal. This last finding has profound implications for the debate on the continuance of the right as it provides a statistical counterbalance to the official argument that the right is being exercised as a means of working the system. This study negates that argument as it suggests that most defendants who elect trial are never convicted. It will be argued in the next chapter that the culture of the lay magistracy determines that resistance is shown to reforms which are not deemed by them to be in the interests of justice. Responses of magistrates interviewed for this study imply that abolition of the right of election might not produce the forecast decrease in the committal rate.

Research has, as a matter of practicality, to rely on inference from samples to the generality (Baldwin and McConville,1977:ix). Generalisation of the findings of this third section to England and Wales as a whole must, however, be treated with a degree of caution. It has to be acknowledged that the figure of seven per cent reaching the Crown Court as a consequence of exercising the right of election in this study is significantly lower than the national figure of 30 per cent (Home Office,2001:para.6.17). The difference in the figures would appear to suggest that exercise of the right is subject to geographical variations (Riley and Vennard,1988; Hedderman and Moxon, 1992). Figures might also be influenced by the proportion of female and ethnic minority defendants in particular areas. The samples in this study were too small to draw any conclusions in these respects. The observation sample only comprised three female defendants and five defendants from minority ethnic groups who elected trial. Only one in each category was actually committed.

End Notes

1 Formal pre-trial reviews, involving the clerk but not the magistrates, were held in court in Town and New Courts. These aim to facilitate an exchange of information between the prosecution and defence, clarify the issues in dispute and possibly achieve case settlement (Baldwin, 1985; Ashworth, 1998:280). The defendant was not invited to attend in either court.

2 The dismissed column shows the number of cases in which the CPS withdrew all either way charges. The defendant admitted an alternative summary charge in about a quarter of these cases (see text). The guilty plea column shows the number of cases in which the defendant admitted an either way charge. This was not necessarily the same charge or number of charges as those denied at plea before venue.

3 Section 49 (5) of the Criminal Procedure and Investigations Act 1996 provides that "the court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty." The only mention of no plea is contained in s. 49 (8), which stipulates that a failure to indicate a plea is to be taken as a not guilty indication.

4 The Court of Appeal, chaired by the Lord Chief Justice, has confirmed that the maximum sentence discount is reserved for those who indicate a guilty plea at the plea before venue hearing (Rafferty, 1998, 2 Cr.App.R. (S) 449). The President of Queen's Bench Division has proffered a similar opinion:

The main purpose of the changes to procedure were to ensure- (a) that an accused was given an opportunity to enter a plea of guilty as soon as possible, (and thus be in a position to claim additional credit as compared with any plea entered in the Crown Court).

(Lord Justice Kennedy, R.v.Warley Justices, 1999, 1 Cr.App.R. (S) 156 at 161)

5 By doing so [changing plea], particularly if he is committed to the Crown Court, he will of course lose all or some of the benefit of any sentence discount that he might have gained by indicating an intention to plead guilty under s.17A before the decision on mode of trial.

(Leng and Taylor, 1996:71)

The authors (1996:71) did, however, note that defendants to serious charges may choose to indicate a not guilty intention in order to reserve their position.

6 Research by Henham (1999:515) indicated that the expressed opinion of about half of the judiciary was that the timing of the guilty plea was considered unimportant in relation to the sentence discount.

7 These two defendants admitted a charge of affray in the Crown Court and received community service orders.

8 Other reasons why the number actually committed will be lower than the number in relation to whom jurisdiction had been declined include cases where the defendant changes his/her plea to guilty and is sentenced by the magistrates and instances in which the defendant dies prior to committal.

9 The names of the three community orders have been altered by sections 43-45 of the Criminal Justice and Court Services Act 2000 since the conclusion of the empirical study.

Probation Orders are now Community Rehabilitation Orders;
Community Service Orders are Community Punishment Orders; and
Combination Orders are Community Punishment and Rehabilitation Orders.
The former names are used throughout the text in the interests of consistency and clarity.

10 The principle is that an offender who has been given a legitimate expectation that he/she would not be committed for sentence should not be so committed if they subsequently appear before a differently constituted bench (R.v.Nottingham Magistrates' Court, Ex p.Davidson,2000, 1 Cr.App.R. (S) 167). This essentially means that the bench must indicate when ordering reports that the option of committal for sentence remains open.

11 The proportion of defendants exercising the right of election was higher in the observation sample than in the register sample in all three courts. This raised the suspicion that court registers might not always accurately reflect that a case had been committed to the Crown Court because of defendant election. The 20 observed cases in which an election had occurred were examined in the registers. The records for New Court were entirely accurate in this respect. There was one example in each of Town and City Courts (from seven and nine cases respectively) in which committal was indicated to have taken place because the magistrates had declined jurisdiction rather than the true situation of defendant election. This casts an element of doubt on the accuracy of the figures provided. Figures obtained from the observation sample alone showed that 17 per cent of those offered summary trial exercised the right of election (Table 4.11 indicated 11 per cent); 22 per cent of cases committed at PBV followed such exercise (Table 4.12 indicated 14 per cent); and eight per cent of actual committals followed the right (Table 4.15 indicated seven per cent). These figures do not affect the principles behind any statements made or arguments advanced in the text.

CHAPTER 5

LAY MAGISTRATES AND THE INFLUENCE OF CULTURE

This chapter offers an analysis of the decision-making process for either way offences from the perspective of lay magistrates. Drawing on data obtained from all methods of data collection adopted in this study, the chapter has been divided into three sections. The first examines implementation of recent initiatives designed explicitly to achieve the goal of having more cases completed by magistrates. The second considers the implications of the culture of the lay magistracy for three potential reform measures: amended criteria, increased sentencing powers and enhanced liaison with the Crown Court. The third section investigates various specific aspects of the decision-making process. These include the procedure adopted in either way cases, the existence of policies, interpretation of advice to accept the prosecution version of events and application of the sentence discount in borderline cases.

There are various core conventions, attitudes and beliefs which are widely held in the national magisterial community as well as traditions which are essentially local in nature (Wilkinson,1992:257). The former provide the focal point for the first two sections of this chapter; the latter do so for the third. This facilitates the development of the two central arguments advanced in this thesis. The first is that attempts to change procedure cannot afford to underestimate the strength of the culture of the lay magistracy. The second is that individual court cultures which have evolved as a consequence of an implicit belief in the concept of local justice provide the prime explanation for variations in committal rates between courts. It should not, however, be assumed that there are no local variations in practices founded in national culture. There are differences, as the analysis of the use of guidelines will reveal. It should not be assumed that individual court traditions are totally independent of the culture of the lay magistracy. Magistrates' attitudes towards application of the sentence discount reflect both national and local influences.

5.1 REFORM MEASURES

This section examines implementation of three recent reforms: the issue and revision of national mode of trial guidelines, the extended power of committal for sentence after summary trial and the introduction of plea before venue. The argument will be developed that measures designed to achieve judicial change will only have the desired effect if they become part of court culture. One of the aims of all reforms to mode procedure since 1990 has been to encourage magistrates to accept jurisdiction more readily and to finalise a higher proportion of cases. Official statistics infer that the effect of these initiatives has been disappointing from a policy perspective. It would appear that the principles which influence magistrates in the either way process remain those which were pivotal prior to 1990 despite procedure ostensibly having been significantly amended since that date. It will be argued in this section that the various mode of trial initiatives have not become part of court culture or, at the least, have not become part of the culture of some courts.

5.1.1 The need for reform

This subsection examines magistrates' perceptions of the need for mode reform and the significance of venue determination. Government policy is quite clear. Magistrates, however, would not appear to acknowledge the validity of the objective of a reduced committal rate. This attitude presents as being crucial to an analysis of the implementation of reforms. Interview responses suggest that magistrates deem current procedure to be quite satisfactory and to produce a fair and realistic division of business between the higher and lower courts in the interests of justice. As one magistrate said, "We already deal with 96 per cent of cases. How much more do they want us to take?"

Subject to two dissenting voices in City Court, discussed in section 5.3.1, all of the interviewed magistrates expressed satisfaction at the current division between the courts. In the opinion of one sitting in Town Court, "The current split is OK. I don't think we should keep any more." This viewpoint was shared by a magistrate in New Court. "The current allocation is OK. There is no need to retain more." A magistrate in City Court summarised the position.

The current split is alright. We should keep appropriate work, but equally should not hesitate to commit to the Crown Court when we consider that appropriate.

(Magistrate, City Court)

There was also concern, expressed by three magistrates, that keeping more cases would create administrative and workload problems.

The need for procedural reform was not acknowledged by magistrates in this study. The potential use of judicial reforms as instruments for effecting economic or other politically expedient policy was deeply resented. Many magistrates of varying degrees of experience emphasised the importance of the doctrine of judicial independence by volunteering the viewpoint that government policy would not persuade them to retain more cases.

I would never agree to retaining cases on economic grounds. I am fed up with political speak. There should not be pressure put on us. We are trained to do a job and should be left to do it.

(Magistrate, City Court)

A colleague in the same court concurred.

The current split is OK. The government will not persuade me to keep more cases.

(Magistrate, City Court)

A magistrate in New Court agreed.

The current division is alright. I have no concern for government policy.

(Magistrate, New Court)

A second crucial contextual factor is that many longstanding magistrates viewed mode of trial as being of peripheral significance. Given the centrality of senior magistrates to the perpetuation of court culture, the view that mode of trial was of limited importance continued to prevail in the three sample courts despite more recent appointees to the bench having been taught that venue determination was consequential. A clerk in New Court noted, "As a rule mode of trial is not treated seriously by magistrates." A partial explanation for this attitude may be the perception that most decisions were obvious. It may have been caused partly by a feeling among experienced magistrates that mode of trial had not been afforded much importance by training clerks.

Only one of the ten lay magistrates interviewed for this study who had been appointed prior to 1990 could recall anything at all about initial training on mode of trial. One from City Court said, "I cannot remember any training on mode of trial." A colleague in New Court noted, "I don't recall any original training on mode of trial. You learnt from experience." From Town Court,

I cannot remember any initial training on mode of trial, but presume it must have been included in the residential weekend.

(Magistrate, Town Court)

It may be argued that this simply reflects the fading of memory with the passage of time. The majority of longstanding magistrates were, however, able to recall other aspects of induction training in some detail. A more plausible interpretation is that mode of trial was not afforded importance in training until the steep rise in committals during the 1980s gave the issue of venue political significance. This argument would appear to be supported by the comments of a recently appointed magistrate.

We were taught that mode of trial was very important. But some more experienced magistrates might not view it as important.

(Magistrate, New Court)

5.1.2 Mode of trial guidelines

This subsection examines the use made of formal guidelines by courts in this study. National mode of trial guidelines are a modern innovation. They were issued in 1990 and revised in 1995. They were designed to clarify the relevant considerations for magistrates with a view to enhancing consistency between courts and encouraging them to accept jurisdiction more readily (Hedderman and Moxon,1992:15). Arguably their most innovative principle was the incorporation of a presumption in favour of summary trial. Magistrates were advised to retain a case unless it displayed at least one specified aggravating feature (see Appendix 3). Official statistics suggest that the guidelines have only had a modest impact on committal rates. It will be argued that the prime reason for this is that they have not become part of the culture of some courts as many magistrates sitting at the date of their issue did not view them as being necessary. As one said, "Common sense overrules the guidelines."

There has been a proliferation in the quantity of formal guidance provided to magistrates over recent years. One magistrate noted, "We've had three or four handbooks in eight years." Interview responses suggest that this is resented by the majority. It is seen as an attack on the dominant ideology of common sense representing the prime characteristic of lay justice (Raine,1989; Seago et al.,2000). One magistrate with almost thirty years experience said:

The work was what I expected when I joined the bench. But everything is now much more complicated and there are more constraints. I prefer to rely on common sense than guidelines.

(Magistrate, Town Court)

It would appear, however, that use of mode guidelines varies quite considerably between courts. Their use will be determined in the first place by a court's traditional approach towards the decision for which guidance has

been issued. Courts whose culture prescribes the adoption of a structured mode decision-making process will incorporate guidelines more readily into that process than those which have traditionally made mode decisions with a minimum of deliberation.

Previous research has recognised that a strong local culture exists which influences the way in which national guidance is interpreted (Moxon and Hedderman, 1994:101). The word "interpretation" presumes, however, that use of something has been made in the first place. It must be emphasised that all interviewed court participants considered the majority of mode decisions to be obvious. There would not appear to be any need to refer to written guidance in these cases. Having incorporated a commendatory foreword by the Lord Chief Justice, there might be an expectation that their use would be an integral element of the decision-making process in all other cases. It will be seen, however, that the expressed attitudes of magistrates, the approach of solicitors and the propensity of the bench to retire all varied between courts.

It became apparent during interviews that the magistrates of New Court viewed the guidelines in an altogether more positive light than did those in the other two sample courts. The guidelines had become part of that court's culture. All six of those interviewed considered them to be important, although one thought them to be "somewhat basic." A magistrate with 15 years' service said, "The guidelines are very important. They make you think." A magistrate appointed to the bench since their issue went as far as to comment, "I always refer to the guidelines in borderline cases. They are the bible." This use would, however, appear to be restricted to considering the effect of aggravating features on sentencing powers. Their modest impact on committal rates, even in courts which have adopted them, might be partially explained by the fact that

there was not a single mention of the presumption in favour of summary trial or of the requirement for aggravating features.

By way of contrast, only six of the 13 lay magistrates interviewed in Town and City Courts expressed the view that the guidelines were of any real significance. Five of these six had been appointed to the bench since 1990. One of this minority group commented:

Guidelines are of great value. They exist for consistency and well structured decision-making, but are not user-friendly.

(Magistrate, City Court)

The small majority emphasised common sense and experience.

I don't make much use of the guidelines as I think I know the balance [between suitable and unsuitable]. I rely on common sense. The revised version made no difference to decisions.

(Magistrate, Town Court)

There was a consensus of opinion among the interviewed clerks that the guidelines were beneficial. It was, however, accepted that many magistrates in Town and City Courts did not acknowledge their value.

Differences between courts are brought about by magistrates not paying attention to the guidelines. Some rely too much on gut feeling and not enough on the law.

(Clerk, Town Court)

A clerk in City Court commented:

The newer magistrates tend to rely on the guidelines. But there are many exceptions among the more experienced.

(Clerk, City Court)

The opinions expressed by magistrates were supported by court observation. Lawyers recognised the importance or otherwise of the guidelines in the eyes of their bench. Defence solicitors in New Court have realised that the guidelines form part of the culture of that court. They tended to approach a

contested case by stressing the absence of aggravating features or minimising the gravity of those which existed. Advocates in the other two courts placed emphasis on the adequacy of the court's sentencing powers. There were considerable differences between courts in the number of contested cases, in the observation sample, in which defence solicitors made specific reference to aggravating features as defined in the guidelines when attempting to persuade the bench to accept jurisdiction against the recommendation of the CPS. This only occurred once in Town Court in six cases (17 per cent). The figure in City Court was three cases out of 14 (21 per cent). Solicitors in New Court, however, made reference to aggravating features in eight cases out of ten (80 per cent).

Two observed cases can be compared and contrasted by way of illustration of solicitors' perceptions of magistrates' different attitudes towards the guidelines. The factual scenarios were similar. Both involved a male defendant denying a charge of entering a dwelling house during the day while the occupier was out and stealing items to a value of less than £2,000. In each case the CPS alleged that damage had been caused to the property and invited the court to decline jurisdiction. In the example from New Court (case 104), the defence stressed the implications of the guidelines. In the case in Town Court (003), no mention was made of the guidelines. In the former, the defence emphasised that it had been agreed that "five of the six aggravating features in your guidelines are not applicable." The sixth was "a bone of contention" as no mention had been made of ransacking in the owner's first two statements, and he had subsequently only claimed damage of £200. In the latter case, the defence argued that their client could be sent to prison for 12 months if convicted (he denied a further charge of stealing £112 from a social club) and that he could still be committed for sentence.

Use of the guidelines was facilitated in New Court by the practice of the magistrates in that court to retire before reaching a mode decision. The magistrates of New Court retired to consider their decision in 28 per cent of cases (eight from 29), in the observation sample, in which the defendant entered a not guilty indication at the plea before venue hearing. By way of contrast, the magistrates of Town Court only retired once in 57 cases (two per cent), while the lay bench in City Court did so in three cases from 36 (eight per cent). If magistrates are to refer to the "little red book" in courts such as Town Court, where the bench very rarely retires and generally only confers for a matter of seconds, they would have to do so while one of the advocates was speaking.

It will be seen as this thesis develops that the culture of New Court favours a structured approach to mode decision-making. The practice has been established there of reading out reported decisions in borderline cases (see section 5.3.3). It is suggested that the use of written guidelines more readily becomes part of such a culture. A structured approach and the propensity to retire resulted in the average length of time taken to decide cases being quite considerably longer in New Court than in the other two sample courts. The average length of time in New Court (from the defendant entering the dock until the mode decision was announced) was 9.5 minutes as compared to 3.9 and 5.2 minutes in Town and City Courts respectively. A court's approach to venue determination might not, however, be typical of its approach to other decisions. Magistrates in all three sample courts have been trained to adopt a structured approach to sentencing. Evidence that Town Court determines mode of trial with a minimum of deliberation reflects a culture that deciding jurisdiction is a common sense matter which benefits from a simple procedure.

5.1.3 Committal for sentence after summary trial

This subsection examines use of the extended power contained in the Criminal Justice Act 1991 to commit a defendant for sentence after summary trial. This reform presents as a measure designed to encourage magistrates to accept jurisdiction more readily. They are reminded of this power on every page of the revised guidelines. It will be suggested, however, that the new power has not become part of court culture and that magistrates continue to view the decision to accept jurisdiction as being essentially final. The purpose of mode of trial, in the words of one magistrate, is to "provide a clearly defined path." There is, however, an argument that the power provides a form of safety net which may render magistrates less cautious in accepting a case even if it is rarely used. Prior to October 1992 the decision to accept jurisdiction was final on the basis of the facts of the case. Magistrates' power of subsequent committal was restricted to the grounds of antecedents or character introduced in 1948. It was established in Chapter 1 that the 1991 Act provides a relatively unfettered power in law. The initial requirement is to ascertain the extent of use of this power. Table 5.1 below reveals the incidence of committals for sentence after accepting jurisdiction at the mode of trial hearing.

Table 5.1 Number of committals for sentence after summary trial by court

	Sentenced (n=)	(%)	Committed to CC (n=)	(%)	Total (n=)
Town Court	64	94	4	6	68
New Court	23	77	7	23	30
City Court	59	89	7	11	66
Total	146	89	18	11	164

$\chi^2 = 6.50, p < .039$

Table 5.1 shows that 11 per cent of defendants who were convicted after magistrates had accepted jurisdiction were committed to the Crown Court for sentence. This figure, however, conceals significant differences between courts with a range of six to 23 per cent between Town Court and New Court. Statistics relating to committal for sentence present problems of interpretation. It may be that the defendant was committed on precisely the same charges as those for which jurisdiction had been accepted because of previous convictions, new evidence or a different bench adopting a different attitude. It may, however, be occasioned by the defendant having committed further offences in the intervening period or having had guilty pleas adjourned pending the outcome of the trial. It also has to be acknowledged that statistics have the potential to provide a distorted picture when small samples are involved. It would appear from Table 5.1 as though New Court made quite considerable use of the power of committal for sentence. However, of the seven relevant cases, one defendant was in breach of a Crown Court conditional discharge while two had committed further serious offences.¹ The other four were co-defendants. Had they entered their plea precisely one week earlier the case would not have come within the sample period, reducing New Court's committal percentage by a half.

A case (036) from the observation sample in Town Court illustrates the circumstances in which committal for sentence might occur and the inadequacy of statistics in providing definitive evidence of magistrates' attitudes towards use of the power. The male defendant had denied a charge of affray arising out of an attack with another man on a male victim. The co-defendant faced a further charge of possessing an offensive weapon which he had used in the assault. The CPS recommended summary trial on the basis that 12 months' imprisonment could be imposed although this was only applicable to the co-

defendant. Jurisdiction was accepted and both men eventually pleaded guilty. The co-defendant was sentenced to a total of 12 months in prison by way of consecutive sentences for the two offences. This defendant was committed for sentence. Discussions with his solicitor revealed that the bench's reasoning was that the criminal responsibility of the two men had been equal and that this defendant should also receive a sentence of 12 months' imprisonment which the magistrates could not impose.

Statistical data may provide equivocal evidence of the use of the power to commit for sentence after summary trial. Court observation and interviews supported the argument that magistrates continue to view the decision to accept jurisdiction as being one which ought to be confirmed unless there are exceptional or intervening circumstances. The current power did not exist when the majority of sitting magistrates were appointed and initially trained. It was apparent from the outset of the empirical study that viewing a decision to accept a case as being a fluid decision had not become part of court culture in any of the sample courts. The court observation data form for a sitting in Town Court in October 1999 concludes with a comment to the effect that everyone seems to take the view that if the bench accepts jurisdiction it will sentence if there is a conviction and not commit for sentence.

Fourteen of the 19 interviewed lay magistrates, representing the majority in all three sample courts, indicated that the mode of trial decision was essentially final and that the power of committal would only be exercised, if at all, on the grounds of previous convictions. It was, therefore, not a relevant factor when determining jurisdiction. Arguably the most significant finding from this area of questioning was that only a very small minority of magistrates could remember ever having used the power. A typical response was:

The mode of trial decision is essentially final. I have never committed after jurisdiction was accepted.

(Magistrate, City Court)

There was a minority opinion, expressed by five magistrates, that the power was applicable in wider circumstances. One from Town Court said, "I take the view that we can always send a case at the sentencing stage." Another, appointed to the bench in City Court since 1992, was more emphatic.

If borderline, you keep it and have the power to commit in mind. I think it is underused.

(Magistrate, City Court)

There was a consensus of opinion among interviewed clerks and solicitors that the decision to accept jurisdiction was seen as being final in all three courts on the basis of the facts of the case. The power of committal was only exercised, and then very rarely, on the grounds of previous convictions.

Magistrates do not consider the power to commit at plea before venue. The only reason for exercise would be precons. The power is used, but rarely.

(Chief Clerk, Town Court)

A defence solicitor in a different court concurred.

The magistrates only ever commit because of antecedents. I have never known them commit because of new evidence.

(Defence Solicitor, New Court)

The sole limited exception to this was provided by one clerk.

Committal is very rare. Usually on the grounds of antecedents. But in one case video footage of an affray was shown.

(Chief Clerk, New Court)

This apparent reluctance to use the power or to take it into account when determining jurisdiction raises the question of whether or not it should be retained. This is a pertinent question as its existence is viewed as an anathema

by many (Legal Action Group,1993:5; Wadham,1994:250). The conclusion from this perspective would be to abolish the power as a matter of principle. This view was expressed by one Chief Clerk.

Mode of trial has been illogical since the Criminal Justice Act 1991 because of the power to commit. You should take account of previous convictions at plea before venue and then deprive magistrates of the power to commit.

(Chief Clerk, City Court)

This perceived prerequisite of revealing previous convictions raises the first of two issues which conflict with the argument for abolition of the power. Academic debate as to the significance of previous convictions in sentencing is outside the scope of this study (see Wasik and von Hirsch,1994; Harding and Koffman,1995:157). In practice, however, current government policy is to make a defendant's record more important. There is wisdom in accepting that total abolition of the power to commit for sentence would not be contemplated unless previous convictions were to be revealed at the mode hearing. All court participants interviewed for this study acknowledged that this was a correct interpretation of policy. Most considered that it was also appropriate from the standpoint of justice and that abolishing the power without revealing previous convictions would be unacceptable. This raises the question of whether or not a defendant's record should be given at plea before venue.

Majority opinion was that revealing previous convictions at the mode hearing would be prejudicial to the interests of justice and that venue should continue to be determined by sole reference to the alleged offence.

I do not wish to hear precons. It would be human nature that they would influence us. You must deal with the case in front of you. You should only consider precons at the sentencing stage.

(Magistrate, Town Court)

This opinion was endorsed by a solicitor.

The system should have an objective of consistent decision-making. It would cloud the issue if precons were revealed as the decision should be based on the offence and not the offender.

(Defence Solicitor, Town Court)

This viewpoint was not entirely unanimous. Five of the sample of 38 court participants, all professionals, thought that revealing previous convictions was acceptable on the understanding that this resulted in abolition of the power of committal for sentence. A solicitor in City Court presented this view.

Precons should be given in the interests of justice, although this might not be in the client's interests. Then get rid of the power to commit.

(Defence Solicitor, City Court)

The inference of the reference to the client's interests is that such reform would produce a higher committal rate. In the words of one solicitor, "They'd send more up if precons were revealed."

The second issue conflicting with any proposal to abolish the power is the more significant to this study as it provides evidence of the attitudes of magistrates to the decision-making process as well as contributing to a policy debate. This is that the power may be seen as a form of safety net even if it is rarely used. A tightrope walker may never actually fall, but this does not mean that the existence of a net does not enhance the confidence of the performance. It will be seen in section 5.3.1 that the majority of magistrates in New and City Courts stated that they would commit borderline cases to the Crown Court for trial if there was any doubt in their minds even though they had the power of subsequent committal for sentence. The argument is that removal of the power would have the potential to make magistrates even more cautious and, therefore, more likely to decline jurisdiction. This argument has clear policy implications.

It was indicated above that the responses given in interview suggested that the power to commit for sentence was not taken into account when mode of trial was being determined. A decision to accept jurisdiction was viewed as being essentially final. A logical conclusion of this argument is that abolition of the power would have no noticeable effect on the decision-making process. The elimination of an irrelevance should not serve to increase the committal rate. The three Chief Clerks involved in this study emphasised that magistrates were not encouraged to view the power in the nature of a safety net and that they attempted to reach a final decision without relying on the power.

Arguably paradoxically, however, the lay magistrates interviewed for this study provided considerable support for the idea that the existing power did provide a form of safety net.

There is an element of a safety net in the power to commit. We would be much more tentative if it was not there. If we lost this power we would send every case approaching 50-50.

(Magistrate, Town Court)

This opinion was shared by another magistrate in the same court.

The power to commit is a safety net although I have never used it. It would have an effect if it went. We would simply send more to the Crown Court.

(Magistrate, Town Court)

The majority of others agreed with the concept of a safety net while stressing that the decision to accept jurisdiction tended to be final in practice. Only three magistrates viewed the existence of the power as an irrelevance to the current decision-making process. One said, "You only use the power to commit on the basis of previous." This finding has significant implications for the debate on mode of trial as it renders a return to the pre-1992 position, where committal was restricted to antecedents or character, unattractive to a policy objective of increasing the proportion of cases completed by magistrates.

5.1.4 Plea before venue provisions

This subsection will consider the most innovative of the three reform measures, namely the authorisation of defendants to obviate the need for a mode of trial hearing by indicating a guilty plea before magistrates. An analysis of the implications of the different procedures to be adopted when this happens will be offered. The plea before venue provisions (PBV) had two prime motivations. The first was to enable defendants to obtain the maximum sentence discount by pleading guilty at the earliest possible opportunity. The second was to facilitate the completion of more cases by magistrates by allowing them to consider all offence and offender information and apply the discount before determining whether or not their sentencing powers were sufficient. The idea that magistrates were being encouraged to pass sentence on offenders who would previously have been sent to the Crown Court for trial was still a fairly new one when this empirical study commenced. The plea before venue provisions had only been in operation for just under two years at that time.

It is apparent that the Criminal Procedure and Investigations Act 1996 was intended to effect a significant procedural change. It would not achieve the desired policy objective unless it did so. The findings of this study suggest that any change has to date been limited. They suggest that magistrates view the decision to order reports as equating to an acceptance of jurisdiction and being virtually conclusive that they will finalise a case. The consequence of this cultural position is that they appear unwilling, or at the very least reluctant, to order reports in cases which might be outside their sentencing powers. The ultimate question at mode of trial in denied cases should be whether or not magistrates' sentencing powers would be sufficient in the event of a conviction. If magistrates decide that the probable sentence would be one of nine months'

imprisonment, the advised course of action is to decline jurisdiction. Two arguments will be advanced in this subsection. The first is that this principle is not applicable when guilt has been admitted. The appropriate course of action in a case which appears on the facts to warrant a sentence of nine months is to order a pre-sentence report and postpone any decision on committal until all information is available. The second is that lay magistrates have not adopted, and indeed do not appear to agree with, this suggested approach. They will consider more information at plea before venue in admitted cases, but continue to adopt the mode of trial principle and commit a defendant to the Crown Court if that information indicates a sentence in excess of their powers.

An appreciation by magistrates of the implications of the procedural change after a guilty plea presents as a prerequisite of the attainment of the policy objective of having more cases completed in the lower court. It is suggested that this appreciation had not materialised, or at best was only just beginning to appear, at the time of this study. In the opinion of one clerk:

It took a long time for magistrates to grasp the different concept when guilt was admitted as training didn't appear to sink in, and even now it has not been fully grasped.

(Clerk, Town Court)

Magistrates' comments tended to reinforce this perception. As one said, "PBV just happened. As far as I can see it effected no real change." The first case (001) observed in this study established this continued link between mode of trial and sentencing. The CPS outlined an admitted charge of possessing cannabis by stating that a small amount of the drug for personal use was involved. The defence sought an adjournment in line with summary matters denied at a previous hearing. The chairman said, "We accept jurisdiction. Do we need to put that to the defendant?" The terminology of mode of trial, and by implication the magistrates' thought processes, had not changed.

It would appear as though a partial explanation for this lack of appreciation lies in the perceived inadequacy of the training offered when plea before venue was introduced. This is in contrast to a general perception among magistrates that training is now excellent. One session or part session of training was run by clerks in each of the three sample courts. Attendance was not, however, mandatory and by no means all magistrates attended. Eight of the 18 magistrates interviewed for this study (one was appointed after 1997) either did not attend or could not recall attending any training session. As one said, "There was no training on PBV. I just talked to colleagues." This was confirmed by one of those colleagues who was on the training sub-committee. "I don't remember any training on plea before venue. It never seemed difficult."

Some of those who did attend a training session were dissatisfied with the quality of instruction given on this particular occasion.

There was one session run by clerks when PBV was introduced. This was the worst presentation ever. We tend to be trained too far in advance of a new procedure so that it's not always remembered.

(Magistrate, New Court)

A similar opinion was expressed by a magistrate in City Court.

There was one session when plea before venue was introduced and some information was received, but this was inadequate.

(Magistrate, City Court)

It may be that the clerks themselves failed to comprehend the significance of the new provisions due to a lack of instruction. The clerk in New Court responsible for the much maligned training session with magistrates said with a wry smile, "I had no training on PBV, but was just told to read the book." A more likely explanation, however, is that they failed to grasp that magistrates would not effect a substantial cultural change unless very clearly trained and convinced of the benefits.

Appreciation of the significance of the change was only the first step. It then had to be implemented. The policy objective could not be achieved unless magistrates were prepared to order reports ² and ultimately pass sentence in cases which would previously have been committed for trial. Official statistics suggest that this has not happened. A fall in the number committed for trial since 1997 has been balanced by an increase in those committed for sentence (Home Office,2000:para.6.15). The proportion of defendants sent to the Crown Court on either way charges who had been committed for sentence rose from less than nine per cent in 1996 to almost 30 per cent three years later (Home Office,1997,2000). The proportion in this study was very similar at just over 28 per cent: 97 out of 341 defendants (see Table 4.5).

The responses received from magistrates in this study suggested a greater willingness to order reports. Nine of the 19 interviewed lay magistrates indicated that they would err on the side of caution in determining mode of trial and commit borderline cases to the Crown Court. When the same dilemma was presented to the interviewees in relation to guilty pleas, 17 magistrates indicated that they would order a pre-sentence report (PSR) in borderline cases. Only one, in City Court, indicated that committal without a report was appropriate. "If borderline, you err to the Crown Court and do not order a PSR." A magistrate in New Court felt unable to answer as she had never faced the problem in practice. Majority opinion was reflected by a magistrate in that court. "If it is borderline you order a PSR, but must reserve the option to commit." A stronger response was given by a magistrate in Town Court.

If borderline, you order a PSR. We should deal with a case if it is reasonably within our bounds in order to get it completed. Finalising a case is in the interests of the defendant, the victim and the system.

(Magistrate, Town Court)

This raises the question of how to determine what constitutes a borderline case. Data supplied in Chapter 4 indicated that 45 per cent (30) of 66 defendants committed for sentence by New and City Courts were sentenced at the Crown Court within magistrates' powers. Eighty per cent (24) of these 30 had been committed without a report. One implication of these figures may be that magistrates' interpretation of borderline is too narrow. The principles and procedure to be adopted were laid down in *R.v.Warley Justices* (1999, 1 Cr. App.R. (S) 156) (see Appendix 2). Magistrates were entitled to commit without seeking a report or hearing full mitigation if the gravity of the offence was such that it was obvious that punishment would exceed their powers whatever may be the mitigation. This stipulation was largely irrelevant in the observation sample because of the practice of defendants to decline to indicate a plea in serious cases. Yet 12 defendants were committed for sentence without a PSR.

If committal was not obvious and it "may be possible for the court to sentence properly," the magistrates should proceed to a sentencing exercise while retaining the option to commit as long as that remained a possibility (Lord Justice Kennedy in *R.v.Warley Justices* above). This means, quite simply and starkly, that magistrates have to be prepared to order reports in cases which appear on the basis of the facts alone to be somewhat outside their sentencing powers. They have to order reports in cases in which it "may be possible" for them to sentence, not just those in which it will be possible. The problem with the *Warley* judgement is that no attempt was made to define the subjective word "obvious" or to delineate the boundaries of being borderline. The stipendiary and acting stipendiary magistrates interviewed for this study deemed reports to be appropriate in all cases in which a sentence not exceeding 12 months' imprisonment appeared realistic on the basis of information available at plea before venue.

This interpretation of borderline as being 12 months' imprisonment has not been adopted by lay magistrates in the sample courts. The practice of ordering reports in cases in which sentencing only "may be possible" would inevitably extend the likelihood of committal being ordered after consideration of reports. Observation and examination of records facilitate the conclusion that magistrates currently appear to be ordering reports to assist them in cases which, on the basis of the information available at plea before venue, seem to come within their sentencing powers. They remain reluctant to extend the range of cases in which reports are considered before possible committal. Table 5.2 below indicates the number and proportion of defendants who were committed to the Crown Court for sentence at the plea before venue hearing and the number and proportion committed after reports had been read.

Table 5.2 Decisions made by magistrates at PBV and after consideration of PSR by court

PBV	Observed				Records				Combined			
	Sent (n=)	PSR (n=)	CC (n=)	(%)	Sent (n=)	PSR (n=)	CC (n=)	(%)	Sent (n=)	PSR (n=)	CC (n=)	(%)
Town Court	12	20	2	6	86	81	16	9	92	93	17	8
New Court	21	38	5	8	77	92	16	9	91	113	17	8
City Court	23	23	5	10	115	92	25	11	125	111	30	11
Total	56	81	12	8	278	265	57	9	308	317	64	9

Reports	Sentenced			CC			Sentenced			CC		
	(n=)	(n=)	(%)	(n=)	(n=)	(%)	(n=)	(n=)	(%)	(n=)	(n=)	(%)
Town Court	20	0	0	80	1	1	92	1	1	105	7	6
New Court	34	3	8	84	6	7	103	7	6	249	13	5
City Court	22	1	4	85	6	7	300	15	5			
Total	76	4	5									

Two cases (1 at New Court and 1 at City Court) in which outcome was still pending do not appear in the lower set of figures.

Table 5.2 shows that only five per cent of defendants for whom reports had been ordered were committed for sentence after consideration of those reports. This total of 15 defendants can be contrasted with the figure of 64, nine per cent, who were committed at the plea before venue hearing without a report. These statistics are open to two conflicting interpretations which are fundamental to the current analysis. The first, adopted by magistrates in this study, is that they represent an achievement, proving that their colleagues had made the correct decision at plea before venue. One magistrate said, "It should be apparent before ordering a PSR if it needs to go." This opinion was expressed more strongly by a magistrate in a different court.

There is no point in obtaining a PSR and then committing. Judges get annoyed. PSRs do not determine the gravity of the offence.

(Magistrate, Town Court)

The alternative interpretation is that the statistics reflect a conservative attitude which contradicts the theory behind the plea before venue provisions. The theory was that magistrates would be able to consider all offence and offender information before determining whether or not their sentencing powers were adequate and, hence, send less defendants to the Crown Court. Yet figures previously revealed show that 80 per cent of defendants who were sentenced at the Crown Court within magistrates' powers had been committed without a pre-sentence report.

A small majority of interviewed solicitors supported the argument that magistrates were reluctant to order reports in cases which may be outside their powers.

Magistrates don't consider enough information before committing.

Borderline cases are often committed without a PSR. I think it's important they should order PSRs more frequently.

(Defence Solicitor, New Court)

This opinion was broadly supported by a colleague.

The bench approach it on the prosecution outline and effectively make a decision before you speak. It is then very difficult to get them to change their minds as they don't like to be seen to climb down. Otherwise you can usually persuade them to order a PSR.

(Defence Solicitor, New Court)

This opinion was stronger in New Court than in the other two courts. A solicitor in City Court gave a more balanced view. "Some magistrates commit too quickly. Others will order a report." All interviewed clerks and solicitors did, however, indicate that it was "rare" or "very rare" to commit a defendant after reading a report. Court observation confirmed this impression. A number of defence solicitors specifically urged the bench to "accept jurisdiction" by ordering a report in cases serious enough to consider committal.

Reports are important because evidence suggests that their availability restricts the use of imprisonment (Walker and Padfield, 1996:30). They provide an assessment of the risk of further offending and information on community facilities which might address that risk. The majority of defendants sentenced at the Crown Court within magistrates' powers in this study received community orders (see section 4.2.4). The argument is that committal rates will not be reduced until a practice of ordering reports in more serious cases has been established. This involves a change in the attitude that adjourning for reports equates to an acceptance of jurisdiction. The consequence of such a practice would be a higher rate of committal after consideration of those reports. This would appear to conflict with the culture of the lay magistracy for finality and supporting colleagues. Magistrates indicated that the low committal rate after reading reports showed that the decision to order reports had been correct. A decision to commit after reports may be construed as implying a criticism of the bench which ordered those reports.

5.2 POTENTIAL REFORMS

This second section of the chapter considers the implications of the culture of the lay magistracy for three potential reform measures: amendment of the criteria for determining mode of trial, increasing magistrates' sentencing powers and enhanced liaison with the Crown Court.

5.2.1 Amendment of criteria

This subsection examines the possibility of amendment to the mode of trial guidelines. Data obtained in this study accorded with national statistics and indicated that the majority of defendants sent to the Crown Court because magistrates declined jurisdiction received sentences which the lower court could have imposed (Barclay and Tavares, 1999:36). As the large majority of defendants in this study did not exercise the right of election, there would appear to be scope to reduce the committal rate in those cases in which defendants prefer summary trial. It has been established that current criteria render it inevitable that some defendants will be sentenced at the Crown Court within magistrates' powers without this outcome by itself indicating that an incorrect decision had been made. Majority opinion among interviewed court participants supported the retention of two criteria which contribute to this situation. The first was that mode of trial should continue to be determined without reference to any personal mitigating circumstances of the accused. The second was that the principle of taking the prosecution case at its highest should be retained as a pragmatic means of enhancing consistency of decision-making. The implication is that a number of defendants will continue to be sentenced at the Crown Court within magistrates' powers unless there is a redefinition of the initial sentencing test.

It can be argued that there would be scope for magistrates to retain jurisdiction more frequently if the question to be asked at mode of trial was whether or not the defendant, if convicted, would receive a sentence in excess of 12 months' imprisonment. This would provide a gap to allow for offence and offender mitigation, while an unfettered power of committal for sentence would protect the public interest. This possibility was recognised in interview by one clerk in City Court. "Magistrates could exceed sentencing powers in determining jurisdiction in order to allow for subsequent mitigation." Such a reform would have clear implications for defendants when deciding whether or not to exercise the right of election and might result in a higher number of elections. Solicitors would be obliged to draw their attention to the increased possibility of committal for sentence in more serious cases.

It is suggested, however, that the culture of the lay magistracy would render this theoretical proposal largely inoperable. That culture dictates that magistrates view the purpose of a mode of trial hearing as being to determine which court should hear a case throughout. They see the decision to accept jurisdiction as being essentially final. Any guidance to retain cases apparently outside their sentencing powers, with the consequence that they would be more likely to have to commit for sentence after summary trial, would challenge that culture. This argument was supported by the attitude displayed by magistrates in this study following admission of a more serious offence. It has been shown that they are extremely reluctant to order reports in cases in which it only "may be possible" for them to pass sentence despite clear judicial authority to that effect (see *R.v.Warley Justices* cited in Appendix 2). The opinion of stipendiary magistrates that reports should be ordered when a sentence not exceeding 12 months' imprisonment appears realistic has not found support among the lay bench.

There is a tendency for magistrates to adhere to tradition. Research has suggested that part of the explanation for this may lie in the difficulty experienced by magistrates in keeping abreast of the complexity of the law and assimilating changes (Parker et al., 1989:58). Magistrates in this study placed emphasis on adherence to tradition because of the lack of need for the mode procedure to be reformed rather than on difficulty in understanding those reforms. The consequence is, however, the same in that the principles behind the mode decision have been largely unaffected by recent procedural measures. Guidelines are only advisory and confer enormous discretion on magistrates (Cavadino and Dignan, 1997:84). This discretion would enable them to interpret amended guidance in a restrictive manner so that its practical effect would be likely to be minimal. This conclusion was acknowledged by all three of the Chief Clerks involved in this study. One said:

A policy of magistrates keeping more cases is only viable if their sentencing powers are increased as magistrates aren't easily influenced by government policy.

(Chief Clerk, Town Court)

One factor restricts the potential of any reform measure. This is the apparent absence of any impetus coming from within magistrates' courts to finalise more cases. Almost all of the interviewed clerks and solicitors thought that magistrates were already being asked to deal with cases at the extreme of their ability. As one clerk said, "Magistrates' courts could take on more work, but magistrates are not capable of dealing with more serious cases." Only two of the 19 lay magistrates interviewed for this study, both in City Court, expressed any desire to accept jurisdiction more readily. There was a virtual consensus of opinion among all court participants that a policy of magistrates keeping more cases was only viable if their sentencing powers were to be increased. It is this possibility which is now considered.

5.2.2 Increasing magistrates' sentencing powers

This subsection examines the latest proposal being considered by the government to achieve the objective of a reduced committal rate. Magistrates' maximum sentencing powers have stood at six months' imprisonment for a single offence ever since the introduction of either way offences in 1855, although a number of statutes at that time prescribed a lower maximum. An increase would not, however, represent a radical departure from principle. Magistrates already have the authority to send an adult offender to prison for a year by way of consecutive sentences for two or more offences. Those qualified to sit in the Youth Court can now impose a two year Detention and Training Order. This raises two issues, both of which are contentious. The first is the effect which increased sentencing powers would have on committal rates. The second, largely outside the scope of this study, is whether or not increased powers would be desirable in the interests of justice.

There is an apparently logical argument that magistrates would finalise more cases were their sentencing powers to be increased. Lord Irvine has estimated that this would result in around 6,000 fewer cases each year being sent to the Crown Court (Rozenberg,2002:1). There is, however, the possibility raised by a number of lawyers in this study that increased powers would have the effect of net widening. They might result in magistrates imposing longer prison sentences on offenders who currently receive six months or less rather than lead to them accepting jurisdiction more readily. Research has indicated that previous initiatives taken to reduce the incidence of custody tended to provide additional powers as well as alternatives to prison (Newburn,1995: 111-113). Suspended sentences of imprisonment, introduced by the Criminal Justice Act 1967, may, paradoxically, have served to increase the size of the

prison population (Advisory Council,1978:117; Vass,1990:80). It has been suggested that up to half of those given suspended sentences would not have been sentenced to immediate custody had the suspended sentence not existed (Newburn,1995:112). Community service orders, introduced by the Criminal Justice Act 1972, were similarly sometimes used as a more punitive non-custodial sentence and not as an alternative to imprisonment (Bottomley and Pease,1986:91). The inference is that increased sentencing powers might lead to magistrates being more punitive rather than dealing with more cases.

Interviews conducted for this study indicate that it is problematic whether or not increased sentencing powers would result in significantly reduced committal rates. It was suggested in section 4.3.2 that defendants tend to exercise the right of election in more serious cases. Greater sentencing powers might, therefore, have the effect of increasing the rate of exercise of that right were magistrates to retain more cases. They might serve to enhance inconsistency between courts. Courts with a tradition of accepting jurisdiction might retain additional cases more readily than those which display a cultural belief that judges should be the sole arbiter of more serious offences. There was, however, a consensus of opinion among interviewed magistrates that increasing their powers would have the effect of them retaining more cases.

We would be happier with greater sentencing powers. This would save us sending a lot of stuff up.

(Magistrate, Town Court)

A magistrate in New Court commented that, "The current split is OK, although you could increase our powers to 12 months so that we kept more." A magistrate in City Court agreed.

Powers should be increased to 12 months. This would have the effect of us retaining more business.

(Magistrate, City Court)

Professional court participants provided a different perspective. The argument that extended powers would lead to more severe sentencing rather than a reduced committal rate was foremost in their minds.

You would only persuade magistrates to keep more cases by increasing their sentencing powers. But that would be dangerous as they might increase existing sentences rather than keep additional work.

(Chief Clerk, City Court)

The Clerk to the Justices in Town Court noted that any increase in powers would have "the potential to increase sentences." Most defence solicitors and the senior stipendiary magistrate in City Court emphasised the inability of magistrates to handle more serious cases. But one solicitor in City Court noted specifically that, "Magistrates would give longer sentences, but still wouldn't touch more serious matters."

Detailed examination of the principle of increased powers is outside the scope of this study. Mention is, however, appropriate as it illustrates the attitude of magistrates and lawyers towards the lower courts handling more serious cases. Only two professionals, both defence solicitors, indicated that an increase to 12 months would be beneficial.

I would be happy for the sentencing power to be increased to 12 months as long as the power to impose more by way of consecutive sentences went.

(Defence Solicitor, New Court)

Majority opinion was that magistrates' powers should remain at six months for one offence.

There should be no increase in sentencing powers. Magistrates would get carried away. Judges would be reticent to interfere on appeal as they wish to support the magistrates even if they wouldn't have given that sentence.

(Defence Solicitor, City Court)

Magistrates interviewed for this study were almost equally divided as to the desirability of increased sentencing powers. All saw it as a means of reducing the committal rate, but only some wanted the change. One group supported the idea without reservation.

It would be a good idea to increase our powers to 12 months. We could handle that safely with more training, and increased training is feasible.

(Magistrate, City Court)

A magistrate in a different court concurred.

Our powers should be increased to 12 months. This would increase our credibility and enable us to keep more cases. Magistrates might still opt out near to the threshold, but we would sentence more.

(Magistrate, Town Court)

A second group expressed a considerable degree of ambivalence.

12 months would enable us to deal with more cases and make life more interesting. But we must remain in our depth and increased powers would necessitate even more training.

(Magistrate, City Court)

A colleague agreed.

Increasing our powers to 12 months would reduce the level of business going to the Crown Court. But although I can see the argument for an increase I am equivocal about a change.

(Magistrate, City Court)

A significant minority was opposed to the idea altogether. A magistrate in Town Court concluded that powers should remain unchanged as "sentencing to 12 months is in a different league." A colleague in City Court concurred.

You would only change the split by raising our tariff to nine months. But I'm not happy with that as I'm worried at the quality and consistency of magistrates. The cons outweigh the pros so that the split should stay as it is.

(Magistrate, City Court)

5.2.3 Liaison with the Crown Court

This subsection considers the implications of an apparent lack of knowledge among magistrates and clerks of the sentencing patterns in their local Crown Court and whether or not enhanced awareness would influence the committal rate. The analysis in this chapter to date has suggested that the culture of the lay magistracy provides a prime explanation for the relative failure of recent reform measures to achieve their objective of a reduced committal rate. There is an argument, however, that one facet of that culture has the potential to facilitate that objective. This is an inherent respect among magistrates for the professional expertise and authority of judges and a desire not to be criticised by the higher judiciary. As one magistrate said, "Criticism from the judge and not the case's ultimate outcome is indicative of whether we were wrong."

The majority of magistrates expressed the opinion in interview that they would not commit defendants if they knew that their Crown Court was routinely sentencing such offenders within their powers. One said, "We simply get irritated if judges give less than six months when we commit." Magistrates are amenable to advice from the higher judiciary and all would appear to welcome greater feedback from the Crown Court. The inference is that an enhanced flow of sentencing knowledge between the two courts would have the potential to reduce the committal rate. The current position and its possible significance were summarised by a clerk.

There is limited knowledge of Crown Court sentences. Feedback would be a great help. We take our lead from the Crown Court attitude and might commit in ignorance of Crown Court sentences.

(Clerk, Town Court)

This comment is illuminating. Magistrates' courts take their lead from an attitude of which they would generally appear to have little or no knowledge.

An allocation system based primarily on sentencing powers presupposes an awareness on the part of magistrates or their clerks as to the level of sentence being passed in their Crown Court for the different categories of offence. If magistrates lack this knowledge they have to reach decisions on the sole basis of their interpretation of the appropriate sentence. As one magistrate said, "We should not try to guess at what sentence the Crown Court might impose." This situation will inevitably lead to defendants being sentenced within magistrates' powers if the Crown Court routinely adopts a more lenient attitude towards particular categories of offence. Interviews and statistics suggest that this happens. Twenty one defendants who were convicted at the Crown Court of offences of assault occasioning actual bodily harm or affray after City Court had declined jurisdiction were sentenced by judges within magistrates' powers. Only two were sentenced outside those powers for such offences.

One implication of these figures is that either the magistrates of City Court believe that defendants accused of offences of violence should be committed irrespective of the likely outcome or they have no idea of what befalls such offenders in their local Crown Court. It will be shown later in this chapter that there may be an element of truth in the former in certain circumstances. It is suggested that the latter would appear to be unquestionably true in all three sample courts. The knowledge of most magistrates and clerks of sentences passed by their Crown Court appears to be limited to that gleaned from reading reports in the local press or, until recently, from magistrates' occasional experience of sitting with judges on committals for sentence.³ As one magistrate said,

We have no knowledge of Crown Court sentences so that you never know whether you've made the right decision.

(Magistrate, Town Court)

It is suggested that the requirement is not simply to rectify this deficiency of factual information. Monthly lists of outcomes would achieve this. The need is for magistrates and clerks to be made aware of why their Crown Court has its particular sentencing pattern. The current position and the future requirement were summarised by one Clerk to the Justices.

I learn of Crown Court sentences through the papers, but there is no formal channel. I would welcome feedback. I would then be keen to analyse it and would want dialogue with the liaison judge.

(Chief Clerk, City Court)

This argument is supported by the situation in New Court, where case results are sent and placed in a folder in the magistrates' assembly room. Outcomes are interesting but not as such informative. One magistrate said:

I look at the folder in the retiring room with Crown Court sentences in. But this doesn't tell me why they sometimes give lower sentences.

(Magistrate, New Court)

A colleague concurred.

I will look at Crown Court sentences, but I don't know why they pass sentences we could have imposed.

(Magistrate, New Court)

This raises the question of whether or not such knowledge would bring about a change in magistrates' practices. It is suggested that the answer is that it would. The culture of the lay magistracy facilitates the authority and guidance of judges (Ashworth,2000:56) (see section 5.3.4). Advice from judges will not influence a culture that committal is appropriate whenever there is any doubt. Magistrates in general are, however, sensitive to criticism from the higher judiciary. There is at least an argument that they would be more amenable to retaining jurisdiction if judges had specifically indicated that particular types of offender were receiving sentences within their authority. This

argument is supported by the reported position in New Court relating to offences of supplying class B drugs to prison inmates. According to magistrates interviewed for this study, the advice of their previous liaison judge had been to retain such cases as he would impose a maximum sentence of three months' imprisonment. This advice was allegedly followed and it was indicated that such defendants were tried or sentenced by magistrates. The current liaison judge had stated that he wished to see all such offences. This advice had effected a change in decisions and the only two relevant defendants in this study had been committed to the Crown Court.

The argument was supported by interviews. One of the few things on which all court participants agreed was that more feedback from the Crown Court would be beneficial. In the opinion of one clerk, it would be "massively helpful." Numerous extracts from interviews could be given in illustration of this accord, but the text will be limited to three. The first comes from a magistrate.

I have very little knowledge of Crown Court sentences. There is a need for more liaison between the courts. We need to know why the Crown Court passes sentences we could have imposed.

(Magistrate, City Court)

The senior stipendiary magistrate at City Court was in agreement.

We never hear anything from the Crown Court. This is an unquestioned weakness. It would be a great help to know what was happening.

(Senior Stipendiary Magistrate, City Court)

A defence solicitor confirmed this when discussing committal for sentence.

It is not that magistrates commit too quickly, but that they are purely guided by clerks. But clerks don't seem to get feedback from the Crown Court. They simply use Stones.⁴ This leads to the Crown Court often passing sentences which the magistrates could have imposed.

(Defence Solicitor, City Court)

5.3 THE INFLUENCE OF COURT CULTURE

The objective in this section is to examine various aspects of the decision-making process for either way offences from the perspective of lay magistrates. This will assist in the provision of a comprehensive analysis of that process and facilitate consideration of local justice and individual court culture. It was suggested in the last chapter that variations existed in the committal rates of the three sample courts which could not be fully accounted for by different offence patterns or the number of charges faced by defendants. Part of the explanation for discrepancies had to be sought in different attitudes towards accepting or declining jurisdiction.

5.3.1 Cultural and individualistic factors

It was established in the Introduction that there is a debate as to whether cultural or individualistic factors are primarily generative of discrepancies between courts. Data collected for this study suggest that court culture provides the prime explanation for variations. They suggest that the traditional model of criminal justice, which views decisions as being the outcome of the facts of the case plus individual discretion plus the law, is far too restrictive (Paterson and Whittaker, 1995:264). It will be shown that the three sample courts have each established an identifiable pattern of decision-making. Individual decisions generally conformed to expectation within that particular court, while frequently being different from those which would have been anticipated in the other courts. All interviewed magistrates were asked to express their attitude towards determining mode of trial in "50-50" cases. These are cases in which the limited information supplied left them unable to come to any firm conclusion as to whether their sentencing powers would be adequate.

The findings of this exercise are significant as they reveal marked variations between the three sample courts. Five of the seven magistrates from City Court, which had the highest committal rate, expressed the opinion that they would decline jurisdiction if there was any doubt in their minds. Two quotes reflect this view. "If borderline you send to the Crown Court. Definitely."

If borderline, you err to the Crown Court. You must commit if there is a chance of the defendant getting more than six months.

(Magistrate, City Court)

Four of the six magistrates from New Court proffered a similar opinion. One noted, "If undecided, you err on the side of caution and commit." Another said,

You err on the side of the Crown Court in not guiltyies as the judge should determine.

(Magistrate, New Court)

By way of contrast, all six magistrates of Town Court, which had the lowest committal rate, indicated that they would accept jurisdiction in such cases. Opinion was reflected by the comment of one. "If it is borderline, keep it and give it a run." A more forceful viewpoint was expressed by a colleague.

If it is borderline you keep it. We should not waste time and money by sending a case to the Crown Court if we can deal with it.

(Magistrate, Town Court)

Observation and interviews revealed that the culture of the three sample courts displayed significant differences. Each court had a core philosophy perpetuated by tradition. The essential philosophy of the magistrates of Town Court is to retain jurisdiction and complete a case if that is at all possible. In the words of one magistrate previously quoted:

We should deal with a case if it is reasonably within our bounds in order to get it completed. Finalising a case is in the interests of the defendant, the victim and the system.

(Magistrate, Town Court)

The magistrates of City Court, and to a lesser extent those of New Court, adopt a significantly different attitude. They deem the Crown Court to be the sole arbiter of doubtful cases. One magistrate said, "If it needs to go to the Crown Court then it jolly well should go." According to their Chief Clerk, the culture of City Court is, "If in doubt send it up." These philosophies determine initial responses to procedural changes. Those which accord with a court's culture are adopted; those which do not remain of peripheral significance.

Committal statistics from the empirical study were presented to magistrates and their views sought as to the reasons for variations between courts. It can be argued that this line of questioning was somewhat academic for many of the interviewees. It will be shown in the next subsection that most magistrates deem the practices of other courts to be irrelevant because of an implicit belief in the concept of local justice. If other courts did not matter, comparison and the reasons for differences become inconsequential. It was, therefore, logical that explanations tended to focus on differences in offence patterns. One magistrate said, "Differences are brought about by types of offence." Other material reasons including training, advice from the liaison judge and the use of different criteria were tendered.

It was, however, the concept of different attitudes and traditions which arguably inspired the most illuminating explanations. A magistrate in Town Court expressed an opinion that appeared to reflect the views of all of her colleagues on that bench interviewed for this study.

The reason why our committal rate is lower is that we have a philosophy that there is no benefit in committing if we have sufficient powers. Perhaps we think we can deal with more cases.

(Magistrate, Town Court)

A minority of magistrates in City and New Courts acknowledged the relevance of different attitudes between benches. One concluded that,

Differences are brought about because the guidelines only scratch the surface in attaining consistency. Benches are hotbeds of local cultural thinking.

(Magistrate, City Court)

A number of clerks acknowledged the significance of "bench culture" or "different traditions." This conclusion was summarised by a clerk in Town Court. "Differences between courts are historic."

Court culture presents as being pivotal to an analysis of variations between courts. There was, by way of comparison, little evidence to suggest that the magistrates of the three sample courts were significantly different as individuals. The results of the mode of trial exercises (reproduced as Appendix 9) appeared to support this conclusion. The variations in actual committal rates might suggest that different responses were to be expected between courts. Yet the proportion of magistrates declining jurisdiction was almost identical in each of the courts. A second method adopted by this study to consider individual differences was an attempt to establish whether one court had a higher proportion of magistrates who presented as strong characters within the court setting. The chairperson of each lay bench was graded in the strength of their general approach on a scale between one and five (see court observation data form reproduced as Appendix 5). Data revealed that the chairperson was graded as being of above average strength in 34 per cent of sittings in Town Court and in 41 per cent of sittings in City Court. There were virtually no examples of magistrates being graded as below average strength in either court. The figure for above average strength of approach was lower in New Court at 14 per cent, but most of their chairpeople were graded as average, with very few below average.

These data suggest that the considerable differences in the committal rates of Town and City Courts could not be explained by virtue of one bench having stronger or weaker magistrates than the other. Indeed, the consequences of having strong magistrates appear to be dependent on the culture of a particular court. Strength in Town Court is interpreted by participants in that court as a willingness to accept jurisdiction.

Other courts might commit more because of a lack of confidence among magistrates. We have a lot of experienced magistrates who are not scared to make decisions.

(Defence Solicitor, Town Court)

However, strength in City and New Courts is reflected by magistrates having the courage to send defendants to the Crown Court. As one in the former court said, "We should not hesitate to commit if we consider that appropriate."

Court culture presents as the prime reason for decision-making patterns. It is not, however, to be assumed that the dominant philosophy met with the approval of all individual magistrates in a particular court. The vast majority of interviewed magistrates thought that their court got the allocation of business between the higher and lower courts about right. But there was a feeling expressed by two magistrates at City Court that magistrates needed to be encouraged and trained to accept jurisdiction somewhat more readily.

We should be bolder in accepting jurisdiction. There is a risk of a cop out. Our inability to take on more cases is the result of culture rather than guidelines. Magistrates could and should keep more.

(Magistrate, City Court)

The initiative of individual magistrates would appear to be constrained by court traditions (Tarling, 1979). The cultural "inability" of City Court to take on more cases would appear more influential than the opinion of individual magistrates, especially as they sit in groups of (usually) three, even though the person expressing the above viewpoint was a very senior member of the bench.

5.3.2 National consistency or local justice?

Before the issues arising from the various procedural stages are addressed, it is necessary to examine magistrates' perspectives of the relationship between the objective of consistency and the perceived requirement to meet local needs. A central argument of this thesis is that one reason why measures designed to achieve the two central policy objectives have only had a limited effect is that magistrates in general do not acknowledge the validity of those objectives. The aim of having less cases committed to the Crown Court has been checked by a virtual consensus of opinion among magistrates interviewed for this study that the current division of business was quite satisfactory in the interests of justice. This subsection will reveal that the enhancement of consistency between courts has been frustrated by an even stronger opinion that national consistency is of secondary importance to the perceived principal responsibility of meeting the needs of the local community.

There is broad agreement among academics, politicians and the media that national consistency should be a prime objective of the criminal justice system. The principle of equality before the law is one of the declared aspirations of most criminal justice systems (Ashworth,2000:198). One of the objectives of this study, to identify the reasons for disparity of committal rates between courts, implies that variations are undesirable as disparity literally means inequality. A reduction in discrepancies is viewed as a desirable aim as it would result in a fairer system and facilitate public confidence (Tarling, 1979:44). It might, therefore, appear as though enhancement of national consistency was one of the few genuinely agreed objectives of the criminal justice system. The problem with such a statement is that it is subject to significant qualification. It is subject to the concept of local justice.

Seventeen of the 19 interviewed lay magistrates expressed the opinion that consistency between courts was an appropriate theoretical objective. There were, however, only two instances of unequivocal support for this goal. One came from a magistrate in City Court. "Consistency matters a lot as justice should be balanced throughout the land." The second was expressed by a magistrate in Town Court. "We should be in line with the rest of the country." The other 15 all balanced their response with one of two interrelated qualifications which effectively rendered their support for the objective meaningless. The first was an acknowledgement that national consistency was impractical although, in the words of one member of the bench, "it would save magistrates from a bad press."

Consistency is a desirable but unobtainable goal. There will always be disparities because there is a local courtship.

(Magistrate, City Court)

This opinion was endorsed by a magistrate in a different court.

I would like more consistency, but it is not practical. What matters is what we see.

(Magistrate, New Court)

The tenor of this last statement leads to the second qualification, which in fact represented the majority opinion. The concept of local justice, of meeting the needs of one's own community, was paramount to the extent that any endorsement of national consistency was purely rhetorical. All six magistrates of New Court adopted the attitude that, in the words of one of them, "doing what was right" by their local community was afforded priority. A very experienced colleague said, "There is a national law, but you must know your own neighbourhood." Another magistrate noted:

There should be more consistency. But we are here to deal with [our town]5 and we need to look at local problems.

(Magistrate, New Court)

Majority opinion in Town and City Courts reflected the notion that local justice took precedence over national consistency.

Consistency is desirable, but it hasn't happened and at the end of the day we should be focusing on [our town].

(Magistrate, Town Court)

This viewpoint was shared by a magistrate in City Court.

Differences between courts do matter, but local circumstances affect judgement and our role first and foremost is to serve [our town].

(Magistrate, City Court)

This emphasis on local needs produced the two opinions that consistency had no theoretical relevance. A magistrate in New Court said, "Other courts don't matter as it's all about local justice." One in City Court commented, "Other courts do not matter as our function is to serve [our town]." One statement appeared to encapsulate the true feelings of most magistrates. "I am not interested in other magistrates' courts." The real significance of this statement, however, is that it was not made by a magistrate. The author was a Chief Clerk.

The majority of magistrates interviewed for this study deemed the practices and procedures of other courts to be irrelevant. "Why should I know about other courts?" was the response of one very experienced magistrate in Town Court. Even if it had been deemed relevant, magistrates would have been unable to learn from those practices as their personal knowledge of other courts appeared to be generally non-existent. Apart from an occasional observational visit as part of induction training prior to being sworn, only two of the 19 interviewed magistrates had been to any magistrates' court outside their own county. One magistrate expressed the majority opinion.

I have not attended any other courts since training and don't concern myself with what they do.

(Magistrate, New Court)

5.3.3 Procedure

One of the objectives of this study is to investigate the procedure adopted in either way cases. The perceived inconsistency of the lay magistracy has been a major source of criticism for a considerable number of years. Implicit in this criticism is an assumption that a professional system would enhance the level of consistency. There might, therefore, be an expectation that court procedure would display little variation as it has been said that the character of the court process is governed to a large extent by the values of professionals (Raine and Willson, 1993:181). This subsection will reveal that this expectation does not materialise, at least so far as the either way procedure is concerned.

Different procedures may be determined by the logistical need of busier courts to complete cases more quickly. As the Clerk to the Justices in City Court said, "Our priority is to clear the list." It will be suggested, however, that court culture provides the prime explanation for procedural differences. This study supports the findings of Morgan and Russell (2000:39) that there are significant cultural differences between courts in procedure and in the degree to which lay magistrates retire before reaching decisions. Professionals both influence and are constrained by court culture. There is little evidence to suggest that procedural differences in the three sample courts were occasioned by the professionals participating in those courts holding different beliefs. The clerks of Town Court recognise that they have little role to play in mode of trial as their magistrates have traditionally determined venue with a minimum of deliberation. It will be seen, however, that they did not necessarily desire to exert less influence than their counterparts in the other two courts. Differences were brought about by clerks and solicitors having to respect a culture of which they are a part.

Section 49 (4) of the Criminal Procedure and Investigations Act 1996 provides that the plea before venue procedure is to commence with the court explaining "to the accused in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty." It then has to explain the consequences of a guilty indication. A form of wording suggested by Leng and Taylor (1996) is reproduced in Appendix 2. In practice, the length and wording of this "ordinary language" and the person making the explanation varies between courts and even within the same court. In City Court it is read from a card by the chairperson of the lay bench or by the stipendiary magistrate. In the other two courts the clerk proffers this information in a manner which varied considerably between clerks. Most of those in New Court and some of those in Town Court offered a lengthy exposition. A minority, primarily but not exclusively in Town Court, contented themselves with one sentence. "Will you indicate whether you are guilty or not guilty."

This variation is symptomatic of procedural differences. It might be argued, however, that its practical effect is negligible if it could be assumed that defendants who have seen a solicitor would be aware of the procedure and the implications of the various options. Only two defendants in the observation sample of 340 cases had not sought legal advice. Both of these admitted minor offences for which they were fined. A total of 333 were represented in court, while a further five stated that they had consulted a solicitor. In the absence of post-hearing interviews, this study has not tested whether or not the assumption of defendant knowledge is justified. It is, however, arguably naive in view of previous findings that defendants had little true understanding of what choice of venue entailed (Bottoms and McClean, 1976; McConville et al., 1994). Were this to remain the position, the truncated exposition would violate the principle of an "ordinary language" explanation.

The initial explanation given to defendants varied between courts and between individual clerks within the same court. The mode of trial procedure following a not guilty indication only varied significantly between courts. It has been established that all court participants agreed that the majority of mode decisions were obvious. Procedure in these routine cases after indication of a not guilty plea was broadly similar. The Crown Prosecution Service lawyer outlined the facts and made a venue recommendation. The defence solicitor either agreed with that recommendation or made no representations. The magistrates then usually reached a decision with little more than a glance at each other. Seventy per cent of decisions involving sole defendants were made within five minutes of the accused entering the dock.

The quantity of information presented to magistrates in borderline cases varied considerably between courts. In Town and City Courts this tended to be limited to the prosecution and defence representations noted above. Just occasionally the defence solicitor challenged the venue recommendation (see Table 6.3). In New Court there was a practice for reported cases to be read in open court on occasions when the clerk or, rarely, one of the lawyers deemed the decision to be problematic.⁴ This happened in five denied cases from an observation sample of 36. Four of these involved allegations of violence, the bench accepting jurisdiction in two and declining it in the other two. The fifth (case 142) can be compared with a factually similar case (031) in Town Court to illustrate use of this practice in New Court alone. Male defendants were charged with theft from an employer. The allegation in Town Court was of theft by a public house manager of money and stock to a value of £4,637.50. The one in New Court was of stealing computer equipment valued at £5,600 from an employer's storeroom. In both cases the CPS and defence agreed that summary trial was suitable. No reported cases were read out in Town Court.

The bench there accepted jurisdiction without retiring, the total case time being four minutes. In the latter case, the clerk of New Court read out three cases of theft involving breach of a relationship of trust, all three defendants being sentenced to more than six months' imprisonment. The magistrates retired before accepting jurisdiction, the total case time being 18 minutes.

The three clerks interviewed from New Court were all of the opinion that bringing reported cases to the bench's attention was "good practice", and indicated that all clerks at that court were trained to follow this procedure. The interviewed magistrates of New Court unanimously approved of the practice. One said, "The reading of cases is very important and very helpful." Another commented, "The clerk's role is to draw attention to sentencing precedents." There are, however, three potential problems with the practice. The first is that it takes no account of sentencing patterns in the local Crown Court which would hear the case if jurisdiction was declined. The second is that cases tend to be reported in national publications because there is something distinct about them. They do not as a rule reflect the run-of-the-mill offences which present themselves to magistrates on a daily basis. Yet the criterion for reading out reported cases in New Court appeared to be that the case before the court was borderline and not that it was unusual. The third potential problem is that the cases cited may differ in some material factual aspect from the case being determined. An admitted case (118) from the observation sample illustrates this argument. The 18-year-old male defendant pleaded guilty to a charge of having unlawful sexual intercourse on one occasion with a girl aged 13. The CPS lawyer, with the defence's prior knowledge, referred to two cases. Both of these related to defendants in their thirties although it is recognised that age differential is an aggravating factor in such cases. The bench ordered a report and eventually made a Combination Order.

The danger is that magistrates, when advised of sentences passed in relation to more serious offences, will fail to make the necessary distinction and commit a defendant for trial or sentence without due consideration of the facts of the case before them. The one proviso stipulated by defence solicitors in New Court to a practice of which they generally approved was that quoting more serious cases could "plant seeds in magistrates' minds." There was no evidence from the observed cases to suggest that the magistrates of New Court fell into this potential trap. It is necessary to stress, however, that there is a counter argument to the one of citing cases as being good practice. This argument may be one reason why the clerks at the other two sample courts did not adopt the practice. Pressure of business may have influenced the procedure in City Court. Its lack of use in Town Court could not be attributed to time constraints as its six courts only sat for 76 per cent of their target hours during the period which included this empirical study (Annual Report, 1999-2000).

The findings of this study suggest, however, that the prime reason for not adopting the practice is that it would prove unacceptable to a culture which views the mode of trial procedure as benefiting from being simple and brief. Cultural factors render it unlikely that the lengthier procedure favoured by New Court could be imposed on the magistrates of Town or City Courts whatever may be the preferences of professionals at any given point in time. One magistrate in City Court said, "A lengthier procedure would be counter-productive." The traditions of the sample courts in relation to the mode procedure resulted in markedly different use by magistrates of their clerk for advice and in the propensity of the bench to retire. Table 5.3 below indicates the number of consultations with the clerk in each court and the number of cases in which each bench retired.

Table 5.3 Use of clerk for advice and number of occasions on which the bench retired by court

	Clerk advised in open court		Bench retired		Clerk advised in retirement		Total Courts
	(n=)	(%)	(n=)	(%)	(n=)	(%)	(n=)
Town Court	1	2	1	2	1	2	57
New Court	5	17	8	28	7	24	29
City Court:Lay	6	17	3	8	2	6	36
Total	12	10	12	10	10	8	122

Table 5.3 shows that the magistrates of Town and City Courts rarely retired before reaching a mode decision. Indeed, the former hardly ever did so. By way of contrast, the magistrates of New Court retired in 28 per cent of cases. It may be logical that those magistrates were more likely to retire given that they were presented with more information in borderline cases. They were, however, also more likely to retire when no reported cases had been read out. There was no indication from case analysis that this variation could be explained by New Court dealing with a higher proportion of borderline cases than the other two courts. There were, for example, four cases in Town Court when the bench did not retire after the defence solicitor had challenged the recommendation of the Crown. The bench in New Court retired in all such cases. Figures suggest that the magistrates of New Court consulted with their clerk in all, or at least virtually all, cases which were not deemed obvious. The advice of the clerk was only sought in two cases out of 57 in Town Court. It is suggested that court culture provides the prime explanation for this differential use. There was nothing to indicate that the clerks of Town Court desired a more peripheral role than their counterparts in New Court. Indeed, one stated in interview that it should be compulsory for magistrates to consult with their clerk before announcing a mode decision.

5.3.4 Policies

This subsection examines the existence of formal and informal bench policies and magistrates' attitudes towards their finality. There are, as a generalisation, two forms of policy. The first comprises formal advice from the liaison judge that jurisdiction should be declined for certain categories of offence. The typical example is dwelling house burglary. The second, which tend to be informal, are policies initiated by individual benches in response to behaviour perceived to be causing concern in the local community. The view has been expressed that some courts may have a policy of committing all residential burglaries to the Crown Court irrespective of the particular facts and in breach of the national criterion of sentencing powers (Criminal Justice Consultative Council, 1993:10). Data obtained in this study may appear to support this view. There were no cases in which jurisdiction was accepted for dwelling house burglaries in the observation sample, and only three in the registers, one from each court. It can, however, be argued that policies relating to residential burglaries have little significant effect either on committal rates or on variations in rates between courts as most of these offences, other than opportunistic ones, would be committed in any event on the sentencing test.

The second category of policy may have a more significant effect on variations in committal rates between courts. It will, for example, be apparent that a bench decision to commit all charges of aggravated vehicle taking to the Crown Court because the offence was prevalent has the potential to increase the committal rate in that court. One magistrate indicated that there had recently been such a policy in City Court. Indeed, City Court was the only one of the three sample courts to display, in the words of a solicitor, the "protectionist element. This is our city and we won't tolerate this."

The existence of a policy or general consensus among magistrates can be illustrated by case 206. The male defendant denied a charge of assault occasioning actual bodily harm. An argument in a public house continued in the street at closing time. Words turned to violence and the defendant threw three punches at the victim, causing cuts near to his eye which required two stitches. The CPS and defence agreed that it was suitable for summary trial. The magistrates declined jurisdiction despite the absence of any aggravating features. The chairman said, "The bench views this assault very seriously as it took place in the city centre at night." A clerk in City Court advised that committing such cases was "informal bench policy." The defendant received a conditional discharge in the Crown Court after admitting common assault.

Magistrates have a firm belief that each case should be determined on its merits. The guidelines endorse this principle. "They are not intended to impinge upon a magistrate's duty to consider each case individually and on its own particular facts" (Pg.1). The presumption in favour of summary trial applies to dwelling house burglaries (although not to the supply of drugs) in the same way as it applies to shoplifting. The existence of policies interferes with both the principle and the presumption. The perception among court participants that they exist and are binding can, however, be illustrated by case 302 in City Court in which jurisdiction was declined for a charge of possessing heroin with intent to supply. The police found 0.22 grams of the drug at the home of the female defendant, who allegedly indicated in interview that she was going to give some to another lady. The CPS acknowledged that it was a small amount of drugs and that there was no evidence of a profit motive, but concluded that it was not suitable for summary trial. The defence solicitor noted that it was the least possible amount to support a charge of supply, "but I am aware of the court's policy." He did not take his address further.

It would appear that there are cultural differences between courts in the extent of the existence of policies and in magistrates' attitudes as to whether or not they are binding. The culture of the lay magistracy determines that the overriding attitude to be adopted towards advice from liaison judges is that it should be treated as highly influential without being totally binding (Ashworth, 2000:56-57). The degree of potential influence of the liaison judge is, however, prescribed by court culture. The magistrates of Town Court revealed a greater willingness to accept jurisdiction by displaying a more independent attitude towards guidance than did their colleagues in City Court.

City Court presented as being the most likely to have policies and to treat them as binding. All seven lay magistrates interviewed at that court acknowledged the existence of bench policies. Although one clerk indicated that no policy "was carved in a tablet of stone," six of the seven gave the impression that they were at the very least almost binding.

There are bench policies. Dwelling burglary when the occupier is in and violence in the town centre will be committed.

(Magistrate, City Court)

A colleague concurred.

There are bench policies. When aggravated vehicle taking was prevalent it was likely to be committed.

(Magistrate, City Court)

A clerk broadly agreed.

There are policies. Dwelling burglaries are rarely accepted. Racially aggravated offences are topical and may get committed.

(Clerk, City Court)

These magistrates expressed the strongest opinion that any advice received from the liaison judge would be followed. As one said, "His word goes." This was subject to one dissenting voice. "We take note of the liaison judge's guidance, but his advice is not the be all and end all as cases are individual."

The magistrates of New Court were unanimous that dwelling house burglaries would almost invariably be sent to the Crown Court, while being in agreement that, in the words of one of them, there was "no blanket policy" in this respect. If their expressed attitude was more flexible than that of their colleagues in City Court, they still ignored the presumption in favour of summary trial and started from a position of declining jurisdiction.

You start dwelling burglaries at the Crown Court and then work backwards, but you are more than likely to commit.

(Magistrate, New Court)

The impression gained, however, was that judicial guidance in this court was probably more definitive than the magistrates were willing to acknowledge.

We get training from the liaison judge. He might ask that certain offences, i.e., domestic burglaries, should go to the Crown Court. You would have difficulty to persuade me to accept jurisdiction for a dwelling burglary.

(Magistrate, New Court)

The Chief Clerk denied the existence of any policies. However, another clerk acknowledged that, "There is overt and covert policy. There is an unsaid policy that domestic burglaries will be committed."

The magistrates of Town Court pride themselves on a philosophy of independence. Their attitude, as expressed in interview, was quite significantly different. Three of them denied the existence of any policies at all. In the words of one, "There are no real policies. You always look at individual cases." The three who acknowledged that dwelling house burglaries, and no other offences, were more likely to go to the Crown Court indicated that no policy was binding.

We have received strong guidance that dwelling burglaries should be committed, but you still consider each case on the facts.

(Magistrate, Town Court)

The magistrates of this court had an undoubted respect for their liaison judge, as will be discussed in the next chapter. But they qualified this respect by indicating that his advice was not invariably followed. "His opinion and guidance are respected, but he is not God, nor would he want to be."

The liaison judge assists with training and tells us what is acceptable to keep. He is thus relevant, but we don't bow before him. There is a strong philosophy in this court that each case is an individual case.

(Magistrate, Town Court)

The attitude of the Clerk to the Justices, responsible for much of the training programme, is illuminating in this respect.

The law requires that every case must be determined on its merits. Dwelling burglaries will normally be committed because of the sentencing tariff. ... But our magistrates are trained that they must make decisions and have regularly demonstrated a mind of their own.

(Chief Clerk, Town Court)

Data collected for this study suggest that defendants may be committed to the Crown Court for trial as a consequence of policies relating to certain categories of offence or, in City Court, the prevalence of particular behaviour within the local area at that time irrespective of sentencing powers. This raises the issue of whether formal or informal policies also exist in relation to committal for sentence. The general position stipulated by statute is that the criterion for committal for sentence is whether magistrates believe that the offence is so serious that greater punishment should be inflicted than they have power to impose.⁶ It is apparent, however, that the committal rate will increase if magistrates commit some defendants for sentence even though they considered their powers to be sufficient. Variations between courts will be affected if one court adopts this practice while another does not.

The majority of magistrates interviewed for this study indicated that sentencing powers should be, and were in practice, the only consideration when deciding whether or not to commit a defendant for sentence. In particular, all six of the magistrates of Town Court expressed this opinion. In the words of one, "There are no considerations other than sentencing powers." There were, however, three limited exceptions to this opinion expressed by magistrates of City and New Courts. The first was the potential for the liaison judge to make strong recommendations.

The sentencing power is the only consideration unless the liaison judge has said he wants to see certain offences.

(Magistrate, City Court)

The current liaison judge to New Court had apparently indicated that the supply of drugs to prisoners should always be committed for sentence. Magistrates confirmed this advice in interview and complied with it in the only two relevant cases in this study. They may have been somewhat perplexed to learn that both of these offenders were sentenced to three months' imprisonment.

The second exception was the concept of committing offenders in order to stress the gravity of their behaviour. One magistrate in New Court said, "You might commit someone with considerable precons to make them realise the gravity of their own position." This was expressed more bluntly by a magistrate in City Court. "I might make an example of an offender to teach him a lesson." The third exception, noted by two magistrates, was prevalence of a particular offence in their area. It may be, however, that magistrates underplayed the significance of these exceptions. The true position was arguably more accurately summarised by a clerk in City Court.

The prevalence of an offence could increase the sentencing norm. There should be no other considerations than sentencing powers, but there may be in practice.

(Clerk, City Court)

5.3.5 Acceptance of the prosecution case

This subsection examines the attitudes of magistrates to the advice given in the Guidelines to accept the prosecution version of the facts when determining mode of trial. There was a consensus of opinion among interviewed magistrates that the starting point for discussion of mode of trial was the gravity of the alleged offence and whether or not the court would have adequate sentencing powers in the event of a conviction. This raises the question of how to determine the issue of gravity. The fact that the defendant has not admitted guilt implies that there will be two sides to the story. The prosecution alleges that it was an unprovoked attack which involved punching and kicking. The defence states that it was an act of self-defence which only comprised one punch. The difference in versions is not merely consequential. It is potentially decisive to the magistrates' venue decision.

A case (321) from the observation sample in which the male defendant pleaded guilty to charges of assault occasioning actual bodily harm and theft illustrates this potential. The CPS alleged an unprovoked attack by a young Asian on a white student outside a night club in the early hours, during which two punches were thrown at the latter's face causing a black eye and profuse bleeding from various cuts. The victim handed over his credit card so that the defendant would go away. The defence claimed that their client had been subjected to considerable racial abuse inside the club, and only pleaded guilty because he acknowledged that he had "gone over the top." The stipendiary magistrate stated that the difference in versions was fundamental to venue. The prosecution outline would involve committal for sentence. Acceptance of the defence version might result in the avoidance of a custodial sentence altogether. A Newton hearing was ordered to establish the facts.⁷

Magistrates have to make immediate jurisdictional decisions if guilt is denied. They cannot adjourn for a "trial within a trial". Had the defendant in the above example entered a not guilty indication, the magistrates would have had to decide for the purposes of determining gravity and, hence, jurisdiction whether to accept the prosecution version of events, the defence contention or a compromise position somewhere between the two. The advice given in the Guidelines is quite clear. They should assume for the purpose of determining mode of trial that the prosecution version of the facts is correct. The jurisdictional consequences of adherence to this advice can be illustrated by case 329 in which the male defendant denied two charges of assault occasioning actual bodily harm. The CPS alleged that attacks on male and female strangers in the early hours, causing facial bruising, swelling and cuts, appeared to be unprovoked, but were suitable for summary trial as no weapon had been used. The defence concurred, alleging that the victims might have colluded in their evidence. The stipendiary magistrate declined jurisdiction on the grounds that sentencing powers would be inadequate "were the prosecution to prove the case as alleged." The defendant was fined a total of £1,000 when he admitted guilt before the Crown Court.

The advice is clear. The question remains whether or not all courts adhere to this guidance. The answer would appear to be that they do not and that interpretation of guidance is influenced by local culture (Moxon and Hedderman, 1994:101). Professionals experience little difficulty with the advice. Stipendiary magistrates acknowledged its validity in interview and appeared to follow it in court in all observed cases. All nine clerks interviewed for this study agreed that the prosecution case should be taken at its highest. In the opinion of the Clerk to the Justices in Town Court, "The prosecution test is the easiest approach as it provides an element of certainty." Two defence solicitors

thought that equal weight should be given to their arguments. One said,

The procedure should be balanced by hearing defence arguments so that equal weight is given to both sides.

(Defence Solicitor, City Court)

The other seven supported the prosecution test as being pragmatically correct. "Magistrates must approach the adequacy of their sentencing powers on the basis of the prosecution case at its highest." Another commented:

Taking the prosecution case at its highest is a valid test. Otherwise defence lawyers might take advantage of the CPS advocate's lack of knowledge of the file.

(Defence Solicitor, New Court)

There was, however, no consensus of opinion among lay magistrates. The significance of the findings was that responses given in interview revealed differences between courts. Magistrates from New and City Courts recognised that it was appropriate to accept the prosecution version of events. One in New Court said, "You take as read what the prosecutor says is true." This view was shared by a magistrate in City Court. "The issue is whether our powers are sufficient taking the evidence at its worst." This opinion was unanimous in those courts, although two magistrates indicated that they would prefer to hear more from the defence.

I would prefer it if the defence was encouraged to put forward offence mitigation so that we did not have to rely solely on the CPS.

(Magistrate, New Court)

The magistrates of Town Court, with a tradition of accepting jurisdiction if at all possible, adopted a markedly different attitude and did not appear to take as read the validity of the CPS outline. Only two of the six magistrates interviewed for this study indicated adherence to the guideline. Even these two expressed a degree of reservation.

On the whole we accept the prosecution version at this stage as the CPS has conformity of standards.

(Magistrate, Town Court)

Majority opinion differed. In the words of one magistrate:

You tend to look at what's going to happen in reality rather than just take the prosecution case at its highest.

(Magistrate, Town Court)

This was reiterated with a slightly different emphasis by a colleague.

You take the prosecution case as it is, but exercise caution as we know there will be some mitigation.

(Magistrate, Town Court)

A third magistrate noted that, "You look at the circumstances generally rather than take the prosecution case at its highest."

It has to be acknowledged that the attitudes expressed by the magistrates of Town Court could not be empirically verified by court observation as lay magistrates rarely gave any reasons for their mode decisions. Clerks and solicitors practising in Town Court did, however, believe that their bench sometimes mitigated the prosecution case.

Magistrates don't always take the case at its highest. They can use a crystal ball approach.

(Clerk, Town Court)

A solicitor agreed.

Most of our magistrates don't abide by the prosecution test, preferring a grapeshot approach.

(Defence Solicitor, Town Court)

There was one observed case in Town Court (007) which might give credence to the argument that its magistrates did not always abide by the prosecution test. The male defendant denied a charge of wounding. The

prosecution accepted that the female victim struck her partner at home with a pick axe handle during an argument when both had been drinking. It was alleged that the defendant retaliated by lashing out with a broken mug, causing a jagged cut to the side of her face which required 36 stitches. The CPS concluded that the bench might consider its sentencing powers to be insufficient. The defence solicitor noted that the relationship was volatile and emphasised the degree of provocation. The magistrates accepted jurisdiction without any discussion. The reasons for the decision cannot be proven in the absence of any comment by the chairlady beyond, "We accept jurisdiction." It may, however, have been an instance where the bench considered "what's going to happen in reality" as the prosecution case at its highest presented as being of quite considerable gravity. If so, the magistrates were proven justified by subsequent events, the charge eventually being withdrawn.

This extremely liberal interpretation apparently given in Town Court to the advice to accept the prosecution outline for venue purposes has the potential to provide a partial explanation for the lower committal rate in that court. It will be apparent that a court would be more amenable to retaining a case if it mitigated the severity of the accusation before determining mode of trial. There is, however, an argument that any lower committal rate obtained by this interpretation is partly achieved at the expense of consistency between courts. The assumption of the validity of the prosecution version of the facts has an objective of consistency of decision-making. The magistrates of Town Court render themselves more likely to accept jurisdiction by tending "to look at what's going to happen in reality" and knowing that "there will be some mitigation." However, magistrates in different courts do not always agree on the gravity of particular behaviour in the first place. Adoption of "a crystal ball approach" can only serve to increase disparities.

5.3.6 Sentence discount

This subsection examines application of the sentence discount in borderline cases and magistrates' willingness to use their full statutory sentencing powers. Attainment of the policy objective of the plea before venue provisions was partially dependent on the willingness of magistrates to apply the sentence discount in borderline cases. Current criteria provide that magistrates should decline jurisdiction if they believe that the sentencing tariff for a defendant who has denied guilt is nine months' imprisonment. Were that defendant to have admitted guilt at the first hearing, a discount of one third can be applied and the magistrates can finalise the case by using their maximum powers (Watkins et al., 1998:35). This position was envisaged by the consultation document.

(M)agistrates may consider that a discount of one third for an early guilty plea in a case which might otherwise deserve a sentence of between six and nine months might make that case suitable for their retention.

(Home Office, 1995:para.26)

It was subsequently endorsed by the President of Queen's Bench Division.⁸

If having made an appropriate discount a magistrates' court concludes that an appropriate sentence can be imposed if it uses its sentencing powers to the full it should adopt that course.

(Lord Justice Kennedy in R.v.Warley Justices, 1999, 1 Cr.App.R.(S) 156 at 162)

The research of Henham (2000) suggested that use of the sentence discount was inconsistent as many magistrates remained ambivalent towards a concept which was only formally introduced in the lower courts by the Magistrates' Association sentencing guidelines of 1993. The implication is that application of the discount in borderline cases so as to sentence defendants

who would previously have been committed to the Crown Court for trial would be unlikely, as yet, to have become part of the culture of the lay magistracy. This would, indeed, appear to have initially been the case in all three sample courts. Interviews suggested, however, that the discount principle in borderline cases was gradually becoming part of the culture of Town and New Courts, while the magistrates of City Court remained altogether more equivocal.

The three Chief Clerks encouraged magistrates to apply the sentence discount so as to finalise cases.

You can give six months for a nine month tariff, but you must state that credit has been given.

(Chief Clerk, New Court)

It was, however, acknowledged that the attitude of magistrates towards application of the discount in borderline cases had been, and in some instances still was, ambivalent.

You can give six months after credit. The magistrates have been trained hard on this policy and it is beginning to become part of their culture.

(Chief Clerk, Town Court)

The Clerk to the Justices in City Court noted:

The discount should be applied so that six months can be given on a guilty plea. Magistrates follow this on occasions, but not invariably.

(Chief Clerk, City Court)

The responses of magistrates in interview provided evidence of cultural differences between the courts. In accordance with their respective traditions, the magistrates of Town Court favoured an approach which enabled them to complete cases, while those of City Court considered committal to be appropriate whenever there was any doubt. All six magistrates of Town Court were clear that a sentence of six months' imprisonment could be imposed after

giving credit for the plea.

You can give six months with credit stated. That is the advice of our Chief Clerk. I'm surprised that some courts don't.

(Magistrate, Town Court)

A colleague concurred.

You can give six months with credit. We'd sentence him and specifically state that we've taken account of your early guilty plea.

(Magistrate, Town Court)

Five of the magistrates of New Court agreed, significantly using terminology which was almost identical to that of their Chief Clerk quoted above.

You can give six months after the discount, but must indicate that credit has been given for the guilty plea.

Magistrate, New Court)

The sixth magistrate in New Court was emphatically opposed to the idea. "You can't give six months on a guilty plea. It has to go to the Crown Court."

By way of contrast, only two of the seven magistrates of City Court were unequivocal in adopting this concept. One identified their predicament.

The discount at the top end presents a difficult problem for magistrates. They latch on to the idea of six months being the maximum before the discount and might well commit.

(Magistrate, City Court)

Indeed they might. As one emphatically said:

I would always send a defendant to the Crown Court if the tariff was over six months. The starting point is the sentence, not the discounted sentence.

(Magistrate, City Court)

Application of the sentence discount in borderline cases only represents the first step towards achieving a policy objective of having more cases completed in the lower court. Magistrates then have to be prepared to impose

the maximum sentence. It will be apparent that the effect of the discount on committal rates will be minimised if those magistrates who acknowledge its availability still commit to the Crown Court for sentence because they are unwilling to impose the maximum penalty. Data collected in this study suggest that some magistrates, possibly many, are reluctant to use their full statutory powers.

Data collected in the observation and register samples reveal that only eight per cent of defendants (11 from 142) who were sentenced by magistrates to a term of imprisonment (other than a nominal one day's detention) received the maximum period of six months. This average figure does, however, conceal differences between the courts. Town Court, with a rate of 15 per cent, used its maximum powers more often than the other two sample courts, the rates in New and City Courts being five and six per cent respectively. These statistics by themselves do not conclusively prove anything, especially as important considerations such as previous convictions were not available from court registers. It may be that there were only a few cases which merited a sentence of six months' imprisonment. There is, however, an inference that magistrates were reluctant to use their full sentencing powers and opted instead to commit the defendant to the Crown Court. It was indicated above that there were only 11 cases in which a sentence of six months' imprisonment was imposed by magistrates. By way of comparison, Table 4.5 (section 4.2) revealed that 97 defendants were committed to the Crown Court for sentence, even though it has been established that defendants in the three sample courts tended to decline to indicate a plea in genuinely serious cases. The argument that magistrates may commit rather than use their full powers is reinforced by data that almost 20 per cent of defendants sentenced at the Crown Court within magistrates' powers received six months' imprisonment.

Statistical data revealed that the magistrates of Town Court used their maximum powers more frequently in this study than did those in the other two courts. Responses given in interview, however, implied that there was a general reluctance among magistrates in all three sample courts to impose the maximum sentence. The majority of interviewed clerks and solicitors noted that imposition of the maximum penalty was rare and that magistrates were inclined to "opt out" near to their threshold. A clerk in City Court said, "It is much easier to send to the Crown Court than to prison." This view was shared by a solicitor in Town Court. "Our magistrates tend to commit rather than impose six months with credit." A clerk in New Court commented, "Magistrates find it hard to go beyond six months when there are two offences."

It was, however, the magistrates themselves who acknowledged most openly that there was a reluctance to impose a sentence of six months' imprisonment. Nine of those interviewed, from all three courts, specifically commented that it was rare, or even for them unknown, to impose the maximum penalty. One said,

We can give six months after credit, but don't usually sentence to six months.

(Magistrate, Town Court)

This view was endorsed by a colleague in the same court.

We can sentence to six months with credit. But we very rarely sentence to six months.

(Magistrate, Town Court)

Two magistrates in City Court, with 22 years' service on the bench between them, indicated that they had never imposed the maximum sentence. One said, "I'm not sure about the discount, but I've certainly never sentenced to six months." Another magistrate in that court commented, "You can give six months after the discount, but we are reluctant to do so."

5.4 CONCLUSION

The central argument advanced in the first two sections of this chapter was that attempts to change court procedure cannot afford to underestimate the strength of the culture of the lay magistracy. It was suggested in the first section that reform measures designed to achieve the dominant policy objective of a lower committal rate had only had a limited impact because they had not become part of that culture. One reason for this was that the majority of magistrates did not appear to acknowledge the need for reform. General opinion was that the current division of business between the higher and lower courts was quite satisfactory. There was a feeling that recent changes had been motivated by political expediency rather than by the interests of justice. It was suggested in the second section that the traditions of the lay magistracy had similar implications for potential reforms such as increased sentencing powers. It was, however, argued that enhanced knowledge of Crown Court sentencing patterns might influence the committal rate.

It was argued that magistrates continue to view the initial jurisdictional decision in denied cases as being essentially final. The concept that a decision to accept jurisdiction is a fluid decision has not become part of the culture of the lay magistracy. This concern for finality encourages a cautious approach towards retaining cases at mode of trial. It has arguably even more significant connotations for the procedure following a guilty plea. Magistrates appear to regard a decision to order reports as equating to an acceptance of jurisdiction. It was argued that the philosophy behind the plea before venue provisions required magistrates to postpone making any decision on committal, unless that decision was obvious, until all information had been considered. This necessitated the ordering of reports in cases which appeared

on the information available at plea before venue to be somewhat outside their sentencing powers. The inevitable consequence was that more defendants would have to be committed for sentence after reading those reports. This scenario would appear to be at variance with the culture of the lay bench.

The central argument advanced in the third section of the chapter was that court culture provides the prime explanation for variations in committal rates between courts. The core philosophy of the magistrates of Town Court, which had the lowest committal rate, was that it was a waste of time and money to send a case to the Crown Court unless that course of action was really necessary. The markedly different culture of City Court, which had the highest rate, was correctly summarised by their Chief Clerk as being, "If in doubt send it up." The culture of New Court was less distinct, probably because it comprises the comparatively recent amalgamation of a number of courts. Its culture appeared to dictate a cautious approach to venue decisions with a fairly high committal rate for trial.

It would appear, however, that variations between courts are not a matter of concern for most magistrates. It was suggested that the enhancement of consistency between courts had been frustrated by a strong opinion among the lay bench that national consistency is of secondary importance to the perceived principal responsibility of meeting the needs of the local community whom they represented and served. There were considerable differences in the committal rates of the three sample courts. Yet the majority of magistrates believed that they got the division of business between the higher and lower courts about right. The magistrates of City and New Courts were just as convinced that judges should be the sole arbiter of doubtful cases as the magistrates of Town Court were that they should complete borderline cases.

End Notes

¹ Court participants did not appear to interpret this as use of the power to commit for sentence. It was viewed as a pragmatic means of keeping all matters together.

² The ordering of reports is significant as lay magistrates rarely sentence an offender to a term of imprisonment, except for a nominal one day's detention, without first considering a pre-sentence report. There were no examples of them doing so in the empirical study. There was one case in which a stipendiary magistrate imposed a suspended sentence of imprisonment without a report.

³ Magistrates had traditionally sat in the higher court on appeals and committals for sentence from their court. Section 74 (1) of the Supreme Court Act 1981 provided that such proceedings should be heard in the Crown Court by a Judge (or Recorder) sitting with not less than two nor more than four justices of the peace. The introduction of plea before venue in 1997 resulted in a considerable increase in the number of cases committed for sentence and, therefore, an increase in the amount of time spent by magistrates in the Crown Court. Problems in securing the attendance of sufficient magistrates in some parts of the country led to a consultation paper entitled "Magistrates sitting as Judges in the Crown Court" being produced by the Lord Chancellor's Department in August 1998. The outcome was the provision in section 79 of the Access to Justice Act 1999 that magistrates should no longer sit on committals for sentence, although the requirement for them to sit on appeals remains. The consequence is that only a very small proportion of magistrates now participate in Crown Court proceedings.

⁴ Stone's Justices' Manual, an annual publication, is the work usually consulted by court clerks on procedural matters. When citing reported cases in court, clerks tended to use Thomas's Current Sentencing Practice, a regularly revised looseleaf publication.

⁵ There are inevitably gaps in the text when interviewees referred to the name of their own town as it was a condition of providing facilities to the researcher that the three sample courts retained their anonymity.

⁶ Section 38 of the Magistrates' Courts Act 1980, which provided the general position at the date of empirical study, is reproduced in Appendix 1. There was an exception to the general position whereby an offender who had pleaded guilty could be committed for sentence even though the offence was not so serious that punishment in excess of magistrates' powers should be imposed if he/she had already been committed for trial for one or more related offences. This provision, enacted by section 51 of the Crime (Sentences) Act 1997 now replaced by section 4 of the Powers of Criminal Courts (Sentencing) Act 2000, was irrelevant to this study as there was no example of it in the guilty plea sample.

7 Where there is a dispute about the factual basis of a guilty plea, there is provision for the court to hold a post-conviction hearing to determine the issue. This is known as a Newton hearing after the case of Newton (1982, 4 Cr. App.R. 388). It involves the hearing of evidence from both sides, in general applying the same rules of evidence as would apply at trial. The court then determines the issue and this becomes the basis for sentence (Ashworth, 1998:276). Magistrates should conduct this hearing if the decision as to whether or not to commit a defendant for sentence depends on its outcome. If the defendant will be committed irrespective of the outcome, the case should be sent to the Crown Court to hold the Newton hearing (R.v.Warley Justices, 1999, 1 Cr.App.R. (S) 156).

8 The full relevant section of Lord Justice Kennedy's judgement reads: Obviously, as it seems to me, the magistrates' court must have regard to the discount to be granted on a plea of guilty when deciding whether the punishment which it would have power to inflict for any offence would be adequate. ... If having made an appropriate discount a magistrates' court concludes that an appropriate sentence can be imposed if it uses its sentencing powers to the full it should adopt that course, but it would be helpful if in such a case the court were to indicate that it has only been able to retain jurisdiction because it has in fact made allowance for the plea of guilty and for any other relevant mitigating factors.
(Lord Justice Kennedy in R.v.Warley Justices, 1999, 1 Cr.App.R. (S) 156 at 162)

CHAPTER 6

THE ROLE AND INFLUENCE OF PROFESSIONALS

This chapter offers an analysis of the role and influence of professional court participants in the decision-making process for either way offences, both from their perspective and from the viewpoint of magistrates. It may appear as though that influence is self-explanatory. The CPS determines the charge, provides an outline of the case which magistrates are advised to assume is correct and makes a recommendation which is almost invariably followed. Defence solicitors exert a pivotal influence over plea and exercise of the right of election. Clerks may select and read out reported cases and advise legally unqualified magistrates. The liaison judge may advise that certain categories of offence should routinely be committed to the Crown Court. It is, indeed, an important argument of this thesis that professionals play an integral role in the either way decision-making process and in the system of lay justice generally.

The notion that their influence is self-explanatory is, however, a simplistic one. It assumes that this influence is broadly similar in all courts. Yet the opinions of Chief Clerks interviewed for this study varied from, "Clerks do not have much role on mode of trial" to, "Proactive clerks can usually make the decision in practice." It assumes that professionals act independently when formulating advice for magistrates. Yet it will be seen that CPS lawyers in Town Court appeared more likely than their counterparts in City Court to recommend summary trial in certain categories of offence. Data collected for this study suggest that the influence of professionals is moulded by court culture. Each court's culture affects the expectations which lawyers have in relation to which cases will be retained and which will be committed. Recommendations made by CPS lawyers and advice given by defence solicitors to their clients will be influenced by their knowledge of the pattern of decisions in that particular court. Contested applications become comparatively rare as both sets of solicitors desire to maintain their credibility (Hucklesby, 1997).

6.1 CROWN PROSECUTION SERVICE

This section examines the role and influence of Crown lawyers. The finding of Riley and Vennard (1988:11) that magistrates' mode of trial decisions were consistent with prosecution preferences in 96 per cent of cases implies that the CPS exerts a considerable influence de facto on mode procedure (Ashworth, 1998:250). It may appear as though the reasons for that influence are transparent. Its lawyers determine the charge, provide an outline of the case which is to be presumed accurate and make a recommendation which should represent a logical conclusion to that outline. There can be little argument with the constituent elements of this last sentence. But the problem when analysing the influence of the CPS is interpretation of the word "logical". A conclusion which appears logical to a court such as Town Court, with a tradition of accepting jurisdiction, may present as being irrational to a court such as City Court with a preference for committal. It will be argued in this chapter that the high concordance rate between recommendations and decisions cannot be approached on a cause and effect basis. It is not a question of prosecutors formulating an independent assessment and magistrates acting as a "rubber stamp". Court culture dictates that the CPS recommendation is influenced by knowledge of the type of decision made by that particular court. Although Crown lawyers apply the magistrates' guidelines,¹ their conclusion may be adapted to fit their expectations of the likely court decision.

6.1.1 Concordance rates

Table 6.1 below shows the concordance rate between CPS recommendations and magistrates' mode decisions in cases in the observation sample in which the CPS indicated a firm conclusion.

Table 6.1 Magistrates' decisions and CPS recommendations by court and bench

	Decisions						Total		
	Summary			Crown Court					
	As per Rec (n=)	Against Rec (n=)	(%)	As per Rec (n=)	Against Rec (n=)	(%)	As per Rec (n=)	Against Rec (n=)	(%)
Town Court	55	2	4	9	0	0	64	2	3
New Court	17	0	0	17	0	0	34	0	0
City Court:Lay	16	0	0	24	1	4	40	1	2
Lay Total	88	2	2	50	1	2	138	3	2
Stipendiary	22	1	4	15	2	12	37	3	7
Total	110	3	3	65	3	4	175	6	3

Table 6.1 shows that lay magistrates only reached mode decisions contrary to the recommendation of the prosecution in three (two per cent) of 141 observed cases. Town Court accepted jurisdiction in two of these cases; City Court declined jurisdiction in the third. This finding may appear to support the argument of Cavadino and Dignan (1997:83) that CPS lawyers represent the predominant influence on the way magistrates exercise their decision-making discretion. The extremely high concordance rate of 98 per cent is, however, subject to a significant proviso. This is that the CPS does not always make a recommendation in borderline cases. Use of this practice is, according to magistrates interviewed for this study, increasing. Refraining from making a recommendation may be due to a desire to maintain credibility by not appearing too dogmatic in doubtful cases. It may be the result of an agreement with the defence in cases in which the CPS had initially intended to recommend Crown Court trial. Whatever the motivation, there will inevitably be a high concordance rate if the CPS refrains from proposing any conclusion in those cases which its lawyers consider might be determined either way. Table 6.2 below indicates the incidence of this.

Table 6.2 Number of cases in which the CPS made no mode recommendation and their outcome by court and bench

	Recom (n=)	(%)	No recom (n=)	(%)	Outcome of no rec cases Summary	CC
Town Court	66	100	0	0	0	0
New Court	34	94	2	6	0	2
City Court:Lay	41	93	3	7	1	2
Lay Total	141	96	5	4	1	4
Stipendiary	40	89	5	11	5	0
Total	181	95	10	5	6	4

Table 6.2 shows that the Crown Prosecution Service did not make a recommendation in five per cent of the cases in the observation sample. Eight of the ten relevant cases involved allegations of violence. The other two were a breach of trust theft and a commercial burglary. This low percentage figure might appear to contradict the statement made above that this practice presented "a significant proviso" to the high concordance rate between magistrates' decisions and prosecution preferences. It must be emphasised, however, that all court participants agreed that the majority of mode decisions were obvious. It was apparent from court observation, and is indeed logical, that CPS lawyers only refrained from making a recommendation in those cases which were deemed by them to be borderline. Analysis of observed cases suggested that the CPS indicated no preference in some 15 per cent of cases which were presented as being problematic.² Analysis further suggested that those cases in which lay magistrates reached a decision contrary to recommendation represented some six per cent of borderline cases. Overall figures, therefore, suggest that lay magistrates reached a decision in accordance with the CPS recommendation in approximately four fifths of borderline cases.

The two tables above reveal significant findings in relation to stipendiary magistrates, although it has to be acknowledged that samples were small. Table 6.1 shows that they would appear more likely than a lay bench to reach a decision contrary to the prosecution recommendation. They did so in seven per cent of cases as compared to the lay rate of two per cent. This may indicate that the greater expertise of professional magistrates enables them to exercise a more independent judgement or it may reflect that they have not been absorbed into the culture of City Court. These highly significant possibilities will be explored in the section on stipendiaries later in this chapter. The figures by themselves are, however, relevant as previous research on bail has suggested contradictory findings. The assumption that stipendiaries were more likely to disagree with prosecution requests (King,1971) was challenged by the findings of conformity obtained by Hucklesby (1997:135). One reason for this may be that in the latter's study the same prosecutor appeared on all occasions on which the remand court was observed. CPS lawyers in City Court appeared before stipendiaries on a rota basis with no one-to-one relationship.

Table 6.2 shows that the CPS was more likely to refrain from making a recommendation to a stipendiary magistrate than to a lay bench. The senior stipendiary at City Court did, however, indicate in interview that, "I find a recommendation helpful." Interpretation of figures is complicated by the fact that two of the five cases in which no recommendation was made came after the stipendiary had reached a decision contrary to the CPS request. These cases may represent a reaction rather than being indicative of a policy. Table 6.2 further shows that stipendiaries accepted jurisdiction in all five cases in which no recommendation was made. This outcome can be contrasted with the lay bench declining jurisdiction in four out of five such cases. The implications of this will be considered further in the section on stipendiaries.

6.1.2 The significance of the case outline

Although statistics may be open to varying interpretations, it has to be acknowledged that lay magistrates rarely reached a decision contrary to prosecution preferences in this study. It will be shown that magistrates appear fulsome in their praise of CPS expertise and objectivity. Most are, however, sensitive to criticism that they often do no more than endorse prosecution applications. This led to the majority of magistrates drawing a distinction in interview between the importance of the case outline and the significance of the CPS recommendation. They cannot be criticised for emphasising the former because it represents the prime source of information on which to base a decision (Riley and Vennard, 1988:11). As one magistrate said, "The CPS outline represents all the information we've got." But they are quick to point out that, in the words of one of them, they "are not just a rubber stamp" for the latter.

A number of magistrates in all three sample courts distinguished the significance of the outline from that of the recommendation. One in City Court commented, "Their outline is very important, but I don't take much notice of the recommendation." A colleague noted, "The crux is the outline, not the conclusion, and we sometimes go against the recommendation." A magistrate in Town Court broadly agreed.

The outline is more important than the recommendation. We will go against the recommendation, although this is infrequent.

(Magistrate, Town Court)

A clerk in Town Court summarised this position.

The CPS outline is important and how they present the case. The recommendation is not particularly important as such, but guides magistrates in a particular direction.

(Clerk, Town Court)

This analysis of the relative significance of the outline and the recommendation presents, however, as being somewhat simplistic. It assumes an element of separation between the two, with the outline being given first and the conclusion being indicated at the end of the prosecution address. As one magistrate in Town Court said, "You are making up your mind as the prosecutor talks so that the outline and recommendation have to go together." The problem with this apparently logical statement is that in practice the two are intertwined and not sequential. The recommendation forms part of the total picture. Magistrates will usually be aware of the recommendation before they have heard anything about the alleged offence. CPS lawyers commenced their address by making a recommendation in 59 per cent of cases before the lay bench in City Court and in some 80 per cent of cases in the other two sample courts.

The perceived relative significance of the outline and the conclusion raises the question of the inference to be drawn by magistrates in those cases in which no preference was stated. The absence of a recommendation is logically irrelevant if the outline is, indeed, of paramount importance. It should simply indicate that the case was borderline. Interviews suggested, however, that inferences were drawn, and these appeared to be determined by court culture. The magistrates of New Court saw no particular significance, although the fact that they declined jurisdiction in both of the relevant cases would appear to reflect a culture of caution. The magistrates of City Court, with a culture of committing if in doubt, expressed the opinion that the CPS was really favouring Crown Court trial in such cases. In the words of one:

When they say it's a matter for yourselves, there is an implication that they prefer Crown Court.

(Magistrate, City Court)

They declined jurisdiction in two out of three of the relevant cases in this study.

The magistrates of Town Court, with a preference for retaining jurisdiction, expressed the opposite view.

Occasionally they don't make a recommendation. If they don't we are more likely to keep the case. We think they want us to keep it in these cases and make no recommendation because they don't want to appear soft.

(Magistrate, Town Court)

There were no examples in the observation sample of the prosecution in Town Court refraining from making a recommendation.

The majority opinion that it was the case outline and not the recommendation which was of the essence appeared to reflect an ideological facet of the lay magistracy. A number of interviewed magistrates confirmed the responses given to Parker et al. (1989:171) that it was a core convention of the lay bench that they must be independent and impartial. However, two magistrates sitting in New Court implied that they would follow a strong CPS recommendation even if the outline did not fully support it on the assumption that the prosecution must be in possession of additional facts in order to make that recommendation. These two had, indeed, virtually "delegated their responsibility" for such decisions to the prosecution (Cavadino and Dignan, 1997:83). One stated, "We take a lot of notice of the recommendation as it is based on more information than they give us." A very experienced colleague commented:

We probably never go against the CPS recommendation. We think they have more facts than we have.

(Magistrate, New Court)

This supports the finding of Hedderman and Moxon (1992:15) that magistrates took account of the fact that the CPS possessed information which they could not divulge to the court. It also, however, raises doubts as to the core convention of the lay magistracy that they must be independent and impartial.

6.1.3 Magistrates' perceptions of Crown lawyers

Magistrates' perceptions of the objectivity of prosecution lawyers are fundamental to an analysis of the decision-making process for either way offences. They are, indeed, fundamental to an analysis of any aspect of magistrates' work. A high concordance rate between CPS representations and magistrates' mode decisions is to an extent to be expected as a consequence of current criteria and procedure (Riley and Vennard, 1988:12). It is, however, no more than a reflection of human nature that magistrates would be more likely to agree with the prosecution recommendation if they deem that the case outline presented them has been objective and fair.

Interviews suggested that magistrates' attitudes towards Crown lawyers display an element of contradiction. Those lawyers are portrayed as being subjective and motivated by their own agenda if the RCCJ recommendation (1993:para.6.13) that lawyers should be empowered to reach a conclusive agreement as to venue is raised. One magistrate rejected the RCCJ proposal on the grounds that, "The CPS have underlying motivations such as tactics and cost." Similar emotions are aroused if the question of negotiation between solicitors is mentioned. In the words of one very experienced magistrate:

I am aware of negotiation and realise we're not always being told the whole story. I don't approve of it. We should always be given a full outline.

(Magistrate, New Court)

All interviewed magistrates appeared to have some knowledge of negotiation, although not necessarily of its extent, and expressed reservations. One recently appointed magistrate in New Court said, "When observing court I was amazed at the negotiating and it worried me." She added, however, "But it is forgotten when sitting." Interview responses suggest that, indeed, it is.

A very different opinion is expressed when presentation in court is being discussed. This study supports the findings of Brown (1991) that magistrates assume prosecution lawyers to be objective and unbiased within the court environment. It was considered in all three sample courts that the CPS gave a true picture of the alleged offence. The magistrate in New Court who said, "I realise we're not always being told the whole story," summarised the general perception of magistrates towards the prosecution case.

We presume the CPS are experts. We must take note of expertise so that their recommendation bears a lot of weight. We consider their precis to be objective and have more faith in the CPS than in the defence.

(Magistrate, New Court)

A similar opinion was expressed by a magistrate in Town Court.

On the whole we accept the prosecution version at this stage as the CPS has conformity of standards. Defence solicitors are more variable.

(Magistrate, Town Court)

Magistrates in City Court concurred that, in the words of one of them, they had "Confidence in the outline of the CPS."

6.1.4 Objectivity of CPS presentation

The interview responses outlined above raise the question, considered in this subsection, of whether the case presentation by the CPS is in reality objective and sufficiently detailed. It is a prerequisite of the exercise of independence and impartiality by magistrates that the outline of the circumstances of the case is balanced and complete. That outline is, however, heavily reliant on the police version of events and is inevitably selective. The majority of interviewed magistrates appeared content with the quantity of information supplied by the CPS. This accords with their philosophy that the current mode of trial

procedure has the advantage of being straightforward. The only dissent came from the magistrates of New Court with their tradition of adopting a structured approach. Opinion there was reflected by the comment that, "More information from the CPS would help."

Court observation suggested that lay magistrates are reluctant to seek further information from the prosecution. There are cases, for example theft of items worth £9.18 from a shop (case 243), in which the charge literally does "speak for itself" in terms of venue. The vast majority, however, require explanation if the magistrates are to make a reasoned decision. The observation sample only contained one example of the bench requiring further information. This was when a prosecutor sat down after simply saying that an affray was clearly suitable for summary trial (case 219). There should arguably have been other instances if magistrates were to exercise independence and justice be seen to be done. In cases 273, 274 and 275, discussed later in this subsection, no indication was given of the injuries caused by an alleged attack by three co-defendants. They may have been serious or trivial. Case 225 involved a male defendant charged with stealing electrical items worth £1,100 from a dwelling house. The full extent of the prosecution address was, "This was a dwelling house burglary. It should go to the Crown Court." There was nothing to indicate the existence of any aggravating features and yet the bench declined jurisdiction without seeking further information. This example may, however, evidence the finality of a policy to commit all residential burglaries rather than a reluctance to seek a full outline of the case.

The potential to construct the case outline in order to accord with the mode recommendation conflicts with magistrates' perception of the objectivity of that outline. Yet it has been recognised in relation to sentencing that case

presentation may have been shaped as much by the working practices of professionals as by any objective conception of the "facts of the case" (Ashworth,1997:1104). It was impossible for the true extent of this practice to be gauged as inter-professional negotiation was outside the scope of this study and there was no formal access to post-hearing interviews with Crown lawyers. Interviews with clerks and solicitors did, however, provide some evidence of the potential for case construction. A defence solicitor noted that the CPS might "gild the lily" in order to ensure committal. On the other hand,

The CPS may not always outline a case adequately if they want the magistrates to keep a case as it is not strong.

(Chief Clerk, City Court)

Clerks were, however, never heard to intervene in court. One said:

I would like to believe that the CPS outline is honest, but am open to persuasion. I wouldn't challenge it even if I thought they were playing down the gravity.

(Clerk, City Court)

This leaves the question of the recommendation. The majority of lay magistrates interviewed for this study made conscious efforts to stress the overriding significance of the case outline. There was, however, agreement that the CPS "appraisal is pretty accurate." This might suggest that the recommendation was deemed to conform to the same standards of objectivity as the outline. It may simply indicate that the conclusion was generally considered valid in the opinion of the magistrates hearing the case. It has been established that the magistrates in the three sample courts adopted different attitudes towards accepting or declining jurisdiction. Yet the vast majority of decisions in all three courts accorded with CPS preferences. This raises the question of whether or not recommendations were adapted to meet expectations of the likely decision.

There was evidence in the observation sample to suggest that prosecution lawyers were influenced by court culture when formulating a recommendation. CPS lawyers in Town Court presented as feeling able to recommend summary trial more frequently than their colleagues in the other two courts. Theft by a public house manager of money and stock to a total value of £4,637.50 was deemed by the CPS in Town Court to be suitable for summary trial (case 031). Theft by a shop manager of £857 drew no such conclusion in City Court (case 220). Allegations of violence produced the greatest apparent differences in recommendation between courts. This has considerable potential to influence committal rates as offences of violence accounted for over 40 per cent of the denied cases in the observation sample.

The CPS in Town Court recommended summary trial in cases in which male defendants allegedly punched victims in the head causing a facial cut which required eight stitches (case 071), a broken nose (077) and one followed by kicking on the ground described by witnesses as vicious (020). The CPS in New Court made no recommendation in a case in which the male defendant, who had experienced an epileptic fit, allegedly lashed out at a policewoman called to the hospital, causing her to fall over and break her arm (154). The CPS in City Court presented as being the most cautious of the three. This perception was supported by statistical data that 21 out of 24 defendants (87 per cent) committed for trial by that court for offences of violence received sentences within magistrates' powers. Lawyers there recommended that jurisdiction be declined when three young males punched a 14-year-old boy to the head and body (cases 273,274 and 275). No information was supplied as to the nature or extent of any injuries. The age of the victim may have been a factor in determining this recommendation. However, all three defendants received community orders at the Crown Court after guilty pleas.

6.1.5 Individual Prosecutors

It has been suggested in this chapter that magistrates place considerable reliance on the expertise and objectivity of the prosecution. This leaves the question, considered in this subsection, of whether the identity or presentation of the individual prosecutor affects the decision-making process. There was no evidence from either interviews or court observation to suggest that the identity of the prosecutor had any influence on magistrates in determining the outcome of a case. This, as will be seen in section 6.2, is in contrast to the situation regarding defence solicitors. It is, however, logical that the strength of presentation may be relevant. As a clerk previously quoted said, "The CPS outline is important and how they present the case."

This study examined the relevance of strength of presentation by giving all CPS lawyers a mark on a scale between 1 and 5 in relation to the strength of their representations to the bench (see court observation data form reproduced as Appendix 5). This mark was allocated on the basis of the whole court sitting and was not restricted to plea before venue cases. Grading was also carried out in relation to each individual case. The relevant categories were above average (2), average (3), below average (4) and weak (5), category 1 proving irrelevant in practice. Data revealed that the proportion of CPS lawyers who were graded as being above average in strength of address was very similar in all three courts. The figures were nine per cent in Town and City Courts and 11 per cent in New Court. A far higher proportion of sittings in City Court, however, involved a prosecution lawyer graded as being below average. The figure was 19 per cent for that court (eight sittings from 43) as compared to three per cent in Town Court (one sitting from 35) and none at all in New Court.

The problem with ascertaining the practical effect of weak presentation was that lay magistrates only reached a decision contrary to the CPS recommendation in three cases in the observation sample. This statistic would suggest that the content of the outline and recommendation were far more significant than the strength of presentation. Interviews revealed, however, that all court participants perceived a strong presentation to be an essential element of the prosecution address in borderline cases. A number of magistrates in all three courts volunteered the information that some CPS advocates were rather weak, but did not elaborate on the consequences of this. A solicitor in Town Court was more forthcoming.

A strong representation by the CPS usually wins the day. But we might succeed if the CPS is woolly.

(Defence Solicitor, Town Court)

This opinion was endorsed by a clerk in the same court.

The bench takes a lot of note of the CPS recommendation, especially if there's a strong prosecutor. But if there's a weak prosecutor they might think they can keep it as the case for Crown Court was not put forcibly.

(Clerk, Town Court)

Another clerk agreed that it was "the presentation rather than the identity of the prosecutor" which influenced the decision.

Stipendiary magistrates did not appear to be influenced by the strength of presentation. CPS strength was graded as above average in one case in which they did not follow the recommendation and as average in the other two. The three cases in which lay magistrates did not follow the recommendation, two in Town Court and one in City Court, provided limited evidence that a weak presentation by the prosecution may influence the decision-making process. The strength of the prosecution address was graded as below average (4) in two of these cases. In neither case did the prosecutor commence by making a

recommendation, although this was the practice adopted in 59 per cent of cases in City Court and 80 per cent of cases in Town Court. The recommendation was somewhat equivocal in both of these cases. In the case (206) of assault occasioning actual bodily harm before City Court, the prosecutor concluded by saying that it was "on the cusp," but more suitable for summary trial as no weapon had been used. In the case (007) of wounding before Town Court, the CPS lawyer concluded by saying that, "You may think your sentencing powers are insufficient." However, in the third relevant case (085), an allegation of assault occasioning actual bodily harm before Town Court, the prosecutor's address was graded as average and the recommendation for committal was unequivocal.

Although court observation may have provided limited evidence that a weak prosecution address might influence the decision-making process, it would appear that this factor by itself will not produce a decision contrary to recommendation. The prosecutor in case 206 may have been successful had she been more forceful. But an informal policy to commit cases of violence in the town centre at night to the Crown Court would appear to be the prime reason for the decision.

While the identity of the prosecutor may have little, if any, effect on magistrates, it may in limited instances influence or even determine the recommendation made to the court and, by implication, the tone of the case outline. In most cases the mode recommendation is negotiated so that contested applications are minimised. As one solicitor in New Court said, "The CPS are always willing to discuss mode. We normally end up in agreement." Defence solicitors in all three sample courts indicated, however, that a few prosecutors were not impartial and displayed dislike of particular offences.

We usually agree with the CPS, but some are not impartial so that there is a variation as to mode recommendation between them.

(Defence Solicitor, Town Court)

A solicitor in New Court noted that, "Sometimes the prosecutor doesn't like the sound of a case." This view was endorsed by a solicitor in City Court.

The CPS go very much on the guidelines. But individual prosecutors are different. Some don't like particular offences.

(Defence Solicitor, City Court)

In case 085, the victim of the alleged assault by a man in his thirties was a 15-year-old girl. This fact may have inspired the recommendation for committal rather than the nature of the injuries which were minor. A female solicitor in that court said:

Some prosecutors get emotional, especially on domestic assaults on women, and want them to be committed.

(Defence Solicitor, Town Court)

The identity of the advocate may result in the recommendation being changed on the morning of the court. A solicitor in Town Court explained.

The reviewing lawyer makes the recommendation. The advocate might be persuaded to change it, but usually only if senior to the reviewer.

(Defence Solicitor, Town Court)

A colleague noted:

It's a juggling act as to whether the reviewing lawyer or the advocate makes the decision. You might persuade the advocate to change the recommendation if he is in a sufficient position of authority.

(Defence Solicitor, Town Court)

A solicitor in City Court expressed a similar opinion.

The reviewing lawyer will usually make a note on the file, although sometimes the file has not even been reviewed. A more senior lawyer might go against that recommendation, although it's more likely that you will persuade them to say it's borderline rather than suitable.

(Defence Solicitor, City Court)

6.1.6 The role of the CPS in admitted cases

The gravity of the offence is of paramount importance as a starting point for magistrates' discussion of sentencing. The initial role and influence of CPS lawyers are, therefore, the same in admitted cases as in those denied. They determine the charge and select the information about the circumstances of the offence which will be presented to the court. This statement may reflect a particular view of the offence or have been reconstructed as a result of a plea bargain with the defence (Ashworth,1997:1108). There is, however, a tradition in this country that the prosecutor plays no part in sentencing in the sense that no sentence is requested or recommended (Ashworth,1997:1110). Prosecutors make recommendations in mode of trial which amount to an opinion that the defendant, if convicted, should or should not be sent to prison for more than six months. This raises the question of whether they are entitled to indicate that the defendant should, in the view of the Crown, be committed for sentence.³

The majority of magistrates interviewed for this study indicated that the CPS made no recommendation following guilty pleas. Six of the 19, from all three courts, did, however, suggest that the CPS attempted to influence the sentencing process, although this was not necessarily by means as blunt as making a specific recommendation. The clear impression given by magistrates was that they were somewhat resentful of this, viewing it as an intrusion into their function. One in Town Court said, "The CPS do try and influence the sentence. I take no notice and will point out the irrelevance." This attitude reflects the culture of the lay magistracy and its adherence to traditional principles. Mode recommendations, which have traditionally been made, are welcomed. Sentencing opinions, which have historically not been voiced, are resented.

There were four examples, in the 149 admitted cases in the observation sample, of the CPS making direct reference to the sentencing forum. Two in City Court suggested committal and two in Town Court indicated that the magistrates should conclude the case. In case 257, the prosecutor opened his address after a male defendant had admitted charges of theft, handling and obtaining by deception by saying that, "Had the defendant pleaded not guilty we would have said that this was not suitable." In case 244, the CPS said that the defendant should be committed in view of the circumstances after he admitted receiving earrings worth £939 stolen in an armed robbery. Both defendants were committed for sentence, the outcome being unknown. In case 060, the CPS said in relation to three charges of shoplifting, "You can sentence these cases at this court although not necessarily today." In case 001, a charge of possessing cannabis was deemed "suitable for your jurisdiction."

The findings of this study suggest that as a rule prosecutors will follow the principles established in sentencing practice and provide the court with the circumstances of the offence and the defendant's previous convictions without making any recommendation as to jurisdiction. It was, however, more usual for the CPS to indicate, implicitly or explicitly, that a case was borderline without reaching any conclusion. The first method was to draw the court's attention to the need to determine whether or not its sentencing powers were adequate. In case 016, in Town Court, the prosecutor opened her address after the male defendant had admitted two charges of dwelling house burglary with the words, "You first need to decide whether you or the Crown Court should deal with it." The second method was the practice adopted in New Court for the prosecutor to read out reported cases in borderline matters. This occurred in cases of wounding (108) and unlawful sexual intercourse (118), in both of which the magistrates ordered reports and ultimately passed sentence.

6.2 DEFENCE SOLICITORS

This section examines the role and influence of defence solicitors. A concordance rate of 98 per cent between prosecution recommendations and lay magistrates' decisions implies that their influence within the court hearing is limited. Those solicitors generally acknowledged this level of influence.

The defence has a fairly minor role. You can point out mitigating factors, especially from the police interview if you attended.

(Defence Solicitor, Town Court)

A colleague concurred.

We usually agree with the CPS. But they might gild the lily, and our role is to point out any inadequate summary given by them.

(Defence Solicitor, Town Court)

The prime explanation for this limited role does not appear to be the relatively poor standing of defence solicitors in the eyes of magistrates, although the lay bench might have more faith in the CPS than in the defence. The essential reason is that they rarely seek to challenge the Crown's recommendation (Riley and Vennard, 1988:12). Table 6.3 below indicates the nature of defence representations in the observation sample following not guilty indications in those cases in which the CPS made a recommendation.

Table 6.3 Defence representations in not guilty cases by court

	Agreed with CPS		No representations		Disagreed		Total
	(n=)	(%)	(n=)	(%)	(n=)	(%)	(n=)
Town Court	47	71	14	21	5	8	66
New Court	15	44	12	35	7	21	34
City Court	29	36	44	54	8	10	81
Total	91	50	70	39	20	11	181

$\chi^2 = 23.44$, $p < .000$

Table 6.3 shows that defence solicitors only challenged prosecution recommendations in 11 per cent of cases. This comparative lack of conflicting representations may not be altogether unexpected. As a consequence of the right of election, there are few, if any, advantages for defence solicitors to make representations in favour of Crown Court trial. Their client will simply exercise the right if the magistrates accept jurisdiction. Some do, however, indicate beforehand that their client will elect in any event and this may influence the magistrates to decline jurisdiction rather than make a decision which they deem irrelevant. If the prosecution and the defence both favour summary trial, the latter will merely agree with the former's representations or, very occasionally, emphasise the reasons for agreement if it is considered that the magistrates might otherwise waver. The only occasion on which the bench will hear conflicting representations is when the defence wishes to propose summary trial after the prosecution has argued for committal.

The contested representation figure of 11 per cent revealed in Table 6.3 does, however, conceal significant differences between the sample courts. Given that defence solicitors are only likely to challenge the Crown's recommendation when that is for committal, it is arguably unsurprising that the proportion of contested applications was the lowest in Town Court, at eight per cent, as it has been established that the CPS was least likely to advocate committal in that court. The figure of 21 per cent in New Court almost exactly reflected the higher proportion of cases in which the CPS sought committal. On this basis, there may have been an expectation that the proportion of contested representations would have been at least as high in City Court as in New Court. Yet it was the proportion of cases in which no representations were made which was considerably higher in that court than in the other two courts. The reasons for this are unclear, but it may suggest that advocates in City

Court acknowledged the inevitability of committal in many cases without wishing to appear to their clients to support that conclusion. This would accord with the finding of McConville et al. (1994:181) that defence solicitors deem it important to achieve a balance between maintaining credibility in the eyes of their bench while appearing to their clients to be representing their interests.

6.2.1 Success rates

Observational data collected in this study suggest that defence solicitors were rarely able to persuade magistrates to accept jurisdiction against the recommendation of the Crown. Table 6.3 shows that those solicitors challenged prosecution preferences in 20 cases in the observation sample. They sought summary trial in all of these. They were successful in three cases (15 per cent) and unsuccessful in the other 17 (85 per cent). Statistics are, however, open to varying interpretation. There was a consensus of opinion among defence solicitors interviewed for this study that there were two generalised categories of case in which they would resist, or at least give the impression of resisting, the CPS recommendation for committal. The first category was those cases which they genuinely believed were suitable for summary trial given the court's culture. This usually arose because of the variations between prosecutors noted in the last section.

Most CPS lawyers are realistic and we usually agree. You can usually gauge what attitude the CPS will take. But there is disparity between them.

(Defence Solicitor, New Court)

It is to be assumed, although it cannot be proven, that the two cases in which defence solicitors persuaded lay magistrates to accept jurisdiction came into this category. Both involved the types of offence on which, in the words of a solicitor, some prosecutors "get emotional," namely assaults on females.

The second category comprises cases in which solicitors are obliged to represent their client's instructions even though they have advised that the prospects of success were minimal. It has been shown that some defendants may prefer summary trial because they prioritise the lesser sentencing powers of magistrates. The clear implication from interviews was that this category was the larger.

There are not many differences with the CPS. I usually seek summary trial against the CPS recommendation on client's instructions.

(Defence Solicitor, Town Court)

Similar opinions were expressed by solicitors in the other two courts.

I often try to keep a case in the magistrates' court because of client's instructions rather than my analysis. A client's wishes as to venue are paramount, so agreement with the CPS is often not possible.

(Defence Solicitor, New Court)

I know that the bench takes the prosecution case at its highest. But clients usually want their viewpoint putting. ... They don't understand the procedure.

(Defence Solicitor, City Court)

An important consideration for defence solicitors is their credibility in the eyes of the bench. Credibility declines in proportion to the number of "nonsensical" applications made (Hucklesby,1997:139). In order to maintain trust, solicitors phrase applications which they are obliged to make in a way which leads magistrates to recognise why the application is being made (McConville et al.,1994:181). As one magistrate in this study said, "We are aware of coded messages such as my instructions are." It is hardly surprising that these representations tend to fail. As was said by McConville et al. (1994:180-181) in discussing bail, "Applications considered a waste of time would be made in such a way that they *would* be a waste of time." Contested mode applications were rare. Genuinely contested ones were extremely rare.

Defence solicitors expressed the opinion that most magistrates would listen if they presented a forceful argument. They believe that they are able to persuade magistrates to accept jurisdiction in cases which they consider suitable for summary trial more frequently than the figure of 15 per cent provided by data in this study. One said:

The CPS uses a summary. It is essential that the defence reads the prosecution witness statements as they might undermine the summary. It is possible to persuade magistrates.

(Defence Solicitor, City Court)

It would appear, however, as though a prerequisite of this possibility is the absence of a strong presentation by the CPS. All seven contested cases in the observation sample in which the CPS lawyer was graded as being above average in strength of representation were decided in accordance with the recommendation for committal. As a solicitor previously quoted said:

A strong representation by the CPS usually wins the day. But we might succeed if the CPS is woolly.

(Defence Solicitor, Town Court)

6.2.2 Magistrates' perceptions of defence solicitors

The majority of magistrates interviewed for this study confirmed that contested applications were rare and indicated that defence solicitors did "not have much effect in practice" when challenging the Crown's recommendation. Analysis of the influence of those solicitors is, however, complicated by the different perceptions which magistrates appear to have of them as individuals. It has been established that magistrates tend to view prosecution lawyers as being objective and having conformity of standards. Although it is acknowledged that some CPS advocates are stronger than others, it appears as though it is the presentation of the case rather than the identity of the prosecutor which has

the potential to influence the decision-making process. Defence lawyers are perceived as being more subjective than prosecution lawyers.

Defence solicitors are also viewed by magistrates as being very different in standard and credibility from each other. This accords with the finding of Parker et al. (1989:96). Interviews in all three courts suggested that the identity of the defence advocate could influence the decision-making process. While the prosecution outline will be accepted as fair because of magistrates' faith in the CPS, they will only treat a defence application seriously if, in the words of one of them, "the argument appears logical." The perceived ability to be logical may, however, be restricted to those lawyers deemed to be realistic.

Defence solicitors are more variable. But we are aware which solicitors are realistic and some will persuade us to look at mitigating features.

(Magistrate, City Court)

This view was endorsed by a magistrate in New Court.

We know our solicitors. Some are better than others so that choice of solicitor can affect the decision.

(Magistrate, New Court)

A magistrate in Town Court agreed.

The decision is not based on defence representations and they couldn't divert us if we knew it was too serious. But they are sometimes influential. It depends on the solicitor in question.

(Magistrate, Town Court)

It was not possible to test these opinions empirically as only two decisions were made by lay magistrates in favour of contested defence applications. There was, however, a marked difference in attitude displayed by magistrates when solicitors allegedly kept the court waiting. Some were still welcomed into court. Others were challenged to provide an explanation for their tardiness, an allegation of a lack of respect being made in one instance.

It has to be acknowledged, however, that current criteria result in even the most favoured defence solicitor exerting limited influence within the mode hearing. This raises the question of whether this restricted role is accepted by those solicitors as being the best way to determine venue in the interests of justice. The findings of this study suggest that the answer is yes. There was a consensus among those interviewed that mode of trial should continue to be based solely on the gravity of the alleged offence without reference to any personal mitigating circumstances of the accused. Only two solicitors thought that previous convictions should be revealed, and then only if the power to commit for sentence was abolished.

The majority considered the test of taking the prosecution case at its highest to be pragmatically correct in the interests of consistency, and did not support any significant alteration to their input as it was not appropriate to examine the evidence in depth. One noted, "I have no problem with current procedure." Another from a different court commented, "The current situation is generally satisfactory." There were only two dissenting voices who argued that the bench should take offence mitigation into account. One said:

The fullest information should be made available. The procedure should be balanced by hearing defence arguments so that equal weight is given to both sides.

(Defence Solicitor, City Court)

There is an argument that this would serve to increase inconsistencies as only those solicitors deemed "realistic" would obtain additional influence. Previous research has suggested that lawyers from outside areas who were unfamiliar with a court's culture might present cases in a manner which appeared inappropriate (Rumgay,1995; Hucklesby,1997). This study was unable to examine this issue because virtually all defendants from outside a court's county were represented at mode hearings by local agents.

6.2.3 Influence of defence solicitors outside court

It is apparent that while the role of defence solicitors in the mode hearing tends to be peripheral, their influence on what has happened before that court sitting may be fundamental. The willingness of defendants to admit guilt is a prerequisite of the plea before venue provisions attaining their policy objective. This study supports the findings of McConville et al. (1994:9) that defence solicitors exert a pivotal influence over a client's plea. Interviews with solicitors indicated that clients would usually accept advice on both plea and venue. Choice of solicitor may on occasions determine venue. Interviews established different attitudes towards exercise of the right of election, although small samples precluded empirical testing of these opinions. A solicitor in New Court observed, "We send quite a lot to the Crown Court as we have a better success rate there." By way of contrast, a solicitor in Town Court commented that, "We rarely elect. It is better to have summary trial in non-complicated matters." A solicitor in City Court gave a more detailed opinion.

The lay bench has a tendency to convict. We will advise election if we believe the client is not guilty, will give good evidence or if there are holes in the prosecution case. Most clients follow our advice.

(Defence Solicitor, City Court)

This study supports the findings of Moxon and Hedderman (1994:98) that defendants rarely elect against legal advice. They apparently did so in three of the 20 observed cases, two of these being co-defendants.

Negotiation between solicitors tends to minimise the number of contested applications. Table 6.3 showed that the defence agreed with the recommendation of the Crown Prosecution Service in 50 per cent of cases and made no representations in a further 39 per cent. It can only be said as a statement of fact that the defence did not express disagreement in these latter

cases. However, subject to the important proviso of the right of election being retained, there is no logical reason why they would not have agreed with the CPS in the vast majority of these cases, rather than risk their credibility in court, had they been obliged to state their position. The magistrates declined jurisdiction in three cases after an agreed representation for summary trial, although it must be emphasised that two of these involved a stipendiary magistrate. They followed the recommendation of the prosecution in all cases in which the defence made no representations. This data implies that the CPS and defence could have agreed venue in up to 89 per cent of cases and that the magistrates would have concurred in all but two per cent of these.

This finding would appear to support the reasoning behind the recommendation of the 1993 Royal Commission that magistrates should no longer be involved in mode decisions when the CPS and defence agreed as to venue. The Commission's reasoning was that magistrates would be likely to concur in such cases (RCCJ,1993:para.6.13). But the influence of court culture results in the finding only appearing to support the RCCJ reasoning. The pattern of decision-making established in each court affected the expectations which lawyers had in relation to which cases would be retained and which would be committed. As one solicitor said,

Most cases are fairly clear-cut and our advice tends to be confirmed by the decision.

(Defence Solicitor, Town Court)

The agreement between lawyers was not reached independently, but was negotiated within the context of that court's culture. It was based on a shared understanding of what their bench was likely to do as both sets of solicitors desire to maintain credibility (Hucklesby,1997). If lawyers were empowered to make the final decision, and did not have to justify their reasoning before the court, the nature of the agreed decisions might sometimes change.

6.2.4 The role of defence solicitors in admitted cases

Sentencing, in which defence solicitors may have a more central role to play within the court hearing, is outside the scope of this study. The requirement in this subsection is limited to considering their role and influence when committal for sentence is being contemplated. There will be occasions when that role is restricted to acknowledging the inevitable. Committal for sentence was, however, somewhat rarely inevitable in this study as a consequence of the tendency for defendants to decline to indicate a plea when facing genuinely serious charges. The available information indicates that only around a quarter of 66 defendants committed for sentence ultimately received a custodial term in excess of 12 months. The role of the defence in all other cases would appear to be to persuade the bench to order a pre-sentence report as it has been established that committal rarely takes place after reading reports.

Data collected in this study show that 80 per cent of defendants sentenced at the Crown Court within magistrates' powers had been committed without reports. This statistic might suggest that defence solicitors would be keen to see reports ordered more frequently. There were, however, markedly different opinions expressed by solicitors interviewed for this study. A small majority wanted more reports. As one previously quoted said:

Magistrates don't consider enough information before committing.
Borderline cases are often committed without a PSR. Magistrates
sometimes seem frightened to accept responsibility.

(Defence Solicitor, New Court)

Others were satisfied. A solicitor in City Court noted that, "Our bench is quite good at ordering a PSR if you want it." Two solicitors in Town Court concurred. "It is rare to commit without a PSR unless committal is obvious." A colleague said, "Our court will usually order a report if borderline."

This raises the question, already considered in relation to magistrates, of the interpretation of what constitutes "borderline" and "obvious". Statistical data of Crown Court sentences would appear to contradict the idea that reports are ordered sufficiently frequently. Yet one solicitor noted,

I have never known a committal after a PSR. This is indicative that the bench is realistic at PBV.

(Defence Solicitor, Town Court)

This opinion of being realistic reflects the culture of the lay magistracy in relation to the finality of jurisdictional decisions. The inference is that seeking reports in cases which appear on the basis of the information available at plea before venue to merit a custodial sentence in excess of six months has not become part of defence solicitors' culture.

If it has become part of thinking for some solicitors, they remain reluctant to challenge the culture of the lay magistracy. There were 12 cases in the observation sample in which the defendant was committed for sentence at plea before venue without a report. The defence solicitor only acknowledged that the gravity of the offence rendered committal inevitable in one of these. There were, however, only two examples from the other 11 cases in which the request for reports could be described as having been argued forcibly. In one, a case (123) of supplying cannabis heard in New Court, the defence advocate brought the policy objectives of plea before venue to the magistrates' attention and argued that this was precisely the sort of case in which the ordering of reports had been envisaged. The defendant received a community service order in the Crown Court. By way of comparison, there were three cases (056,131,232) in which the defence solicitor gave the impression that committal was anticipated without acknowledging that it was inevitable. Yet only one of these three defendants was sentenced outside magistrates' powers, and he only received nine months' imprisonment.

It must be emphasised that defence solicitors have a strong need to maintain credibility given that magistrates would appear to pay considerably more attention to those deemed to be realistic. Challenging a court's culture is rarely a viable proposition. It becomes counterproductive if solicitors believe that their clients will receive lesser sentences if committed to the higher court. Research has consistently shown that the Crown Court is considerably more severe in sentencing (Justices' Clerks' Society, 1982; Bale, 1987; Hedderman and Moxon, 1992). The findings of this study suggest that this is not necessarily the case in borderline examples of certain categories of offence, particularly violence, dishonesty involving a breach of trust and the supply of class B drugs. It is not a question of defendants receiving five or six months' imprisonment when committed for sentence. The majority of those sentenced at the Crown Court within magistrates' powers in this study received a community order. Solicitors are aware of this possibility. Judges, in the view of one, take more account of mitigating circumstances. A colleague said:

In borderline cases the Crown Court might be more lenient. The magistrates follow the guidelines and are more rigid in their approach to sentencing, whereas judges are more flexible and may pass a lesser sentence. ... The magistrates will imprison someone for an assault when in drink. If he's working, the Crown Court may impose a community sentence.

(Defence Solicitor, City Court)

A solicitor in a different court agreed.

I am not concerned if the client is committed as 70 per cent get sentences which magistrates could have passed. This is partly due to the comparative effect. These offences are very serious for magistrates, but at the lower end of the scale for judges.

(Defence Solicitor, Town Court)

Committal may increase the anxiety level for defendants, but there is little incentive for their solicitors to push strongly for reports in more serious cases if they believe that committal may result in a more lenient sentence.⁴

6.3 COURT CLERKS

This section examines the role and influence of court clerks. It has been suggested in the previous two sections of this chapter that the influence of prosecution and defence lawyers in the either way process was largely prescribed by the culture of the lay magistracy. There were inevitably subtle differences between courts. The magistrates of Town Court, for example, were slightly more likely to reach decisions contrary to CPS recommendation. But the perception of Crown lawyers as professional experts supplying objective information did not vary between the sample courts. The view that defence solicitors were more subjective and variable in standard was consistent. This section will reveal that the influence of court clerks, while founded in national culture, is moulded to a greater extent by individual court culture.

It would appear to be a cultural facet of the lay magistracy that clerks are viewed as being highly professional and valuable. Interviews suggested that a good working relationship has traditionally existed between clerks and their bench.⁵ A consequence of this is that clerks possess considerable potential to influence a decision-making process. That potential is, however, delineated by their own court's culture. It will be suggested that not all courts make the same use of, or have the same expectations of, their clerks in the mode of trial procedure. Their role in Town Court is restricted by a culture which views mode of trial as a straightforward process rarely requiring professional advice. The structured approach favoured by New Court facilitates clerks having an integral role, but culture does not encourage them to become too proactive. The culture of City Court permits the highest degree of proactivity, and their magistrates saw the greatest potential influence of clerks to the point that they were deemed to effectively make some decisions.

6.3.1 Use of clerk

It was shown in Table 5.3 that the magistrates of New Court were considerably more likely to retire before reaching a mode decision than those in the other two courts. This practice facilitates use of the clerk for advice in the decision-making process. Table 6.4 below provides greater detail of the incidence of use of the clerk following a denial of guilt in the observation sample.

Table 6.4 Consultations with clerk by type and court

	Advice given by clerk			Total Advice		Total Sample (n=)
	Court Only	Court and Retiring	Retiring Only	(n=)	(%)	
Town Court	1	0	1	2	4	57
New Court	2	3	4	9	31	29
City Court:Lay	6	0	2	8	22	36
Total	9	4	6	19	16	122

A case involving more than one defendant appears as one case and not by reference to the number of defendants.

Table 6.4 shows that magistrates consulted with their clerk in 31 per cent of denied cases in New Court as compared to only four per cent of cases in Town Court. A consequence of these figures is that the role of clerks in the either way decision-making process in Town Court is extremely limited. This restricted role does not reflect magistrates' opinions of their clerks, who were portrayed in interview as being highly professional and useful. It is determined by the cultural attitude adopted towards the mode of trial procedure in that court. The role of clerks is seen as being to respond to requests for advice on the rare occasions when this is deemed necessary rather than adopt a proactive approach. All six interviewed magistrates noted that clerks did not influence the decision. One experienced magistrate in that court said:

Our clerks are good. We might occasionally ask them if we can keep a case if we are unsure, but in general we don't use clerks much in mode of trial. They are very careful not to push us.

(Magistrate, Town Court)

A clerk acknowledged this position.

We have a very limited role on mode of trial as the bench rarely retires. We should ensure that they are considering the right points and advise on the law. But we must be careful not to intervene.

(Clerk, Town Court)

Expectations of the relationship between magistrates and clerk in mode of trial were markedly different in City Court. Table 6.4 showed that clerks were consulted in 22 per cent of denied cases, usually in open court. All seven interviewed magistrates considered that clerks should be consulted in most borderline cases and that they were becoming increasingly proactive. One said:

The clerk's role is to advise. On the whole they are very good and useful. They might advise before the sitting commences. They don't make recommendations, but they do push us in certain directions.

(Magistrate, City Court)

A colleague noted:

Clerks advise on points of law and policy. They can influence our decision and we are loathe to go against their advice.

(Magistrate, City Court)

There was a general acknowledgement that clerks could influence a decision without making any recommendation.

We often ask the clerk whether he has anything to add. They can influence us by the mode of address without actually making a recommendation.

(Magistrate, City Court)

This opinion was taken a stage further by a very experienced magistrate who indicated that clerks could be influential without speaking at all.

You rely on common sense rather than guidelines. The reality is the exchange between bench and clerks, either through words or body language.

(Magistrate, City Court)

The clerks of City Court acknowledged this interpretation of their role and influence. All three of those interviewed believed that they had the potential to make decisions in practice, and that doing so did not necessitate giving lengthy or dogmatic advice, or even giving verbal advice at all. The Chief Clerk said, "Proactive clerks can usually make the decision in practice." This view was supported by a senior clerk.

You must ensure that magistrates are not being led down the garden path. You can make their decision in practice without saying what it is.

(Clerk, City Court)

There were, in fact, rare occasions in this court when the clerk did say what that decision should be. In case 214, the female defendant denied a charge of theft. The allegation was that a supermarket cashier only scanned some goods so that a customer paid £43.46 instead of £443.26. The CPS and defence agreed that it was suitable for summary trial as it was an unsophisticated act and appeared to be a one-off offence. The bench audibly expressed concern at the element of breach of trust, an aggravating feature which weighed heavily in City Court and resulted in most such offences being committed to the Crown Court. They asked to speak to their clerk. She rose and said, "You can keep it madam." A decision to accept jurisdiction was immediately forthcoming.

Observational data appeared to support the interview responses of the clerks of City Court as they presented as being more proactive in the court setting than their colleagues in the other two sample courts. All clerks were given a mark between 1 and 5 in relation to their degree of proactivity towards

the bench (see court observation data form reproduced as Appendix 5). This mark was allocated on the basis of the whole court sitting. Data obtained from this grading exercise reveal that the clerks of City Court were rated as displaying above average proactivity towards lay magistrates in precisely one third of court sittings: nine sittings from a total of 27. By way of comparison, the figures for New and Town Courts were 17 and 11 per cent respectively.

There might, however, be a danger of overstating the influence of clerks in City Court. A magistrate was quoted above as indicating that reality is the exchange between bench and clerk. But it is somewhat difficult to reconcile this opinion with the view of the same magistrate that, "We should be bolder in accepting jurisdiction. There is a risk of a cop out." This criticism was clearly directed towards his fellow magistrates and not towards clerks. The view of the senior clerkship at City Court would appear to be that the bench declines jurisdiction slightly too often. The Chief Clerk considers that, "Only clerks can get magistrates to keep more." This raises the question of why they are not doing so and are allowing magistrates to "cop out".

One possible explanation may lie with the clerks themselves. Only some are proactive. Some do not appear to favour a policy of retaining more cases. One of those interviewed for this study indicated that she would advise magistrates to send borderline cases to the Crown Court. The impression given by magistrates in interview was that clerks leant towards committal. In the opinion of one magistrate, "Clerks encourage us to send cases to the Crown Court and push us slightly in that direction." It is suggested, however, that the prime explanation for the apparent discrepancy between attitudes and practice is the culture of City Court. Clerks are an integral part of that culture. The core philosophy is to send cases to the Crown Court if there is any doubt.

The notion that a clerk can make the mode decision in practice may contain an element of truth with individual benches. Culture may be influenced by the philosophy of the current Chief Clerk that his staff should become more proactive. The concept of clerks effectively making decisions will, however, remain an exaggeration overall in the absence of a cultural change among magistrates towards determining borderline cases.

The clerks of New Court clearly have the potential to play a crucial role in the mode decision-making process of that court. The practice of selecting and reading out reported cases has been established. They are consulted by their bench in a higher proportion of cases, probably in virtually all borderline ones. Magistrates' attitudes were that clerks had a vital role to play and were generally very helpful and useful. Indeed, one saw them as "the most important person," although it was acknowledged that individual clerks displayed differences. Opinion was reflected by one magistrate.

We have a very good working relationship with the clerks who are very good. Some are more proactive than others. Their role is to give advice on factors, but not to recommend a decision.

(Magistrate, New Court)

The value and integral role of clerks were clearly acknowledged. There was, however, none of the emphasis given in City Court that clerks could make decisions in practice or that body language was influential. Magistrates expressed a strong belief that it was not the function of clerks to make recommendations. The clerks themselves viewed their role as being the traditional one of advising. One said, "My role is to refer magistrates to the guidelines and keep them informed on offences and sentences." The essential reason for this would appear to be that the culture of New Court, while welcoming advice as part of a structured decision-making process, would not accommodate a more proactive clerkship.

6.3.2 The Chief Clerk and training clerks

The philosophy and attitude of the Chief Clerk can be crucial to the perpetuation or variation of a court's culture. It has been suggested in this thesis that court culture provides the prime explanation for differences between courts. Culture may, however, be influenced by the appointment of a new Clerk to the Justices (Hucklesby,1997:141). The culture of Town Court reflects the philosophy of their Chief Clerk that magistrates should be encouraged to "display a mind of their own" when reaching decisions. The culture of City Court may be changed by the emphasis given by their Chief Clerk that clerks should become more proactive and that borderline cases should be retained. The Chief Clerk of New Court stated in interview that the role of her clerks was to assist and bring matters to the bench's attention, but "not to recommend."

Senior clerks, and in particular the Chief Clerk, exercise an extremely important and consequential training function, outside the scope of this study, as well as their role of legal adviser. If their latter role is largely defined by court culture, their training role has the potential to influence that culture. Interviews established that most magistrates had little or no knowledge of the modus operandi of the lay magistracy prior to their appointment to the local bench. One said, "I saw an advert and decided to find out more." Introduction to the tasks involved and the methods of performance comes primarily from formal induction training and experience gained by sitting on the bench. The majority of training is undertaken by personnel, primarily clerks, of the particular court (Hucklesby,1997:141). Training would appear to produce greater uniformity among magistrates of an individual court by emphasising the value of experience and the existence of bench tradition rather than by changing them as individuals (Bond and Lemon,1979).

6.3.3 The role of clerks in admitted cases

The advice of the clerk is likely to be sought more frequently after guilty pleas, especially when the bench intends passing sentence or is considering committal. Table 6.5 below indicates the incidence of use of the clerk for advice after a guilty plea at plea before venue in the observation sample.

Table 6.5 Consultations with clerk after guilty plea by court

	Advice given by clerk						Total Advice		Total Sample
	Sentence (n=)	(%)	PSR (n=)	(%)	CC (n=)	(%)			
Town Court	4	33	7	35	1	50	12	35	34
New Court	13	62	19	50	5	100	37	58	64
City Court:Lay	7	58	5	33	4	100	16	52	31
Total	24	53	31	42	10	91	65	50	129

$\chi^2 = 4.53, p < .104$

Only total advice figures tested

Table 6.5 shows that variations remained between the three sample courts in their propensity to consult their clerk and that their proportionate use was in the same order as it had been in mode hearings. Lay benches consulted with their clerk in all except one of the cases in the observation sample which were committed for sentence without a pre-sentence report. The exception was the case of dwelling house burglary in Town Court, previously noted, in which the defence solicitor acknowledged that committal was inevitable. The bench retired in eight out of the other ten cases. The remaining two involved a lengthy consultation in court. These statistics would appear to support the argument that virtually all of the cases committed for sentence at plea before venue were borderline. There is no logical reason why the bench should see the need for lengthy deliberation if the decision to commit presented as being obvious.

The findings of this study suggest that clerks conform to the culture of the lay magistracy when the question of whether or not to order reports in more serious cases arises. Magistrates acknowledged that the advice given them by clerks was extremely persuasive. Although the nature of the advice given in the cases committed for sentence is unknown, the decisions to commit would suggest that clerks did not seek to persuade magistrates to order reports if the available information indicated that a sentence outside their powers might be appropriate. This supposition was supported by five of the six, non-Chief, clerks in interview. One, in City Court, deemed reports to be appropriate in cases which appeared to be somewhat outside magistrates' powers, while acknowledging that in a busy court it was easier to send straight to the Crown Court. The other five considered that reports should only be ordered in cases in which magistrates would be likely to pass sentence. Majority opinion was reflected by a clerk in Town Court.

You should hear all the facts including mitigation. If deemed to attract over six months after hearing mitigation you should commit without a PSR.

(Clerk, Town Court)

The three Clerks to the Justices did not support the expressed majority opinion of their staff. These three emphasised that reports should be ordered in cases which appeared on the basis of the information available at plea before venue to merit sentences somewhat outside magistrates' powers, although their interpretation of what constituted "somewhat outside" varied. The Clerk to City Court, an acting stipendiary, proposed a test of 12 months' imprisonment. The Clerk to Town Court thought that "nine or ten months" represented the upper limit. The Clerk to New Court did not attempt quantification, but concluded that a report was appropriate unless committal was "blindingly obvious."

Magistrates indicated in interview that they saw the clerk's role as being to "draw attention to sentencing precedents" and "to provide knowledge of Crown Court sentences." It would appear as though there are two limitations to the effectiveness of this role. The first, established in the last chapter, is that clerks would appear to have very little knowledge of the sentencing patterns of their local Crown Court. This leads to their advice being based on nationally reported cases. It is worth repeating the opinion of a solicitor.

It is not that magistrates commit too quickly, but that they are purely guided by clerks. But clerks don't seem to get feedback from the Crown Court. They simply use Stones. This leads to the Crown Court often passing sentences which the magistrates could have imposed.

(Defence Solicitor, City Court)

The second limitation is that there is evidence to suggest that clerks do not always interpret reported cases accurately. In case 123, the male defendant admitted a charge of possessing cannabis with intent to supply after the cultivation of plants had been discovered at his home. His solicitor argued for a pre-sentence report, pointing out that the equipment was unsophisticated and that his client only supplied friends. The clerk advised the bench in open court that the Court of Appeal guideline for such offences was two years' imprisonment after allowance for the sentence discount. It is arguably unsurprising that the magistrates committed the offender for sentence given the nature of that advice, although the defendant received a community service order in the Crown Court. It would appear, however, that the clerk's advice was erroneous and based on the appropriate sentence for "pushers" who touted for business. A more appropriate precedent would appear to be that of the Court of Appeal in Rafferty (1998, 2 Cr.App.R. (S) 449) in which concurrent sentences of four and three months were upheld for producing and supplying cannabis.

6.4 STIPENDIARY MAGISTRATES

This section examines the approach of stipendiary magistrates to venue determination and their influence on the decision-making processes of the lay bench. It has been established that lay magistrates pay considerable attention to CPS lawyers partly because of their perceived professional expertise. There might, therefore, be an expectation that professional magistrates, being experienced solicitors or barristers,⁶ would be afforded at least the same degree of respect. There are, however, political implications to the initial appointment of a stipendiary magistrate to a bench which has existed for a very long period of time without one. Stipendiaries are viewed by many lay magistrates as representing a threat to the concept of lay justice (James and Raine, 1998:60). Their influence may be deliberately marginalised in a way which would be deemed culturally unacceptable in relation to the prosecution.

This perceived threat is relevant to the analysis offered in this section of the effect of stipendiary magistrates on the policy and culture of the lay bench. It will be suggested that the effect in City Court was minimal and that their two stipendiaries had not been absorbed into the court's culture. This would appear to contradict the findings of research by Hucklesby (1997:137). The apparent difference may be due to the fact that City Court had only had a stipendiary for some five years when this empirical study commenced. Some magistrates remained hostile to the appointment. Attitudes within metropolitan courts with a history of professional involvement might be very different. There is no reason, however, why this lack of influence in City Court should not apply to other courts which may in the future appoint a professional magistrate. Magistrates in the other two sample courts tended to view the prospect of stipendiaries as a threat rather than a fountain of knowledge.

6.4.1 Approach to mode of trial

Statistical data collected in this study revealed three significant findings in relation to stipendiary magistrates. The first is that the committal rate for trial of stipendiaries was 14 per cent lower than that of the lay bench in City Court at plea before venue (Table 4.6). The second is that they were more likely than lay magistrates to reach a decision contrary to the recommendation of the prosecution (Table 6.1). The third is that the CPS was more likely to refrain from making any recommendation before professional magistrates (Table 6.2). This statistical evidence would imply differences of approach by, and towards, stipendiaries. The findings of this study, however, support those of previous research that both sets of magistrates share the ideology of common sense (Seago et al.,2000:645). It became evident from court observation, and was subsequently confirmed in interview, that stipendiary magistrates viewed the core question as being whether or not the court's sentencing powers would be sufficient were the prosecution to prove the case as outlined. Emphasis is placed on the sentencing test and the assumption that the prosecution version of events is correct rather than on the requirement for aggravating features. The presumption in favour of summary trial was not mentioned in interview. This essentially accords with the lay bench approach of common sense. The difference, however, is that stipendiaries would appear to exercise a more independent judgement when assessing their sentencing powers.

The two cases in which jurisdiction was declined contrary to the prosecution recommendation for summary trial illustrate the approach of stipendiary magistrates. One (case 329) was outlined in section 5.3.5. The other (case 317) involved a male defendant denying a charge of dangerous driving. The allegation was described as being one of excessive speed, the

police deciding to follow a motorcycle as it was travelling at 50 miles per hour in a 30 zone. The driver accelerated to 90 miles per hour, ignoring police lights and siren. The CPS said it was borderline, but slightly more suitable for summary trial as "powers were just about sufficient." The defence concurred without elaboration. The stipendiary magistrate stated that on balance he did not agree that his sentencing powers would be sufficient were the prosecution to prove the case as alleged. The defendant admitted the charge in the Crown Court and was sentenced to three months' imprisonment.

These examples define the approach adopted by professional magistrates. They consider the adequacy of their sentencing powers taking the prosecution case as it stands. The cases do not, however, explain their lower committal rate in City Court. Indeed, they would suggest a higher rate as lay magistrates would have been more likely to endorse the recommendation for summary trial assuming that the CPS had made the same recommendation if there had been a lay bench. The prime reason for differences would appear to be provided by a senior magistrate's appraisal of his colleagues previously quoted. "We should be bolder in accepting jurisdiction. There is a risk of a cop out." Evidence suggests that the stipendiary magistrates had not been absorbed into the dominant culture of committing cases to the Crown Court if there was any doubt. While they question the CPS assessment of the possible sentence, there is no "risk of a cop out" at the upper level of their sentencing powers. As one solicitor said, "Stipes are less likely to send." Another noted that they were more likely to state the option of subsequent committal. They would appear more willing to take into account and use their full sentencing powers. This argument is supported by the fact that stipendiaries accepted jurisdiction in all five cases in which the CPS made no recommendation. The lay bench in City Court declined jurisdiction in two out of three such cases.

Interviews suggested that professional magistrates will consider each case individually on the basis of sentencing powers and appear less likely to be influenced by, or even to know about, bench policies. It has been suggested that a significant reason for the lay bench of City Court to decline jurisdiction against the recommendation of the CPS in the only case (206) in which this happened was an informal policy to commit all cases of violence in the city centre at night. The senior stipendiary gave a different viewpoint.

I know of no bench policy in relation to particular offences, and wouldn't follow one because I don't think they're lawful.

(Senior Stipendiary Magistrate, City Court)

This may provide a further indication that he had not been absorbed into the culture of City Court. There were, however, no examples in the observation sample of stipendiary magistrates accepting jurisdiction for dwelling house burglaries or offences of violence in the town centre.

It would appear as though the approach of stipendiary magistrates towards mode of trial provides few, if any, lessons from which the lay magistracy as a whole could benefit. The most noticeable apparent difference is that they display a greater willingness to question the recommendation of the prosecution and to exercise independent judgement. As a "role model", however, this is of limited practical significance as lay justices are by definition neither professionals nor experts. The approach of stipendiaries in City Court presents as being essentially the same as that of lay magistrates in that the central issue is whether or not their sentencing powers would be adequate taking the prosecution case as it stands. It would appear that their committal rate was lower than that of the lay bench in City Court because they did not conform to a culture of committing if in doubt. This is arguably a valuable lesson for those particular magistrates, but does not have national implications as there was no such culture in courts like Town Court in any event.

6.4.2 Approach to committal for sentence

In contrast to the mode of trial similarities, the expressed attitude of stipendiary magistrates following guilty pleas in more serious cases displayed a significant difference to that of the lay bench. Their attitude towards ordering pre-sentence reports in cases which may be outside their sentencing powers would appear to be fundamentally different to that of lay justices. It has been shown that lay magistrates tend only to order reports for offenders whom they consider will be sentenced by them. Stipendiaries appear to challenge this cultural inhibition by deeming it appropriate to order reports in more serious cases in which it only may be possible to pass sentence.

If an offence merits 12 months or more, I would commit without a PSR. If it is under 12 months you order a report.

(Senior Stipendiary Magistrate, City Court)

The Clerk to the Justices in City Court, an acting stipendiary, endorsed this view. "If over a year you send it direct. Less than a year you order a PSR."

There was agreement among interviewed defence solicitors in City Court that stipendiaries were more likely to reserve the option to commit when ordering reports and more likely to commit after reading reports. One said:

The stipe is more likely to state the option to commit. The lay bench doesn't often commit after a PSR. It is more frequent with stipes.

(Defence Solicitor, City Court)

There was, however, very little evidence from actual cases to support the expressed difference. There were only two cases in the observation and register samples in which a defendant was committed for sentence after a stipendiary had ordered reports. One of these defendants was sentenced at the Crown Court outside magistrates' powers, while the other received a community service order.

Two cases from the observation sample can, however, be compared to provide limited evidence of the different attitudes of stipendiary magistrates. In case 322, the male defendant admitted two charges of obtaining by deception and asked for five further matters to be taken into consideration. He had written down credit card numbers while working for the customer service department of a large company and had used these details to obtain services. The stipendiary said, "This involves a serious element of dishonesty and a breach of trust. I will order a PSR, but keep open the option of going to the Crown Court." The defendant was ultimately sentenced to 12 weeks' imprisonment suspended for a year. By way of contrast, a male defendant with no previous convictions who admitted two offences of commercial burglary was committed for sentence by the lay bench without reports (case 232). He had stolen electrical items from a secure warehouse owned by a large store in which his employers had a retail unit. He was sentenced to two months' imprisonment in the Crown Court.

A further difference between lay and professional magistrates in City Court would appear to be that the latter had no doubt as to the effect of the sentence discount in borderline cases. Stipendiary magistrates were clear that it was appropriate to sentence an offender to six months' imprisonment after giving credit for a guilty plea. A solicitor said:

The stipe will give six months with credit, but there is a tendency for the lay bench to opt out.

(Defence Solicitor, City Court)

The senior stipendiary magistrate concurred.

Stipes will impose six months after giving credit for the plea. It surprises me that the lay bench is reluctant to do so.

(Senior Stipendiary Magistrate, City Court)

This, however, also surprised most of the lay magistrates in Town Court.

6.4.3 Effect on court culture

Previous research has suggested that the "working credo" of stipendiary magistrates can have an important influence on the way a lay bench operates and on the culture of a court (Hucklesby,1997:141). This study does not support those findings, with the limited exceptions of changing attitudes towards adjournments and influencing the culture of delay. It must be reiterated and emphasised, however, that different findings may be caused primarily by the fact that City Court had only had a resident stipendiary magistrate since 1994. The majority of sitting magistrates had been appointed to a totally lay bench. The significance of this was noted by the stipendiary himself. "Being [X's] first ever stipe is a factor. I was integrated very softly, softly." Provincial stipendiaries date back to 1813 (Seago et al.,2000:633). Benches with an historical tradition of including one or more professional magistrates are likely to have integrated those magistrates in a very different and more inclusive manner.

There was a consensus of opinion among the lay magistrates of City Court interviewed for this study that the appointment of a resident stipendiary magistrate had advantages for the bench as a whole. He could preside over lengthy trials or contested committals, assist with training programmes, attack the culture of delay and generally give advice. They were equally adamant, however, that he had no effect on lay policy and did not influence the decision-making process for either way offences. In the words of a magistrate with some 20 years' experience:

The stipe is used for training. He has reduced delay, given us more confidence and made us more interventionist. But he has no effect on mode or sentencing policy.

(Magistrate, City Court)

A magistrate appointed to the bench some three years before the first stipendiary agreed.

The stipe has a positive effect on the bench and there is no him and us situation. We can learn a lot from him. How to deal with advocates, to make us more positive. But he has no effect on lay policy.

(Magistrate, City Court)

A magistrate of similar experience noted, "The stipe has no influence on lay policy, but is interesting to observe." Even the one interviewed magistrate who had been appointed after 1994 stated that, "He has no effect on policy."

The inherent independence of lay magistrates and their implicit belief in the concept of lay justice raise the suspicion that they may be liable to underplay the influence of professionals in their decision-making processes. The feeling that the appointment of a stipendiary might be seen, in the words of one magistrate, "as the thin end of the wedge" could lead to the value of that professional being deliberately marginalised. It should be noted, however, that solicitors in City Court talked about stipendiaries being "more likely" or "less likely" to do certain things rather than mention lay magistrates being influenced by professional input. More significantly, the senior stipendiary at City Court would not disagree with the comments or conclusions of his lay bench.

I have no influence on lay policy. This is because of the realities of life and not out of choice. I would like to have some influence. ... There is a reluctance on the part of lay magistrates to accept a stipe's expertise, and a few are openly hostile to the concept of a stipe. ... The formal route of influence is to be involved in training, but I now tend to do less of this. The Chief Clerk has a statutory duty to advise the bench and stipes have little control over policy. ... The situation has become more difficult since a second stipe was appointed. Lay magistrates feel threatened as to their continued existence and are consequently less accepting of my guidance.

(Senior Stipendiary Magistrate, City Court)

6.5 LIAISON JUDGES

Each commission area has a Crown Court judge who is appointed to be the liaison judge for the magistracy (Ashworth,2000:56). This section examines the influence of those judges. Procedure and policy in a particular court are primarily determined by the evolution and perpetuation of court culture. Liaison judges do not have the influence to alter that culture. There was, however, a consensus of opinion among magistrates and clerks interviewed for this study that liaison judges possess considerable potential influence over whether benches should accept or decline jurisdiction for particular categories of offence. As one training clerk in City Court said, "The views of the liaison judge are extremely important. He says --- magistrates follow. I say --- magistrates consider." There may be an element of hyperbole in respect of the "follow" part of this statement, but there is an unquestionable basis to the comparison. This basis is occasioned, as was mentioned in section 5.2.3, by magistrates' perceptions of the expertise and authority of judges and a desire to avoid criticism from the higher judiciary. As one previously quoted said:

Criticism from the judge and not the case's ultimate outcome is indicative of whether we were wrong.

(Magistrate, New Court)

This introduces two factors for consideration. These are the level of input of the judge in different courts and the content of that advice. A third factor, the degree of notice that individual courts take of such advice, was analysed in the last chapter. Interviews suggested that there were significant differences between the three sample courts in the level of input of their liaison judge. This may be due to the personality of the individual judge or the cultural expectations of the relationship between judge and magistrates in that court. It may, however, be more simply explained by the length of time during which a

particular judge has been the designated liaison judge. At the date of this empirical study, City Court had had three liaison judges within five years. New Court had experienced a fairly recent change of personnel after a lengthy association with his predecessor. The liaison judge to Town Court had been in position for a number of years. The consequence was closer ties between magistrates and judge in Town Court than in the other two courts.

Interviews with magistrates of Town Court emphasised their meaningful relationship with their liaison judge.

We have enormous contact with the liaison judge, who is brilliant. He comes to meetings and social functions. He organises two sentencing exercises each year in different parts of the county.

(Magistrate, Town Court)

The liaison judge is important and takes training sessions. The current one is greatly respected and viewed as a font of knowledge.

(Magistrate, Town Court)

This degree of contact can be contrasted with the expressed views of the magistrates of City Court, not all of whom could even remember their liaison judge's name.

The liaison judge has the potential to be influential, but I cannot remember any directives. More feedback would be helpful.

(Magistrate, City Court)

The most dogmatic opinion came from the senior stipendiary magistrate.

The liaison judge could be influential, but in practice his involvement is far too limited. I suspect he doesn't take much notice of what magistrates are doing. There is no feedback at all. There should be.

(Senior Stipendiary Magistrate, City Court)

The clear inference, however, was that previous liaison judges in City Court had been more communicative and that the current lack of contact was due to either the personality or the newness of the particular judge and not to cultural expectations of the relationship.

Policy advice emanating from liaison judges appears to be reasonably consistent between courts. Magistrates and clerks in all three sample courts acknowledged that they had received strong representations to commit cases of dwelling house burglary to the Crown Court, although it was shown in section 5.3.4 that there were variations in opinion between courts as to whether these representations amounted to advice or a firm policy. No other offence categories appear to have been stressed except occasional, and apparently in New Court changing, advice to commit cases involving the supply of drugs to prison inmates. The Clerk to the Justices in City Court, who acknowledged that the current liaison judge had nominal contact with magistrates, said:

The liaison judge has urged that dwelling burglaries should be committed, and are perhaps more likely to be sent here than elsewhere.

(Chief Clerk, City Court)

That Chief Clerk noted that the liaison judge could be influential if "he went out of his way to indicate that he did not want to see certain offences." The emphasis given in interviews was, however, almost exclusively on the limited categories of offence which judges had stressed ought to be committed to the Crown Court.

Data collected in this study would suggest that liaison judges believe that policy should override the criterion of sentencing powers in relation to dwelling house burglaries. Their strong representations for committal did not result in sentences in excess of six months' imprisonment invariably being imposed. Almost a fifth of convicted house burglars in this study (five from 27) were sentenced at the Crown Court within magistrates' powers. If magistrates had committed any of these cases because of policy advice, it would appear to support their argument that the outcome of a case by itself is not indicative of whether they had made the right or the wrong decision.

6.6 RESPONSIBILITY FOR THE MODE DECISION

The role of professionals within the court process gives rise to considerations of who should be responsible for making mode decisions. Magistrates have been entrusted with those decisions since the advent of either way offences in 1855. But an emphasis on managerialism in criminal justice has originated a debate as to whether or not this should continue. Four possibilities have been mooted. The first, supported by the majority in this study, is retention of the status quo. The second, which has received no official backing and was not discussed in interview, is that the Crown Prosecution Service should determine venue in accordance with national criteria. The third, favoured by the Royal Commission on Criminal Justice (1993:para.6.13), is that the prosecution and defence should agree as to venue and magistrates only become involved in the absence of agreement. The fourth is that a system of case management requires an allocation procedure which should be delegated to clerks.

There was a consensus of opinion among magistrates interviewed for this study that mode of trial should continue to be a judicial decision to be taken by them. Other court participants offered majority support for this proposition. Emphasis was placed on the core conventions of the impartiality and independence of the lay bench.

Magistrates must continue to make the mode of trial decision as they are independent and have no vested interests. They exist to serve the public and must be impartial.

(Magistrate, New Court)

This argument was supported by a number of other magistrates.

Magistrates are the right people to make mode of trial decisions because they have no axe to grind.

(Magistrate, Town Court)

A similar emphasis was placed by the 14 professionals (from 19) who supported the retention of magistrates' authority. The Clerk to the Justices in Town Court commented that, "Magistrates should make the mode of trial decision as they are seen as being independent." One magistrate stressed the need for justice to be seen to be done.

Magistrates should make the mode of trial decision. If we make a mistake, it's in the open and the public domain.

(Magistrate, New Court)

There was only one proviso to the unanimous conclusion of magistrates.

If either way offences were being introduced today, there would be no need for magistrates to make the decision. But the status quo should be retained as there is no better situation.

(Magistrate, City Court)

The proposal that prosecution and defence lawyers should be empowered to reach an agreed decision on mode of trial was rejected by all interviewed magistrates and clerks except for one. That one said:

I prefer the Royal Commission proposal that the CPS and defence agree on mode of trial. But magistrates would still decide in the absence of agreement.

(Clerk, New Court)

Magistrates expressed the need for the decision to remain as part of the judicial process. One expressed a particularly forthright opinion.

The CPS and the defence are rams interlocking horns. We act as a buffer in the middle.

(Magistrate, Town Court)

Clerks stressed that lawyers had underlying tactical and cost motivations.

The CPS and defence will collaborate on the grounds of expediency. But they have vested interests. The current situation is preferable as at least magistrates can question agreed recommendations.

(Clerk, New Court)

Only one of the nine interviewed defence solicitors supported the RCCJ recommendation that venue should be determined whenever possible by agreement between the two sets of solicitors.

Venue to be determined by the CPS and the defence would be preferable as it would avoid the occasional dreadful decision. But the client's wishes as to venue are paramount so that agreement is often not possible.

(Defence Solicitor, New Court)

The other eight all rejected the proposal, most emphasising the effect of the client's instructions. One gave a different emphasis.

Magistrates should make the mode of trial decision. It is not an administrative decision and should not be open to agreement in an adversarial situation.

(Defence Solicitor, Town Court)

The suggestion that clerks should make the mode decision as part of a case management system was unanimously rejected by magistrates and solicitors interviewed for this study. Magistrates placed emphasis on their impartiality rather than on the influence which delegation of decision-making would give clerks over sentencing.

Magistrates should make the mode of trial decision. Clerks have their own agenda and can't be seen to be totally independent.

(Magistrate, City Court)

Defence solicitors emphasised clerks' personal knowledge of defendants and the need for justice to be seen to be done.

Clerks should certainly not make the decision as they often know the defendant and would be influenced by previous.

(Defence Solicitor, Town Court)

More tersely, a colleague commented, "Clerks are not there to judge." A number expressed the viewpoint that clerks favoured the prosecution and would be more likely than magistrates to decline jurisdiction as "they are less

lenient than lay magistrates." This conclusion was tentatively supported by the mode of trial exercises, in which clerks declined jurisdiction in ten per cent more cases than magistrates.

Three of the nine interviewed clerks thought that delegation of the mode decision to them was theoretically appropriate. This minority saw the benefits as administrative rather than enhancing consistency of decision-making.

You should perhaps retain magistrates' powers on political grounds. But this has administrative drawbacks as it means that clerks can't take Narey courts. A system of case management requires an allocation procedure. The clerk should determine that.

(Chief Clerk, City Court)

Majority opinion among clerks favoured magistrates continuing to make the decision as it was "a judicial and not an administrative decision." One noted that, "The clerk's role within the system would become disproportionate if we made the mode of trial decision." Even the minority of clerks who favoured delegation of the mode decision to them acknowledged that it was currently a political impossibility. One said:

Politics come into it. The loss of the decision would be the death knell of the lay magistracy.

(Clerk, City Court)

This may be an exaggeration, but it would certainly have been perceived at the time of this empirical study as a step in that direction. A magistrate from Town Court expressed the very real concern which was felt by the lay bench. "The suggestion of clerks making the decision has been put forward as a step towards getting rid of magistrates." It is suggested, however, that in a climate of managerialism delegation of authority to clerks will remain on the agenda. A clerk in City Court commented that, "Eventually the decision will be made by the clerk." This assessment may well prove to be accurate. Definition of the term "eventually" is altogether more problematic.

6.7 CONCLUSION

This study has supported the finding of Riley and Vennard (1988:11) that there is an extremely high concordance rate between prosecution preferences and lay magistrates' mode of trial decisions in those cases in which a firm recommendation is made. The structure of the current procedure arguably renders this virtually inevitable. Magistrates derive their prime source of information on which to base a decision from an outline given by the CPS which they are advised to assume is correct. Two other findings of this study did, however, influence this concordance rate. The first was a consensus of opinion among magistrates that CPS lawyers were professional experts who provided objective and unbiased information to the court. The second was that defence solicitors rarely challenged the recommendation of the Crown. They only did so in 11 per cent of cases, and in many of these made it clear by recognised techniques that they were doing so simply to meet their client's instructions.

Two findings of this study require consideration together. The first was that variations existed in the committal rates of the three sample courts which could not be fully accounted for by different offence patterns. The second was that lay magistrates in all three of those courts almost invariably followed the mode recommendation of the prosecution. The implication is that CPS preferences must vary between areas in relation to factually similar cases. This raises the question of whether a high concordance rate was produced by magistrates failing to exercise independent judgement or by prosecutors adapting their approach to comply with their expectations of the likely decision. It is suggested that the answer is that the question is simplistic. Concordance rates cannot be approached on a cause and effect basis. They are produced by a culture generated by all court participants.

Data would suggest that most mode decisions were effectively not taken by magistrates, but were the result of prior negotiation between lawyers. Only once in 123 cases did lay magistrates not follow an agreed or unchallenged recommendation. Negotiation was, however, conducted in the knowledge of the decision which the magistrates were likely to make as both sets of solicitors desire to maintain their credibility. The culture of the sample courts affected the expectations which lawyers had as to which cases would be retained and which would be committed to the Crown Court. This shared understanding of the likely outcome resulted in contested applications being rare. In turn, the limited number of contested hearings partly explains the high concordance rate between CPS recommendations and magistrates' decisions.

It has been argued that variations in committal rates between courts are primarily caused by court culture and the effect that this has on the working practices of participants. The importance of court culture does not, however, mean that all decisions will conform to the established pattern. Individual performance and reputation can influence the decision-making process. This chapter has shown that, while the strength of prosecution presentation might be relevant, the identity of the prosecutor is unlikely to influence magistrates as a result of their perception of CPS lawyers as having conformity of standards. But the identity of the defence solicitor might be a factor in the decision-making process. Magistrates expressed markedly different opinions of individual advocates. It would appear that only those deemed realistic have the potential to be influential. The inference is that a realistic defence solicitor might achieve a result contrary to a court's pattern if faced with a weak CPS lawyer. The practical significance of these factors is, however, limited as they are moulded by the informal norms held by participants in a particular court. Situational factors are only relevant within a prescribed cultural framework.

End Notes

¹ Paragraph 8 of the Code for Crown Prosecutors (1994), which deals with mode of trial, is reproduced in Appendix 2.

² In order to minimise the element of subjectivity, borderline cases were defined for the purposes of this analysis as those which the prosecution presented as containing an element of doubt.

³ There is judicial authority for the proposition that prosecution lawyers may provide an opinion as to committal for sentence in certain circumstances. There was nothing in the legislation to indicate that the magistrates' court should have the assistance of submissions by the prosecution on the question of mode of trial but not on the question of committal for sentence. Principle would not be infringed by a submission that the case should be committed to a court which had additional powers.
(Lord Justice Kennedy, R.v.Warley Justices, 1999, 1 Cr.App.R. (S) 156)

⁴ Other potential reasons for defence solicitors preferring committal to the Crown Court, such as enhanced rates of legal aid payments, are outside the scope of this study.

⁵ This empirical study was concluded in the summer of 2000 shortly before the submission of the Justices' Clerks' Society to the Auld Commission became public. This submission, which advocated a more professionalised system of lower court justice, was condemned by the Magistrates' Association. It is not known whether the strain on relationships has had any effect on the decision-making process in practice.

⁶ Section 10A of the Justices of the Peace Act 1997, which was inserted by section 78 of the Access to Justice Act 1999, stipulates that District Judges (Magistrates' Courts), formerly stipendiary magistrates, require a seven year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990. This means that they are all barristers, solicitors or justices' clerks.

CHAPTER 7

CROWN COURT OR MAGISTRATES' COURT: DATA, THEORY AND POLICY

The aim of this study has been to examine the decision-making process for either way offences in magistrates' courts in England and Wales. This final chapter will draw together the main empirical findings and discuss their contribution to theoretical and policy debates. The researcher has been able to observe and comment on the venue process without being bound by policy concerns. There is, however, wisdom in acknowledging that saving costs and time are now recognised as facts of life in the English criminal justice system (Fionda,1995:62). These values have inspired the dominant policy objective over the past decade of restricting the number of cases reaching the Crown Court. A secondary objective has been the enhancement of consistency between courts when determining which cases can be completed by magistrates in the public interest.

7.1 THE MAIN FINDINGS AND THEIR THEORETICAL IMPLICATIONS

This thesis has advanced two central arguments. The first is that attempts to change procedure cannot afford to underestimate the strength of the culture of the lay magistracy. The second is that individual court cultures which have evolved as a consequence of an implicit belief in the concept of local justice provide the prime explanation for variations in committal rates between courts. It has been suggested that the core reason why recent initiatives have only had a modest impact on those rates is that they have failed to become an integral part of magisterial culture. It would appear as though scope remains for magistrates to accept jurisdiction more readily. Data obtained in this study accorded with national statistics and revealed that the majority of defendants for whom magistrates declined jurisdiction received sentences which the lower courts could have imposed (Barclay and Tavares,1999:36). The desirability of a reduced committal rate is, however, a matter for debate.

7.1.1 Policy and principle

The objective of a lower committal rate is contentious because it is apparent that the question of mode of trial raises acute conflicts between policy and principle (Ashworth,1998:264). This conflict is primarily occasioned by the prioritisation of the demands of cost and efficiency or those of justice (Raine and Willson,1993:213). Official policy is, in essence, that magistrates should be encouraged to finalise all cases in which a sentence within their powers would be sufficient to protect the public interest. The crucial issue from the perspective of principle is that the court hearing a case should be perceived to be capable of fairly handling that particular case in a manner commensurate with the gravity of the offences charged (Jackson,1994:262).

The two current modes of trial are theoretically distinct, the law having deliberately created two disparate tiers of justice (Winn,1986:373). One was geared in its ideology and generality to the structures of legality. The other, quite simply and explicitly, was not (McBarnet,1983:140). Trial by jury is the epitome of the due process model of criminal justice (McConville and Baldwin,1981:7). The institution of the jury is seen as embodying the ideology of due process within a modern professionalised criminal justice system (Duff and Findlay,1988:215). Formalised summary courts evolved in the mid nineteenth century as tribunals designed around an ideology of guilt to efficiently punish minor offenders (McBarnet,1983). There appears to have been a tacit assumption in the legislation which created them that a conviction was to be the usual outcome of summary proceedings (Jones,1974:32). The structures of legality inherent in jury trial were sacrificed on the altar of expediency at a time when the number of offences prosecuted showed a dramatic increase (McBarnet,1983:140).

The essence of summary justice remains a speedy procedure conducted without the traditional legal formalities (Sanders and Young,2000:485). Magistrates' courts are still essentially crime control institutions with a veneer of due process considerations (Winn,1986:374). They do, however, display one significant difference from their original role. They are now expected to deal with a far wider and more serious compass of offences than those for which summary courts were designed. There has been a progressive extension in their jurisdiction as legislation has increased the categories of summary and either way offences. In the late nineteenth century magistrates were accustomed to dealing with petty thieves, vagrants and prostitutes (Jones, 1974:86). Lay magistrates in England and Wales now deal with more serious offences than lay judges in any other jurisdictions (Morgan and Russell, 2000:110).

The pivotal concern for exponents of principle is insufficient confidence in the ability of magistrates to deal with more serious offences (Jackson, 1994:262; Wadham,1999). Disparaging comments from lawyers and academics display a prevalent feeling that summary justice is too summary and that magistrates' courts provide insufficient opportunity for a full examination of a case (Ashworth,1998:265). Research has repeatedly revealed that the majority of defendants do not expect justice to be done in the magistrates' courts (Bottoms and McClean,1976; Gregory,1976; Riley and Vennard,1988; Hedderman and Moxon, 1992). Although many of the historical perceptions of jury trial might be somewhat idealistic, there is a widespread opinion that trial by jury is fairer and more thorough. Even staunch advocates of the right of election acknowledge, however, that pressure to retain the right would be reduced were the quality, or at least the perceived quality, of magistrates' justice to be enhanced (Wadham,1999).

The views of clerks and solicitors expressed in this study supported these findings of the inadequate quality of magistrates' justice. This inspired an argument that one reason why measures designed to achieve the objective of a reduced committal rate have only had a limited impact is that court participants in general do not acknowledge the validity of that objective. There would not appear to be any impetus coming from within magistrates' courts to finalise more cases. The emphasis of professionals interviewed for this study was on the viewpoint that lay magistrates were already being asked to deal with cases at the extreme of their ability. As a clerk previously quoted said:

Magistrates' courts could take on more work, but magistrates are not capable of dealing with more serious cases.

(Clerk, New Court)

The majority of interviewed solicitors believed that magistrates had a tendency to over-convict. One commented:

There are disadvantages in being tried in the magistrates' court as magistrates are case hardened, know each other and only require a 2-1 majority. I will only run a trial if there is a genuine defence, and believe that more than half of those convicted should have been acquitted.

(Defence Solicitor, New Court)

This resulted in the majority opinion among professional court participants that the goal of a reduced committal rate was a flawed objective.

The attitudes of magistrates towards retaining more cases present as being fundamental to an analysis of mode procedure and the implementation of reforms. There was a virtual consensus among those interviewed for this study that there was no need for any significant change in the distribution of business between the higher and lower courts. Opinion was that current procedure produced a fair and realistic allocation of cases and that government exhortations would not influence the decision-making process.

Dominant values of parsimony and efficiency have inspired an economic and managerial policy argument that the country cannot afford to pay for the continuing expansion of Crown Court trial (Raine and Willson,1993:212; Ashworth,1998:264). But magistrates do not see it as being any part of their function to effect economic or other politically expedient policy and prove resistant to change unless that change is perceived by them to be in the interests of justice. As one previously quoted said:

I would never agree to retaining cases on economic grounds. I am fed up with political speak. There should not be pressure put on us. We are trained to do a job and should be left to do it.

(Magistrate, City Court)

The attitude portrayed by magistrates in all three sample courts that their committal rates were essentially satisfactory was reflected by the majority opinion that procedure benefited from being straightforward and brief. Mode of trial was determined within five minutes in 70 per cent of cases in the observation sample which involved a sole defendant. There was virtually no evidence to suggest that magistrates saw current procedure as being contentious or problematic. Indeed, a number of them questioned the researcher as to how he could possibly write a thesis on a subject as simple as determination of venue. This philosophy was interrelated with a viewpoint, held particularly by more longstanding magistrates, that mode of trial was not of crucial importance. This attitude was arguably understandable given that the vast majority of cases denied at plea before venue in this study were ultimately resolved either by the prosecution withdrawing all charges or by the defendant admitting the original or an amended charge. Trials are so much the exception in both the higher and lower courts that the terminology "mode of trial" borders on being a misnomer. Many magistrates thought that cracked trials presented a far greater problem than mode procedure.

7.1.2 Reform measures

A series of piecemeal initiatives geared explicitly towards the attainment of the two main policy objectives have been introduced since 1990. It has, however, been suggested that the principles underlying the either way decision-making process remain those which were influential prior to 1990 despite procedure ostensibly having been significantly amended since that date. The argument has been presented that measures designed to achieve judicial change will only have the desired effect if they become part of court culture. Data collected in this study suggest that the various mode of trial initiatives have not become part of court culture or, at least, have not become part of the culture of many courts. Magistrates continue to view their sentencing powers as being the pivotal issue and to consider the decision made at mode of trial as being essentially final.

The most innovative principle contained in the first reform measure, the issue of national guidelines, was the introduction of a presumption in favour of summary trial. Magistrates were encouraged to accept jurisdiction unless the alleged offence displayed at least one specified aggravating feature and the bench felt that its sentencing powers would be insufficient (1990,3 All ER 979). In the interests of consistency between courts, they were being advised that a case which had no aggravating features should be deemed to come within their jurisdiction. This presumption in favour of summary trial was not mentioned in interview by a single magistrate, lay or professional. There was not a single mention of the requirement for aggravating features. The majority of magistrates appear to continue to determine mode of trial on the traditional basis of whether or not their sentencing powers would be adequate in the event of a conviction.

It has been argued that one reason why national mode of trial guidelines do not appear to have become part of the culture of some courts is that many magistrates sitting at the date of their issue viewed them, at best, as being superfluous and, at worst, as representing an attack on the ideology of common sense. There has been a proliferation in the quantity of written guidance provided to magistrates in recent years. This trend, described by many magistrates in interview as restricting their freedom and making their job more "complex", is resented by many as implying a criticism of their common sense approach. Magistrates' responses in interview supported the findings of previous research that common sense represents a dominant ideology among the lay bench (Worrall,1987; Raine,1989; Seago et al.,2000). Magistrates stress that they are ordinary members of the community. They believe that guidance and legislation have to be interpreted in the light of common sense, which essentially means their own views and practices (Parker et al.,1989). This led to a very experienced magistrate in City Court saying, "Common sense overrules the guidelines."

The second reform measure, extension of the power of committal for sentence after summary trial, was designed to increase flexibility in the decision-making process. Magistrates were being encouraged to accept jurisdiction more readily in the knowledge that they could always review that decision. Court observation and interviews suggested, however, that magistrates continue to view the decision made at mode of trial as being essentially final. The purpose of that decision in the opinion of many is to provide a clearly defined path. The extended power of committal for sentence would not appear to have had much practical influence on the decision-making process or on committal rates. Prior to October 1992 the decision to accept jurisdiction was final on the basis of the facts of the case. The sole grounds for

subsequent committal, antecedents or character, presented no problems for magistrates as they could not be expected to have taken into consideration information of which they theoretically had no knowledge. The Criminal Justice Act 1991 introduced a relatively unfettered power of committal for sentence after summary trial, a power of which magistrates are reminded on every page of the revised guidelines. The concept implicit in this power that the decision to accept jurisdiction should be viewed as a fluid decision does not appear to have become part of the culture of the lay magistracy. Majority opinion among magistrates and lawyers was that committal for sentence after summary trial continued to be exercised solely on the grounds of previous convictions.

One reason for this may be the suggestion made in previous research that magistrates are reluctant, indeed probably loathe, to make decisions which might appear to conflict with, and by implication criticise, those made earlier in the proceedings by fellow magistrates (Parker et al., 1989). A number of magistrates interviewed for this study commented that the low committal rate for sentence after reading reports indicated that their colleagues had made the correct decision when deciding whether or not to order reports. The inference is that committal after reading reports implies that the initial decision was incorrect. The same principle would seem to apply if committal for sentence was being considered on the grounds of the gravity of the offence after jurisdiction had been accepted. The power of committal for sentence is rarely exercised other than for antecedent reasons as it might appear to imply criticism of the bench which accepted jurisdiction. The other side of this argument is that magistrates approach the decision to accept a borderline case at mode of trial with caution.¹ There is a tendency to commit doubtful cases to the Crown Court in order to avoid the possibility of placing colleagues at a subsequent sentencing hearing in an embarrassing position.

This cultural desire for finality at the initial jurisdictional hearing presents as being of particular significance to an analysis of the operation of the plea before venue provisions when a defendant admits guilt. The policy objective of reducing the number of defendants being sent to the Crown Court was partly dependent upon the willingness of magistrates to order reports and pass sentence in cases which would previously have been committed for trial. National statistics imply that this has not happened. A fall in the committal rate for trial has been balanced by an increase in the rate for sentence (Home Office,2000:para.6.15). It has been argued that the prime explanation for the limited impact of the plea before venue provisions on committal rates is the cultural attitude that the decision made at the initial hearing is essentially definitive. The ordering of reports is viewed as equating to an acceptance of jurisdiction so that magistrates would then almost invariably finalise the case.

The consequence is that magistrates appear extremely reluctant to order reports in cases which present on the basis of information available at plea before venue as being possibly outside their sentencing powers. This conclusion was supported by data that 80 per cent of guilty plea defendants in this study who were sentenced at the Crown Court within magistrates' powers had been committed without reports. The finding that very few defendants were committed after reading reports is open to two conflicting interpretations which are pivotal to any analysis. Magistrates consider that it indicates that their colleagues had made the correct decision when determining whether or not to request reports. The alternative argument is that it reflects a conservative attitude towards the plea before venue provisions. The philosophy behind those provisions was that magistrates should consider all available information before making a jurisdictional decision.² Seeking that information by ordering reports would increase the possibility of committal after reading reports.

7.1.3 Local Justice and Court Culture

It has been argued in this thesis that the objective of enhanced consistency between courts has been frustrated by a strong opinion held by magistrates that national consistency is of secondary importance to the perceived principal responsibility of meeting the needs of the local community. Local organisation has formed the structural basis of the lay magistracy since its evolution in the thirteenth century (Burney,1979:46). The value of local experience continues to represent a dominant ideology among the lay bench (Raine,1989:10; Seago et al.,2000:645). An ideology of localism tends, however, to produce an insular approach (Tarling et al.,1985:166; Acres,1987:61).

The rationale of local justice, of policy having to be uniquely adapted to meet local conditions and patterns of crime, is central to the philosophy of magistrates' courts (Tarling,1979:27). Data collected in this study revealed significant differences in the committal rates of the three sample courts. Analysis suggested that these variations could not be fully accounted for by differences in cases heard. There might be an expectation that these disparities would be a cause of concern for magistrates as perceived inconsistency in decision-making has been a major criticism of the lay bench for a considerable number of years (Morgan and Russell,2000). This, however, was not the case. Interviews conducted for this study suggested that most magistrates viewed their primary responsibility as being to administer the law in a manner which met the perceived needs of the local community whom they represent and serve. Very limited interest in, and an almost total lack of knowledge of, the practices of other courts was shown. One magistrate said:

I have no knowledge of other courts' rates. I have no real interest in other courts' practices as you need to do right by [our town].

(Magistrate, New Court)

The emphasis on local justice resulted in the formulation of informal bench policies that jurisdiction should routinely be declined for certain types of offence because the prevalence of that behaviour was seen as a source of anxiety in the local community. There was evidence to suggest that, at different times, a general consensus among magistrates in City Court had overridden the national criterion of sentencing powers in relation to allegations of violence in the town centre at night and offences of aggravated vehicle taking. It was, indeed, suggested that informal policy provided the essential reason for the magistrates of that court to decline jurisdiction against the recommendation of the Crown in the only case in the observation sample in which they did so.

Local justice forms a central element in the debate as to whether cultural or individualistic factors are primarily generative of discrepancies in decision-making between courts. It has been established that two theoretically distinct approaches towards the study of magistrates' courts, positivist and interactionist, have resulted in alternative perspectives being adopted towards acknowledged disparities at all the various stages of the criminal process (Winn,1986). The concentration of positivist empiricism on differences between individual magistrates and between their interpretation of facts led to the traditional model of criminal justice presupposing that differences between courts could be explained by differences in cases and in the practices of individual decision-makers (Paterson and Whittaker,1995:264). This paradigm has been challenged by interactionist sociology, which focuses on the working relationships of all court personnel. Decisions are seen from this perspective as being the outcome of a social process involving all of its contributors (Rumgay,1995:201). The central thrust of this study has been interactionist. The argument has been advanced that the traditional model of criminal justice is far too restrictive.

It has been argued in this thesis that the prime explanation for variations in committal rates between courts lies in the culture of individual courts and the effect that this has on the working practices of all participants. One magistrate said, "Benches are hotbeds of local cultural thinking." It was shown that each of the sample courts had established an identifiable pattern of decision-making. Individual decisions generally conformed to expectation within the court making them, while frequently being different from those which would have been anticipated in the other courts. The core philosophy of Town Court was to finalise a case if at all possible. Magistrates in the other two sample courts expressed the view that judges should be the sole arbiter of doubtful cases. Each individual decision enhanced the reputation of that court for making that type of decision and, thereby, perpetuated its culture (Rumgay,1995; Hucklesby,1997). Every time that Town Court accepted or City Court declined jurisdiction in a borderline case the prospects of that pattern being repeated were increased and the expectations of all court participants crystallised.

It is, however, an important argument of this thesis that professionals play an integral role in the decision-making process for either way offences and in the system of lay justice generally. All decisions are influenced by the flow of information to the decision-maker and by the way in which supposed "facts" are selected and presented (Ashworth,1998:301). This is particularly significant in mode of trial as magistrates derive their prime source of information from the prosecution outline of the case (Riley and Vennard, 1988:11). Indeed, in most instances they derive their sole source of information from that outline. Research has consistently revealed a close relationship between prosecution representations and lay magistrates' mode decisions (Bottoms and McClean,1976; Baldwin and McConville,1977; Riley and Vennard, 1988).

Data collected in the observation sample of this study revealed a concordance rate of 98 per cent between the two in those cases in which the CPS made a firm recommendation. Current criteria render it to be expected that decisions would accord with prosecution preferences in most cases. The significance of CPS representations to the decision-making process was, however, strengthened by lay magistrates' perception of its lawyers as being professional experts who provided objective and unbiased information to the court (Brown,1991; Hucklesby,1997). This was in sharp contrast to their opinion of defence solicitors as being altogether more subjective and variable in standard (Parker et al.,1989:96-98; McConville et al.,1994). Although magistrates appeared aware of the existence, if not the extent, of negotiating between solicitors, they believed that the case outline provided a true picture of the alleged offence and appeared reluctant to seek further information. These attitudes support the contention that magistrates display a crime control ideology and an attitudinal bias towards the prosecution (Carlen,1976; Sanders and Young,2000). While many interviewed magistrates were somewhat guarded in their use of language in the presence of a researcher, their true attitude was arguably best summarised by a magistrate previously quoted.

We presume the CPS are experts. We must take note of expertise so that their recommendation bears a lot of weight. We consider their precis to be objective and have more faith in the CPS than in the defence.

(Magistrate, New Court)

It has, however, been argued that CPS recommendations varied between courts in relation to apparently similar factual scenarios. In particular, Crown lawyers appearing before Town Court seemed more likely than those in City Court to advocate summary trial for offences of violence or allegations involving breach of trust. It has been established that variations existed in the

committal rates of the three sample courts which could not be fully accounted for by offence patterns or the number of charges. Yet it has also been established that virtually all mode decisions of lay magistrates complied with prosecution representations. This raises the question of whether a high concordance rate was produced by magistrates failing to exercise independent judgement or by prosecutors adapting their approach to comply with their expectations of the likely decision. It has been suggested that the answer is that the question is simplistic. Concordance rates cannot be approached on a cause and effect basis. They are produced by a culture generated by the interaction between all court participants working in a particular area which operates to encourage some types of decision and to discourage others (Paterson and Whittaker,1995:265).

A shared understanding among lawyers of the likely outcome resulted in contested applications being rare. Defence solicitors only challenged the application of the Crown in 11 per cent of cases. Previous research had indicated a figure of 12 per cent (Riley and Vennard,1988:12). This seemingly low figure was partially occasioned by the need of defence solicitors to retain credibility in the eyes of their bench.

As courtroom regulars, they [defence solicitors] need to retain credibility with the court itself in order to continue as effective workers in the daily business of processing defendants.

(McConville et al.,1994:201)

This need is strengthened by the finding of this study that magistrates held different perceptions of defence solicitors as individuals. Opinions expressed by magistrates in all three sample courts suggested that the identity of the defence advocate could influence the either way decision-making process in certain cases. Only those deemed "realistic" had the potential to be influential.

It was apparent that there were occasions when defence solicitors could not persuade their client that committal was inevitable. Many defendants would appear to prefer summary trial because of the element of security provided by the limited sentencing powers of magistrates. The need to appear realistic and retain credibility led to solicitors adopting various recognised strategies in these cases so as to ensure that the magistrates realised why the application was being made. This study supports the finding of McConville et al. (1994: 180-181) that applications deemed a waste of time would be made in such a way that they would prove to be a waste of time. Case analysis suggests that genuinely contested mode applications were only made in some five per cent of cases.

The limited number of fully contested hearings provides a partial explanation for the extremely high concordance rate between prosecution representations and magistrates' decisions. This study supports the finding of Hucklesby (1997:140) in relation to bail that most mode decisions were effectively not taken by magistrates, but were the result of prior negotiation between lawyers. Lay magistrates only reached a decision contrary to the agreed or unchallenged recommendation of the CPS in one case out of an observation sample of 123. This enabled the Clerk to the Justices in City Court to conclude that magistrates might not always consider mode of trial to be important as they "may feel that the decision is being made for them." This situation was acknowledged by a solicitor in New Court. "We usually agree with the CPS. In effect, the CPS and defence make the decision as magistrates will nearly always follow agreed representations." This negotiation between lawyers was, however, conducted in the knowledge of the likely decision to be made by the magistrates. The working practices of solicitors were influenced by cultural expectations.

7.1.4 The courtroom workgroup

The concept of the co-operative courtroom workgroup is crucial to an analysis of magistrates' courts. Adversarial justice is central to the liberal conception of the criminal process (McConville et al.,1994:182). Yet much of the case settlement which is conducted in the name of the accused has a strongly co-operative and non-adversarial nature (Baldwin,1985a; Mulcahy,1994:412; McConville et al.,1994:188-198; Ashworth,1998:296). This study supports the argument that there is a perceived requirement for co-operation between the various individuals and agencies which constitute the criminal justice system (James and Raine,1998:50). Court participants have a common goal of getting the work done which is achieved through working together co-operatively rather than as adversaries (Lipetz,1980; Rungay,1995). Relationships develop based on mutual dependence and trust (Hucklesby,1997:131). Defence solicitors anticipate that most cases will eventually be resolved without the need for a trial (McConville et al.,1994). Plea negotiations become a defining feature of courtroom practices (Mulcahy,1994:412).

Legal representation of the accused is a fundamental element of the due process model of criminal justice. The incidence of such representation in magistrates' courts has increased substantially in recent years (Bridges,1992). Only two defendants in an observation sample of 340 in this study had not taken legal advice. Yet research has revealed that representation may have contributed more to negotiated outcomes than to protecting the rights of defendants in a theoretically adversarial system (Baldwin and McConville,1977; Baldwin,1985; McConville et al.,1994). This study did not elicit the views of defendants. Interviews with defence solicitors, however, suggested that their clients were usually prepared to accept their advice on plea and venue.

The single most important feature of criminal procedure in England and Wales is its fundamental dependence upon the guilty plea (McConville and Baldwin,1981:7). Various pressures are placed on defendants to admit guilt so that most convict themselves by pleading guilty (Darbyshire,2000:896). This was reflected in this study as the majority of defendants ultimately pleaded guilty. However, by no means all of them did so at the plea before venue hearing. One reason for this may be that magistrates and judges do not consider the timing of the plea to be important when considering the appropriate sentence discount (Henham,1999,2000). A more significant reason presents as being the perceived inadequacy of the advance disclosure supplied to the defence prior to initial plea. Previous research has revealed that advance disclosure can fall short of what is required for solicitors to advise defendants properly on plea and venue (Baldwin and Mulvaney,1987,1987a; Baldwin,1992). The majority of solicitors interviewed for this study expressed the opinion that, frequently, the only way to obtain adequate disclosure of the prosecution case was for their client to enter an indication of not guilty. Discussion between solicitors resolved the vast majority of cases without the need for a trial. But meaningful negotiation usually only took place after venue had been determined.

The timing of inter-professional negotiation is crucial to any analysis of mode of trial. It is apparent that venue decisions are often taken on the basis of a charge and a plea that are both eventually altered (Hedderman and Moxon,1992:17). Charge bargaining presents as a significant reason why the majority of defendants are sentenced at the Crown Court within magistrates' authority. A total of 48 defendants in this study who had been committed for trial because magistrates declined jurisdiction received sentences within lower court powers. Precisely half of these, 24, were convicted in the Crown Court of

a lesser charge or a reduced number of charges than those on which they had been committed. Four defendants, for example, admitted charges of possessing drugs before the Crown Court after they had been committed by New Court on the more serious charge of possession with intent to supply.

The inadequacy of advance disclosure is a factor in the question of when discussion between lawyers takes place. The significance of this is enhanced by a managerialist emphasis on efficiency. One of the 12 core performance measures for courts identified by HM Magistrates' Court Service Inspectorate (1999) is the average length of time taken to process cases from first listing to completion. This has resulted in indication of plea being expected as soon as the defence has had an opportunity to consider the advance disclosure. Defence solicitors were often provided with this information on the day of a hearing. It was not uncommon for magistrates to enquire why they could not consider this with their client there and then so that a plea could be taken later in the same sitting. Entering a "holding plea" of not guilty at least runs the risk of a reduction in the sentence discount.

The low incidence of trials renders the conflict between policy and principle in mode of trial less acute in practice than in theory. The perceived advantages of jury trial are rendered largely symbolic by the fact that less than 17,000 defendants each year ultimately have their guilt or innocence determined by a jury (Lord Chancellor's Department, 2001). The stipulation of core performance measures has strengthened the crime control ideology of magistrates' courts and heightened the emphasis on the efficient processing of cases. The pressure to plead guilty before adequate disclosure has been provided or properly considered may represent a more acute conflict between policy and principle in practice.

7.2 POLICY CONSIDERATIONS

This section considers the implications of the findings of this study for potential initiatives designed to attain a policy objective of a lower committal rate. It is apparent that the reform measures introduced since 1990 have not had a sufficient statistical impact to meet government policy. The Lord Chancellor, Lord Irvine, acknowledged in April 2002 that his objective remained to cut the number of expensive Crown Court trials (Rozenberg,2002:1). This has resulted in a series of increasingly radical and, therefore, controversial proposals. The measures implemented to date may have been a cause of concern for some criminal justice practitioners and academics, but they have not provoked public controversy. Proposals such as abolition of the right of election and increased sentencing powers for magistrates strike at the heart of the criminal justice system and precipitate front page media attention.

There would appear to be six potential reform measures. The first, which has represented official policy since the presentation of a consultation paper by the Home Office in 1998, is abolition of the right of election. The second is amendment of the criteria contained in the national mode of trial guidelines. The third, which now appears to be under consideration, is an increase in the sentencing powers of magistrates. The fourth is to enhance liaison with the Crown Court. The consequences of these four possibilities are all dependent to a large extent on the responses of magistrates and will be examined in this section. The fifth option, outside the scope of this study, is the further reclassification of either way offences as summary only (Home Office,1998a). The final possibility is a change to the timing of inter-professional negotiation so that decisions on charge and plea are taken at a sufficiently early stage to affect venue. It is suggested that this is an area for further research.

7.2.1 Abolition of the right of election

There are currently some 18,000 defendants who are committed to the Crown Court each year in England and Wales as a consequence of exercising the right of election (Bridges,1999). It has been argued by Narey (1997:34), and accepted by the government in the Criminal Justice (Mode of Trial) (No.2) Bill 2000, that the proportion of defendants who would persuade magistrates that their case should go before a jury, were the right to be abolished, would be no more than a quarter of those currently electing trial. It has, however, been argued in this thesis that policy initiatives frequently do not have the anticipated effect because magistrates prove resistant to changes which are not perceived by them to be in the interests of justice. Data contradicted the official argument that the right was exercised as a means of manipulating the system by revealing that the majority of defendants who exercised the right had all either way charges against them dismissed prior to committal. The suggestion is that magistrates may continue to grant defendants their wish for jury trial if they deem that abolition of the right of election was solely an economic measure.

The responses of interviewed magistrates indicated that the large majority favoured retention of the right in respect of more serious offences. Data suggested that the majority of defendants who exercised the right did so in relation to comparatively serious allegations. It is acknowledged that factors other than magisterial opinion, such as court culture and training, are influential in determining the response to legislation. It is suggested, however, that the findings of this study imply that abolition of the right might not produce the forecast decrease in the number of defendants committed to the Crown Court. Quantification is not feasible, but it would appear, at least, that Narey's assumption should be subject to critical examination.

7.2.2 Amendment of criteria

It has been established that current criteria render it inevitable that some defendants will be sentenced at the Crown Court within magistrates' powers without this outcome by itself indicating that an incorrect decision had been made. Majority opinion among interviewed court participants supported the retention of two criteria which contribute to this situation. The first was that mode of trial should continue to be determined by reference to the alleged offence and not the alleged offender. The second was that the principle of taking the prosecution case at its highest should be retained as a pragmatic means of enhancing consistency of decision-making. The implication is that a number of defendants will continue to be sentenced at the Crown Court within magistrates' powers unless there is a redefinition of the initial sentencing test.

It can be argued that there would be scope for magistrates to retain jurisdiction more frequently if the question to be asked at mode of trial was whether or not the defendant, if convicted, would receive a sentence in excess of 12 months' imprisonment. This would provide a gap to allow for offence and offender mitigation, while an unfettered power of committal for sentence would protect the public interest. It was suggested, however, in Chapter 5 that the culture of the lay magistracy would render this theoretical proposal largely inoperable. Guidance to retain cases apparently outside the sentencing powers of magistrates, with the consequence that they would be more likely to have to commit for sentence after summary trial, would challenge a culture that views the initial jurisdictional decision as being essentially final. Interview responses suggested that the revised guidelines had made no difference to decisions. Further amendment to the guidelines may cause resentment among many magistrates and the practical effect would be likely to be minimal.

7.2.3 Increasing magistrates' sentencing powers

The latest proposal being considered by the government to achieve the objective of a reduced committal rate is to increase the sentencing powers of magistrates to 12 months' imprisonment for a single offence. There is an apparently logical argument that magistrates would finalise more cases were their sentencing powers to be increased. Lord Irvine has estimated that this would result in around 6,000 fewer cases each year being sent to the Crown Court (Rozenberg,2002:1). It has, however, been argued in this thesis that increased powers may have the effect of net widening in a similar way to previous initiatives taken to reduce the incidence of custody. They might result in magistrates imposing longer prison sentences on offenders who currently receive six months or less rather than lead to them accepting jurisdiction in a wider range of cases.

Interviews conducted for this study imply that it is problematic whether or not increased sentencing powers would result in significantly reduced committal rates. There was a consensus of opinion among magistrates that greater powers would have that effect, although by no means all of them wanted increased powers. Professional court participants provided a different perspective. The argument that extended powers would lead to more severe sentencing rather than a reduced committal rate was uppermost in their minds. Greater sentencing powers might also have the effect of increasing the rate of exercise of the right of election were magistrates to retain more serious cases. The effect of increased powers may be debatable. It is, however, almost certain that they would arouse controversy among criminal justice practitioners and academics. The notion of enhanced powers was rejected in the interests of justice by virtually all clerks and solicitors involved in this study.

7.2.4 Liaison with the Crown Court

It has been suggested that one facet of the culture of the lay magistracy might facilitate the objective of a lower committal rate. This was an inherent respect among magistrates for the professional expertise and authority of judges and a desire not to be criticised by the higher judiciary. One explanation for the fact that the majority of either way defendants are sentenced at the higher court within lower court powers may be that magistrates commit in ignorance of their Crown Court's sentencing patterns. Interviews revealed that magistrates and clerks had little or no knowledge of those patterns beyond that gleaned from reading reports in the local press. They know from this source that some offenders are sentenced at the Crown Court within their powers, but do not know the reasons for this. A clerk previously quoted said:

There is limited knowledge of Crown Court sentences. Feedback would be a great help. We take our lead from the Crown Court attitude and might commit in ignorance of Crown Court sentences.

(Clerk, Town Court)

Awareness of the reasons for judges' sentencing patterns might encourage magistrates to retain jurisdiction more readily. The majority of magistrates expressed the opinion in interview that they would not commit defendants if they knew that their Crown Court was routinely sentencing such offenders within their powers. They are amenable to advice from the higher judiciary and all would appear to welcome greater feedback from the Crown Court. An enhanced flow of sentencing knowledge between the two courts and a greater awareness of the reasons for judges' sentencing attitudes may have the potential to reduce the committal rate. There might also be scope for liaison judges to indicate that certain categories of offender could legitimately be sentenced by magistrates.

7.2.5 Implications for policy

The core conclusions of this thesis may appear to be somewhat negative from the perspective of policy makers. They suggest that amended guidance or further reform measures will, at best, only partly achieve government targets for a reduced committal rate. The underlying reasons for this present as being the culture of the lay magistracy and the lack of impetus coming from within magistrates' courts to finalise more cases. There would, however, appear to be two positive implications. The first is that reform is more likely to be effected from within than imposed from without. Magistrates are not easily influenced by government policy. A suspicion that economic rather than justice values dictate current policy exacerbates this situation. Yet there may be scope for more cases to be finalised in the lower court were all court participants to be made aware of the sentencing practices of judges in their local Crown Court and the reasons for those practices. Training may facilitate magistrates ordering reports more frequently before making a final jurisdictional decision if they knew that many offenders committed for sentence without reports were receiving community sentences in the Crown Court.

The second implication is the need for further research into the administration of summary justice. Insufficient confidence in the quality of magistrates' justice and in their ability to try more serious cases lies at the heart of the mode of trial debate. There is a dearth of objective data on all aspects of magistrates' work, especially on the trial process. Research could assist in identifying areas of weakness, remove some misconceptions and facilitate improvements. There is potential for the committal rate to be quite substantially reduced in the public interest were magistrates' courts perceived to be capable of handling more serious cases fairly.

7.3 CONCLUSION

This thesis has advanced two central arguments, both of which can be generalised to apply to other decision-making processes in magistrates' courts. The first is that attempts to change procedure cannot afford to underestimate the strength of the culture of the lay magistracy. The second is that individual court cultures which have evolved as a consequence of an implicit belief in the concept of local justice provide the prime explanation for variations between courts. It would appear that the principles underlying the mode of trial process remain those which were influential prior to 1990 despite procedure ostensibly having been significantly amended since that date. Guidance and legislation have been interpreted in the light of common sense as that characteristic represents the dominant ideology of lay justice.

It has been suggested that magistrates have traditionally viewed the purpose of a mode hearing as being to provide a clearly defined path for a case. They have a belief that a decision to accept jurisdiction is essentially final. The concept implicit in the extended power of committal for sentence that decisions are fluid does not appear to have become part of their culture. They adopt a cautious approach towards retaining cases in order to minimise the possibility of colleagues having to make an implicitly conflicting decision at the sentencing hearing. This conservative attitude provides one reason for the limited impact of plea before venue on committal rates. Magistrates view the decision to order reports as equating to an acceptance of jurisdiction and, therefore, tend to commit cases which might prove to be outside their sentencing powers. It has been argued in this thesis that the committal rate for sentence will not be reduced until magistrates display a willingness to postpone any decision on committal until all information is available.

There would appear to be considerable scope for magistrates to finalise more cases without interfering with the defendant's right of election. Data collected for this study accord with national statistics and indicate that the majority of defendants committed for trial because magistrates decline jurisdiction are sentenced within lower court powers (Barclay and Tavares, 1999:36). It has been argued that both a cautious approach towards accepting jurisdiction and current criteria for mode decisions contribute to this situation. It is suggested, however, that the prime explanation is the apparent lack of impetus coming from within magistrates' courts to achieve a reduced committal rate. Almost all of the magistrates interviewed for this study believed that the current mode procedure was satisfactory and produced a fair and realistic division of business between the higher and lower courts in the interests of justice. Solicitors and clerks expressed the opinion that lay magistrates were already being asked to handle cases at the extreme of their ability and that the completion of more serious cases was a flawed objective.

Despite this, it has been argued that an enhanced flow of sentencing knowledge between the higher and lower courts might influence the committal rate. Magistrates and clerks currently appear to have limited knowledge of Crown Court sentences and no understanding of why their Crown Court passes sentences which the lower court could have imposed. Interviews suggested that magistrates take their lead from the attitude of judges and would not commit defendants if they knew that their Crown Court was routinely sentencing such offenders within their powers. But this may, paradoxically, result in the imposition of more custodial sentences. Defence solicitors appear sceptical of research evidence that judges are more severe than magistrates. They do not push for magistrates to retain cases as they believe that judges are often more likely to impose a community order in borderline cases.

There was a consensus of opinion among all court participants interviewed for this study that the majority of mode decisions were obvious. They were, however, only obvious on the basis of the charge or charges faced at the mode of trial hearing. Charge bargaining would appear to be a significant reason why the Crown Court often passes sentences within the authority of magistrates. Those sentences are, quite simply, frequently passed in relation to lesser or less offences. The accelerated file provided by the police prior to plea before venue does not appear to provide either set of lawyers with adequate or balanced information. Meaningful discussion as to charge tends to take place after venue has been determined.

The prime explanation for variations in decisions between courts would appear to lie in individual court culture and the effect that this has on the working practices of all participants. It has been argued that most mode decisions are in effect not taken by magistrates, but are the outcome of negotiation between lawyers. Such negotiation does not, however, take place in a social vacuum, but is conducted within the context of an expectation as to which cases will be retained and which will be committed. A magistrate was quoted in Chapter 6 as saying that the bench acted as "a buffer" between two sets of "rams interlocking horns." This study does not offer support for either element of this appraisal. The rams rarely clash in mode of trial. The two sets of solicitors achieve an efficient procedure through co-operation. The buffer would appear to be tilted in favour of the prosecution. Observation and interviews suggested that magistrates tended to conform to their historical philosophy of being prosecution-minded, displaying a faith in the professional expertise and objectivity of Crown lawyers which was not afforded to defence solicitors. Analysis of current procedures cannot afford to ignore the crime control reasons why summary courts evolved.

End Notes

¹ It has been argued in this thesis that the magistrates of New Court, whose committal rate was the middle of the three sample courts, displayed a cautious approach towards accepting jurisdiction. When considering generalisation of this argument of caution, it should be borne in mind that official statistics indicate that the committal rate of New Court is usually some four per cent below the national average.

² Lord Justice Kennedy said in *R.v.Warley Justices* (1999,1 Cr.App.R. (S) 156 at 161) that one of the purposes of the plea before venue provisions was "to ensure that the magistrates' court was fully informed before deciding whether or not to commit for sentence."

APPENDICES

Appendix 1

Statutory Provisions

Plea before venue

Section 49 of the Criminal Procedure and Investigations Act 1996 inserted a new section 17A into the Magistrates' Courts Act 1980:

(4) The court shall then explain to the accused in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty -

- (a) the court must proceed as mentioned in subsection (6) below; and
- (b) he may be committed for sentence to the Crown Court under section 38 below if the court is of such opinion as is mentioned in subsection (2) of that section.

(5) The court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.

(6) If the accused indicates that he would plead guilty the court shall proceed as if -

- (a) the proceedings constituted from the beginning the summary trial of the information; and
- (b) section 9 (1) above was complied with and he pleaded guilty under it.

(7) If the accused indicates that he would plead not guilty section 18 (1) below shall apply.

(8) If the accused in fact fails to indicate how he would plead, for the purposes of this section and section 18 (1) below he shall be taken to indicate that he would plead not guilty.

Mode of Trial

Section 19 of the Magistrates' Courts Act 1980:

(1) The court shall consider whether, having regard to the matters mentioned in subsection (3) below and any representations made by the prosecutor or the accused, the offence appears to the court more suitable for summary trial or for trial on indictment.

(2) Before so considering, the court -

(a) shall cause the charge to be written down, if this has not already been done, and read to the accused; and

(b) shall afford first the prosecutor and then the accused an opportunity to make representations as to which mode of trial would be more suitable.

(3) The matters to which the court is to have regard under subsection (1) above are the nature of the case; whether the circumstances make the offence one of serious character; whether the punishment which a magistrates' court would have power to inflict for it would be adequate; and any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other.

Committal for sentence

Section 38 of the Magistrates' Courts Act 1980 (now repealed):

Where on the summary trial of an offence triable either way ... a person who is not less than 17 years old is convicted of the offence, then, if on obtaining information about his character and antecedents the court is of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict, the court may, in accordance with section 56 of the Criminal Justice Act 1967, commit him in custody or on bail to the Crown Court for sentence.

Section 25 of the Criminal Justice Act 1991 substituted a new section 38 into the Magistrates' Courts Act 1980 (now repealed):

- (2) If the court is of opinion -
 - (a) that the offence or the combination of the offence and other offences associated with it was so serious that greater punishment should be inflicted for the offence than the court has the power to impose; or
 - (b) in the case of a violent or sexual offence committed by a person who is not less than 21 years old, that a sentence of imprisonment for a term longer than the court has power to impose is necessary to protect the public from serious harm from him,

the court may, in accordance with section 56 of the Criminal Justice Act 1967, commit the offender in custody or on bail to the Crown Court for sentence in accordance with the provisions of section 42 of the Powers of Criminal Courts Act 1973.

Section 3 (2) of the Powers of Criminal Courts (Sentencing) Act 2000:

- If the court is of the opinion -
 - (a) that the offence or the combination of the offence and one or more offences associated with it was so serious that greater punishment should be inflicted for the offence than the court has power to impose or
 - (b) in the case of a violent or sexual offence, that a custodial sentence for a term longer than the court has power to impose is necessary to protect the public from serious harm from him,

the court may commit the offender in custody or on bail to the Crown Court for sentence in accordance with section 5 (1) below.

Section 5 (1) of the Powers of Criminal Courts (Sentencing) Act 2000:

Where an offender is committed by a magistrates' court for sentence under section 3 or 4 above, the Crown Court shall inquire into the circumstances of the case and may deal with the offender in any way in which it could deal with him if he had just been convicted of the offence on indictment before the court.

Right of election

Section 20 of the Magistrates' Courts Act 1980:

- (1) If ... it appears to the court that the offence is more suitable for summary trial, the following provisions of this section shall apply...
- (2) The court shall explain to the accused in ordinary language ---
 - (a) that it appears to the court more suitable for him to be tried summarily for the offence, and that he can either consent to be so tried or, if he wishes, be tried by a jury...
- (3) After explaining to the accused as provided by subsection (2) above the court shall ask him whether he consents to be tried summarily or wishes to be tried by a jury.

Sentence discount

Section 48 of the Criminal Justice and Public Order Act 1994:

In determining what sentence to pass on an offender who has pleaded guilty to an offence before that or another court a court shall take into account: (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and (b) the circumstances in which this indication was given.

Appendix 2

Selected Texts

Committal for sentence

Three cases were heard together by a Divisional Court of Queen's Bench Division on the 13th May 1998 by way of judicial review of the decisions of magistrates' courts not to commit defendants to the Crown Court for sentence. The full titles of the cases, commonly referred to as the Warley Justices case, are: R.v.The Warley Justices ex parte the Director of Public Prosecutions; R.v. The Lowestoft Magistrates' Court ex parte the Director of Public Prosecutions; R.v.The Staines Justices ex parte the Director of Public Prosecutions. Judgement was delivered by Lord Justice Kennedy. The relevant sections of that judgement (1999, 1 Cr.App.R.(S) 156 at 162-163) read as follows.

In some cases the gravity of the offence will be such that even when allowance has been made for the indicated plea it will be obvious that whatever may be the mitigation the punishment should be greater than the magistrates' court has power to impose. In that event it seems to me that the court should be prepared to commit the accused to the Crown Court for sentence without seeking any pre-sentence report or hearing in full any mitigation which the accused may wish to advance. ... If after allowance has been made for the plea of guilty it appears to the court that it will or may be possible for the court to sentence properly by deploying its statutory power - if necessary to the full - then it seems to me the court should proceed to hear the case in the normal way, and so long as a committal for sentence remains a possibility care should be taken to ensure that nothing is said or done which might indicate to an accused that that option has been ruled out.

Sentence discount

Lord Justice Kennedy made the following remarks in the same judgement at page 162.

Obviously, as it seems to me, the magistrates' court must have regard to the discount to be granted on a plea of guilty when deciding whether the punishment which it would have power to inflict for any offence would be adequate. ... If having made an appropriate discount a magistrates' court concludes that an appropriate sentence can be imposed if it uses its sentencing powers to the full it should adopt that course, but it would be helpful if in such a case the court were to indicate that it has only been able to retain jurisdiction because it has in fact made allowance for the plea of guilty, and for any other relevant mitigating factors.

Suggested ordinary language explanation to be given at plea before venue

You are shortly going to be asked whether you intend to plead guilty or not guilty at your trial for this offence no matter whether it is decided to try you in this court or at the Crown Court. If you answer that it is your intention to plead guilty then this court will no longer need to consider whether to try you here or commit you to the Crown Court for trial but must proceed to deal with you here and will treat you as actually having pleaded guilty and will therefore convict you without hearing any more evidence. This court would then consider whether its sentencing powers are sufficient for you to be sentenced here or whether you should be committed to the Crown Court on the grounds that the magistrates' powers of sentencing are inadequate.

(Leng and Taylor, 1996:70)

Code for Crown Prosecutors (1994)

7.1 Crown Prosecutors should select charges which:

- a reflect the seriousness of the offending;
- b give the court adequate sentencing powers; and
- c enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always continue with the most serious charge where there is a choice. Further, Crown Prosecutors should not continue with more charges than are necessary.

7.2 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

7.3 Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

8.1 The Crown Prosecution Service applies the current guidelines for magistrates who have to decide whether cases should be tried in the Crown Court when the offence gives the option. (See the 'National Mode of Trial Guidelines' issued by the Lord Chief Justice.) Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.

8.2 Speed must never be the only reason for asking for a case to stay in the magistrates' courts. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.

Appendix 3

National Mode of Trial Guidelines 1995

The purpose of these guidelines is to help magistrates decide whether or not to commit 'either way' offences for trial in the Crown Court. Their object is to provide guidance not direction. They are not intended to impinge upon a magistrate's duty to consider each case individually and on its own particular facts.

These guidelines apply to all defendants **aged 18 and above**.

General Mode of Trial Considerations

Section 19 of the Magistrates' Court Act 1980 requires magistrates to have regard to the following matters in deciding whether an offence is more suitable for summary trial or trial on indictment:

1. the nature of the case
2. whether the circumstances make the offence one of a serious character
3. whether the punishment which a magistrates' court would have power to inflict for it would be adequate
4. any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other
5. any representations made by the prosecution or the defence.

(Page 1)

Certain general observations can be made:

- a. the court should never make its decision on the grounds of convenience or expedition
- b. the court should assume for the purpose of deciding mode of trial that the prosecution version of the facts is correct
- c. the fact that the offences are alleged to be specimens is a relevant consideration; the fact that the defendant will be asking for other offences to be taken into consideration, if convicted, is not
- d. where cases involve complex questions of fact or difficult questions of law, including difficult issues of disclosure of sensitive material, the court should consider committal for trial
- e. where two or more defendants are jointly charged with an offence each has an individual right to elect his mode of trial. [This follows the decision in R.v.Brentwood Justices ex parte Nicholls.]
- f. *In general, except where otherwise stated, either way offences should be tried summarily unless the court considers that the particular case has one or more of the features set out in the following pages and that its sentencing powers are insufficient.*
- g. The court should also consider its power to commit an offender for sentence, under Section 38 of the Magistrates' Courts Act 1980, as amended by section 25 of the Criminal Justice Act 1991, if **information emerges during the course of the hearing which leads them to conclude that the offence is so serious, or the offender such a risk to the public, that their powers to sentence him are inadequate.** This amendment means that committal for sentence is no longer determined by reference to the character or antecedents of the defendant.

(Page 2)

Appendix 4

Committal Figures

The number of either way cases committed for trial by Magistrates' Courts in England and Wales were as follows:

1979	55300	Table 4.5
1980	59600	Table 6.5
1981	65100	Table 6.5
1982	72400	Table 6.5
1983	79600	Table 6.5
1984	82100	Table 6.5
1985	89900	Table 6.4
1986	81500	Table 6.5
1987	93500	Table 6.4
1988	93100	Table 6.4
1989	80400	Table 6.4
1990	80400	Table 6.4
1991	81300	Table 6.5
1992	73800	Table 6.5
1993	64700	Table 6.5
1994	67200	Table 6.5
1995	59000	Table 6.6
1996	58700	Table 6.6
1997	63200	Table 6.6

Note 17-year-olds came within the Youth Court on the 1st October 1992

Source: Criminal Statistics England and Wales.

Appendix 5

Court Observation Data Form

1. Reference

2. Date

3. Court number

4. Session

AM []

PM []

5. Bench

Lay [] Stipendiary []
Number 1 2 3

6. Number of plea before venue cases

7. Case Details

Not Guilty / No Plea

Name	Offence	CPS	Defence	Magistrates	Defendant
------	---------	-----	---------	-------------	-----------

Guilty

Name	Offence	CPS	Defence	Magistrates
------	---------	-----	---------	-------------

8. Lay Bench	a.Chair				
	Male	[]	Female	[]	
	White	[]	Black	[]	Asian [] Other []
	30s	[]	40s	[]	50s [] 60s []
	Seen previously	Yes	[]	No	[]
	Approach		1	2	3 4 5
	b.Male	[]	Female	[]	
	White	[]	Black	[]	Asian [] Other []
	30s	[]	40s	[]	50s [] 60s []
	c.Male	[]	Female	[]	
	White	[]	Black	[]	Asian [] Other []
	30s	[]	40s	[]	50s [] 60s []
9. Stipendiary	Male	[]	Female	[]	
	White	[]	Black	[]	Asian [] Other []
	Resident	[]	Outside	[]	
10. Clerk	Male	[]	Female	[]	
	White	[]	Black	[]	Asian [] Other []
	Seen previously	Yes	[]	No	[]
	Proactive re bench		1	2	3 4 5
	Proactive re CPS		1	2	3 4 5
	Proactive re defence		1	2	3 4 5
11. CPS	Male	[]	Female	[]	
	White	[]	Black	[]	Asian [] Other []
	Seen previously	Yes	[]	No	[]
	Recommendations		1	2	3 4 5

Key to sections 8a,10 and 11

1 : Extremely forceful
2 : Above average
3 : Average
4 : Below average
5 : Weak

Note The same codes apply to sections 18 and 19 in the defendant form.

12. Atmosphere in Court

- a. Magistrates present Formal [] Average [] Informal []
b. Magistrates not present Formal [] Average [] Informal []

13. Discussion in Court

Between	Clerk and Magistrates	1	2	3	4	5
	Clerk and CPS	1	2	3	4	5
	Clerk and Defence Solicitor	1	2	3	4	5
	Clerk and Probation Officer	1	2	3	4	5
	CPS and Defence Solicitor	1	2	3	4	5
	CPS and Probation Officer	1	2	3	4	5
	Defence and Probation Officer	1	2	3	4	5

Other

Key 1 : Considerable
2 : Above average
3 : Average
4 : Little
5 : None

Comments

Appendix 6

Defendant Observation Data Form

1. Reference Number

2. Court Reference

3. Name

4. Sex Male [] Female []

5. Ethnic Origin White [] Black [] Asian [] Other []

6. Age

7. Was Defendant local Yes [] No []

8. Solicitor Own [] Duty [] Agent [] None []
 Male [] Female []
 White [] Black [] Asian [] Other []
 Local Yes [] No []
 Name

9. Status Unconditional bail / Summons []
 Technical unconditional bail []
 Conditional Bail []
 Custody []
 Bail conditions Residence []
 Reporting []
 Non Association []
 Not to visit address / area []
 Curfew []
 Reasons for custody Warrant : Fail to attend []
 Further offences []
 Absconding []
 Interference with witnesses []
 Serving prisoner []

10. Offence(s)

Shoplifting	[]
Other theft	[]
Handling	[]
Obtaining by deception	[]
Forgery / Using false instrument	[]
Burglary : Dwelling	[]
Burglary : other premises	[]
Equipped for stealing	[]
Wounding	[]
Assault abh	[]
Affray	[]
Violent disorder	[]
Threats to kill	[]
Racially aggravated assault	[]
Racially aggravated s.4	[]
Harassment	[]
Breach of Restraining Order	[]
Offensive weapon	[]
Pointed article	[]
Indecent assault on adult	[]
Indecent assault on child	[]
Unlawful sexual intercourse	[]
Possession class A drug	[]
Possession class B drug	[]
Supply class A drug	[]
Supply class B drug	[]
Racially aggravated criminal damage	[]
Threat to damage property	[]
Possess Firearms	[]
Dangerous driving	[]
Fraudulent use of VEL	[]
Dangerous dog	[]
Private Prosecution Offence	[]
Other	[]

Details

11. Plea Guilty [] Not Guilty [] Mixed [] None []
 Specify if mixed

12. Other Offences Yes [] No []

Details

Either way offence committed on bail Yes [] No []

13. Plea to summary charges

 Guilty [] Not Guilty [] Mixed [] None []
 Specify if mixed

14. Previous convictions Yes [] No [] Not indicated []
 Previous caution Yes [] No [] Not known []
 Previous custody Yes [] No [] Not known []
 Current sentence Yes [] No [] Not known []
 If yes Licence [] PO [] CSO [] C.D. []
 Details

15. Co-Defendant Yes [] No []

 Heard with another Yes [] No []

 Name

 Case Number

 Were Ds split Yes [] No []

16. Discussion in Court

Between	Clerk and CPS	1	2	3
	Clerk and Defence Solicitor	1	2	3
	CPS and Defence Solicitor	1	2	3
	Defence and Defendant	1	2	3
	Other			

Key 1 : Considerable 2 : Some 3 : None

Comments

17. Offence Factors

Aggravating

Racial Motivation	[]
Breach of relationship of trust	[]
Vulnerable Victim	[]
Victim -- Public servant / position of authority	[]
Sophisticated nature of operation	[]
Premeditated / Organised	[]
Unprovoked attack	[]
Serious Damage / Injury	[]
High value of goods / Large quantity of drugs	[]
Use of Weapon	[]
Kicking / Biting	[]
Burglary of dwelling at night	[]
Daytime burglary when occupier present	[]
Ransacking during burglary	[]
Supplying drugs for profit	[]
Committed on bail / licence	[]
Previous convictions for similar offences	[]

Mitigating

Believed action lawful	[]
Committed under influence of drink	[]
History of victim abusing defendant or family	[]
Influenced by others	[]
Unsophisticated offence	[]
Opportunist / Impulsive action	[]
Provocation	[]
Minor Damage / Injury	[]
Low value of goods / Small quantity of drugs	[]
No use of Weapon, kicking, etc.	[]
Knew property was unoccupied	[]
Drugs for personal use	[]
Supplying drugs gratis	[]
Expressed remorse	[]
No previous convictions for similar offences	[]
Timely guilty plea	[]
Cooperative with police	[]

18. Not Guilty / No Plea

CPS CC [] Magistrates [] Open []
 Advocacy 1 2 3 4 5
 Details

Defence	CC	[]	Magistrates	[]	No rep	[]
Advocacy	1	2	3	4	5	
Details						

Magistrates CC [] Magistrates []
What was said

Did magistrates confer	Yes	[]	No	[]
If yes	Very briefly	[]	Briefly	[]
			At length	[]
Did clerk advise in court	Yes	[]	No	[]

Did magistrates retire Yes [] No []
For how long

Was clerk sent for Yes [] No []

Did stipe consider Yes [] No []
 If yes Briefly [] At length []

Defendant (if election) CC [] Magistrates []

Case Time

(From when defendant enters dock until final decision on mode of trial taken by magistrates / defendant)

Date of next hearing

Adj [] PTR [] Witness av []
Trial [] Committal [] Plea and D []

Ultimate Outcome

19. Guilty

CPS CC [] Magistrates [] None []
 Advocacy 1 2 3 4 5
 Details

Defence CC [] Magistrates [] None []
 Advocacy 1 2 3 4 5
 Details

Magistrates CC [] PSR [] Sentence [] Adjourn []
 Sentence
 What was said

Did magistrates confer Yes [] No []
 If yes Very briefly [] Briefly [] At length []
 Did clerk advise in court Yes [] No []

Did magistrates retire Yes [] No []
 For how long
 Was clerk sent for Yes [] No []

Did stipe consider Yes [] No []
 If yes Briefly [] At length []
 Did clerk advise in court Yes [] No []

Case Time
 (From when defendant enters dock until final decision announced)

Date of next hearing
 Adj [] PSR [] CC []

Ultimate Outcome

Register Data Form

13. Offence(s)	Shoplifting	[]
	Other theft	[]
	Handling	[]
	Obtaining by deception	[]
	Forgery / Using false instrument	[]
	Burglary : Dwelling	[]
	Burglary : other premises	[]
	Equipped for stealing	[]
	Wounding	[]
	Assault abh	[]
	Affray	[]
	Violent disorder	[]
	Threats to kill	[]
	Racially aggravated assault	[]
	Racially aggravated s.4	[]
	Harassment	[]
	Breach of Restraining Order	[]
	Offensive weapon	[]
	Pointed article	[]
	Indecent assault on adult	[]
	Indecent assault on child	[]
	Gross indecency	[]
	Unlawful sexual intercourse	[]
	Possession class A drug	[]
	Possession class B drug	[]
	Supply class A drug	[]
	Supply class B drug	[]
	Racially aggravated criminal damage	[]
	Threat to damage property	[]
	Dangerous driving	[]
	Aggravated vehicle taking	[]
	Fraudulent use of VEL	[]
	Dangerous dog	[]
	Private Prosecution Offence	[]
	Other	[]

14. Comment

Appendix 8

Interview Guides

LAY MAGISTRATES

Background

Probes	Reasons for becoming a magistrate Differences between expectations and reality Changes over time
---------------	--

Discussion as to training

Probes	Content of original training Subsequent training Training on mode of trial Contact with other Benches
---------------	--

Mode of trial issues

Probes	Prime considerations Use of Guidelines Bench policy in relation to specific offences How is that policy formulated Does chairperson hold sway? Majority decisions Effect of stipendiary
---------------	---

Mode of trial factors

Probes	Determination of sentencing powers Many less committed for sentence than trial Does sex of defendant have any relevance? CPS recommendation : always made? Relevance Relevance of defence representations Involvement of defendant in process Use of Clerk Undecided : keep or commit Relevance of power to commit for sentence Circumstances in which this might happen
---------------	---

Reform

- Probes
 - Current situation : satisfactory / changes
 - Awareness of difference in committal rates between courts
 - Reasons
 - Relevance of other courts' practices

Sentencing

- Probes
 - Factors at PBV hearing
 - Sentencing power only consideration or should you commit certain types of offence?
 - CPS : Make recommendations? Relevance
 - Relevance of defence representations
 - Involvement of defendant in process
 - Use of Clerk
 - Relevance of power to commit after PSR
 - Circumstances in which this might happen
 - Power to give six months after discount
 - Knowledge of Crown Court sentences

Personnel

- Probes
 - Should the right of election be abolished
 - Should magistrates retain more cases
 - Increase in sentencing powers
 - Awareness of pre-hearing negotiation
 - Should magistrates continue to make mode of trial decisions

Exercises

- 1
- 2
- 3
- 4
- 5
- 6

CLERK TO THE JUSTICES

Magistrates' training

- Probes
 - Selection procedure
 - Content and personnel of original training
 - Subsequent training
 - Training on mode of trial
 - Is mode of trial deemed important

Mode of trial issues

- Probes
 - Prime considerations
 - Considerations other than sentencing powers
 - Success or failure based on CC sentence?
 - Use of Guidelines
 - Bench policy in relation to specific offences
 - How is that policy formulated
 - Role of clerk
 - Why option of no plea

Mode of trial factors

- Probes
 - Most important factors
 - Determination of sentencing powers
 - Many less committed for sentence than trial
 - Relevance of CPS recommendation. Selectivity
 - Relevance of defence representations
 - Relevance of power to commit for sentence
 - Circumstances in which this might happen

Reform

- Probes
 - Is current situation satisfactory?
 - Awareness of difference in courts' committal rates
 - Reasons
 - Relevance of other courts' practices

Sentencing

- Probes
- Factors at PBV hearing
 - Sentencing power only consideration or should you commit certain types of offence?
 - Warley Magistrates
 - Co-defendants : one pleads guilty
 - Role of Clerk
 - Relevance of power to commit after PSR
 - Circumstances in which this might happen
 - Power to give six months after discount
 - Knowledge of Crown Court sentences
 - Why does the Crown Court frequently pass sentences which the magistrates could have imposed?

Personnel

- Probes
- Should the right of election be abolished
 - Should magistrates retain more cases
 - Should sentencing powers be increased
 - Should magistrates continue to make mode of trial decisions
 - Proposals for change

Exercises

- 1
- 2
- 3
- 4
- 5
- 6

COURT CLERKS

Discussion as to training

Probes	Any input on magistrates' training Own training on mode of trial Is mode of trial deemed important
--------	--

Mode of trial issues

Probes	Prime considerations Considerations other than sentencing powers Success or failure based on CC sentence? Use of Guidelines Bench policy in relation to specific offences How is that policy formulated Role of clerk Why option of no plea
--------	--

Mode of trial factors

Probes	Most important factors Determination of sentencing powers Borderline : keep or commit Many less committed for sentence than trial Relevance of CPS recommendation. Selectivity Relevance of defence representations Relevance of power to commit for sentence Circumstances in which this might happen
--------	---

Reform

Probes	Is current situation satisfactory? Awareness of difference in courts' committal rates Reasons Relevance of other courts' practices
--------	---

Sentencing

- Probes
- Factors at PBV hearing
 - Sentencing power only consideration or should you commit certain types of offence?
 - Warley Magistrates
 - Co-defendants : one pleads guilty
 - Role of Clerk
 - Relevance of power to commit after PSR
 - Circumstances in which this might happen
 - Power to give six months after discount
 - Knowledge of Crown Court sentences
 - Why does the Crown Court frequently pass sentences which the magistrates could have imposed?

Personnel

- Probes
- Should the right of election be abolished
 - Should magistrates retain more cases
 - Should sentencing powers be increased
 - Should magistrates continue to make mode of trial decisions
 - Proposals for change

Exercises

- 1
- 2
- 3
- 4
- 5
- 6

DEFENCE SOLICITORS

Discussion as to training

- Probes
 - Own training on mode of trial
 - Is mode of trial deemed important : Self / Magistrates

Mode of trial issues

- Probes
 - Prime considerations
 - Considerations other than sentencing powers
 - Why does CC pass lesser sentences
 - Bench policy in relation to specific offences
 - Court users' meetings
 - Option of no plea : origination / why use

Mode of trial factors

- Probes
 - Should prosecution case be taken at highest
 - Differences between approach of mags and solicitors
 - Many less committed for sentence than trial
 - Differences with CPS
 - Relevance of power to commit for sentence
 - Circumstances in which this might happen

Reform

- Probes
 - Is current situation satisfactory?
 - Should Guidelines be changed
 - Awareness of difference in courts' committal rates
 - Reasons
 - Relevance of other courts' practices

Sentencing

- Probes
- Do magistrates consider enough information before committing
 - What factors should be considered
 - Co-defendants : one pleads guilty
 - Role of Clerk
 - Relevance of power to commit after PSR
 - Circumstances in which this might happen
 - Power to give six months after discount
 - Knowledge of Crown Court sentences
 - Why does the Crown Court frequently pass sentences which the magistrates could have imposed?

Personnel

- Probes
- Should the right of election be abolished
 - Should magistrates retain more cases
 - Should sentencing powers be increased
 - Should magistrates continue to make mode of trial decisions
 - Do you want responsibility for decision
 - Proposals for change

Exercises

- 1
- 2
- 3
- 4
- 5
- 6

STIPENDIARY MAGISTRATE

General

Probes	Role in Court Influence on lay bench Input into training Changes in lay bench Is mode of trial deemed important
--------	---

Mode of trial issues

Probes	Prime considerations Considerations other than sentencing powers Success or failure based on CC sentence? Use of Guidelines Bench policy in relation to specific offences How is that policy formulated Why option of no plea
--------	---

Mode of trial factors

Probes	Determination of sentencing powers Many less committed for sentence than trial Borderline : keep or commit Relevance of CPS recommendation. Selectivity Relevance of defence representations Relevance of power to commit for sentence Circumstances in which this might happen
--------	---

Reform

Probes	Is current situation satisfactory? Awareness of difference in courts' committal rates Reasons Relevance of other courts' practices
--------	---

Sentencing

- Probes
 - Factors at PBV hearing
 - Sentencing power only consideration or should you commit certain types of offence?
 - Warley Magistrates
 - Co-defendants : one pleads guilty
 - Relevance of power to commit after PSR
 - Circumstances in which this might happen
 - Power to give six months after discount
 - Knowledge of Crown Court sentences
 - Why does the Crown Court frequently pass sentences which the magistrates could have imposed?

Personnel

- Probes
 - Should the right of election be abolished
 - Should magistrates retain more cases
 - Should sentencing powers be increased
 - Should magistrates continue to make mode of trial decisions
 - Proposals for change

Appendix 9

Mode of Trial Exercises

All defendants are male.

1. S.20 wounding. Female victim hit defendant with a pick axe handle during a domestic argument at home when both had been drinking. The defendant lashed out with a broken mug causing wound to side of face which required (according to victim) 36 stitches. Photographs but no medical report available to prove extent of injury. Aggravating feature: use of weapon (mug).

CPS: concluded that you may think your powers of sentencing are insufficient.

Defence: suitable, but a matter entirely for you.

2. S.20 wounding. Police called to hospital when defendant became aggressive after sedation following an epileptic fit. Lashed out at policewoman who fell over breaking her arm.

CPS: no recommendation, but asked bench to consider whether it was suitable bearing in mind victim's position of authority.

Defence: injury caused by fall and not directly by assault.

3. S.47 assault and affray. Unprovoked and vicious attack on a man at midnight by drunk defendant. Kicking to head and face causing swelling and grazes.

CPS: not suitable because unprovoked and involved kicks.

Defence: No allegation of weapon. Could perhaps stay here.

4. S.47 assault. Argument in pub between two men in their forties. Argument continued in street after closing time. Defendant threw three punches at head of victim causing wound near to eye which required two stitches.

CPS: borderline, but on reflection suitable for summary trial as no aggravating features.

Defence: suitable as no great complexity.

5. S.47 assault. 15-year-old girl had caused 36-year-old defendant problems over a period of time. After confrontation he hit her twice with a pole causing a swollen and bruised elbow and grazing to back. Aggravating feature: use of weapon (pole).

CPS: not suitable for summary trial as a weapon used.

Defence: entirely suitable. Provocation. Alleged weapon was only a broom handle.

6. S.47 assault. Defendant went behind bar when told to leave pub and headbutted the assistant manager. Punched him in the eye causing bruising, 1 inch cut to bridge of nose and 2 inch cut to rear of head. Aggravating feature: assault on person in position of authority.

CPS: borderline, the need being to consider whether your sentencing powers are sufficient.

Defence: no observations on mode of trial, but pointed out that the facts were in dispute.

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