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Sentencing Disparity and Race in the Nova Scotia Criminal Justice System

Using section 294 [now 334] (theft) of the *Criminal Code*

by
Don Clairmont
Winston Barnwell
Anthony O'Malley

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Introduction

The survey on perceptions of discrimination indicates a belief on the part of respondents that discrimination exists in the criminal justice system in Nova Scotia. Blacks, particularly those who have been involved with the system, are inclined to state that they receive "more time for the same crime" than non-Blacks. There is a paucity of research, especially in Nova Scotia, concerning discrimination and sentencing and this study is, in part, an attempt to redress this situation. Previous researchers have investigated possible discrimination in the Halifax courts (Renner and Warner, 1981); although focussing more on the economically disadvantaged, they have suggested the possible existence of racial discrimination in sentencing.

The aim of this study, then, is to determine if there is any evidence that Blacks receive harsher sentences than non-Blacks charged with the same offence before Halifax courts.

Data Collection and Methodology

Earlier studies suggested the need to control for type of offence. The cases included in this study were all charged under Section 294 of the *Criminal Code* which covers the offence of theft over and under the amount of one thousand dollars. Section 294(b)(ii), an offence punishable by summary conviction, allows for discharges. This sentencing study was carried out and prepared by Don Clairmont, Winston Barnwell and Anthony O'Malley. The Renner (1981) study had indicated that, of the observed cases which had received discharges, Blacks were excluded. We determined, then, that the type of offence selected for this study, precisely because it does allow for a discharge, would be useful to examine from the point of view of the discrimination suggested by previous research.

The two populations included are Black males and non-Black males (*i.e.*, sex was controlled). The term non-Black is used here in preference to White to maintain consistency of wording throughout the study. The Black population of Halifax County is estimated to be roughly three percent of the total population for the county. Since we reviewed over 1,000 files to obtain 51 Black offenders it is clear that Blacks are not overrepresented in the population charged with this crime.

As race is generally not indicated on court documents, we were obliged to obtain access to the identification records of the Halifax Police Department to ascertain the race of the majority of the cases. Difficulties in data collection arose because the Halifax Police Department is in the process of transferring its records to a new

computer system and has stopped loading new records on the old system in anticipation of the changeover. Subpoenas were subsequently issued to obtain the Halifax and Dartmouth Police Departments' records and the records of the Crown Prosecutor's Office of the Province of Nova Scotia.

The variables included in this study were extracted from the relevant court documents. These included: age, residency, employment status, marital status, educational attainment, prior convictions, plea, type of counsel (private, legal aid, or none), presence of a pre-sentence report and whether or not this was favourable to the accused, the type of sentence, and the presiding judge. Although data on the favourableness of the pre-sentence report was collected, only two cases were recorded for which the pre-sentence report was not favourable to the accused. This variable, therefore, was not included in the quantitative analysis; only the presence of a pre-sentence report was used.

Initially, it was intended to have a sample population of 200, comprised of 100 Blacks and 100 non-Blacks. However, it was not possible to obtain the desired sample of Blacks for a number of reasons which are included here in the hope that they will be of value to future researchers. Case files were generally not available for this particular offence before 1986 since they are often destroyed after a period of three years. The scope of this study is therefore restricted for the most part to the years 1986 and 1987. Our data collection revealed that this type of crime - the majority of offences under Section 294 involve shoplifting - is not especially common among Black males, a fact which restricted the size of the Black sample, even though initial discussions with personnel from the criminal justice system had indicated that a sufficient sample could be obtained for this offence.

Difficulties were also encountered in this study as a result of the incompleteness of court records. A substantial number of these records were examined (over 1,000 individual cases) and they varied regarding the amount of information they contained. The "Confidential Instructions to the Crown" sheet was often incomplete, particularly regarding the name of the presiding judge and the defence counsel. The adjudication often did not appear in the proper section of this sheet, and the civil and employment status of the accused were missing in many cases.

The Information laid against the accused contains a section on the reverse side for demographic details which was usually incomplete. On the inside of the front cover of some files a court record sheet was attached, which provided an opportunity for entering the details of adjudication and other data pertinent to the

Figure 1
Sample Population
Showing Age by Race

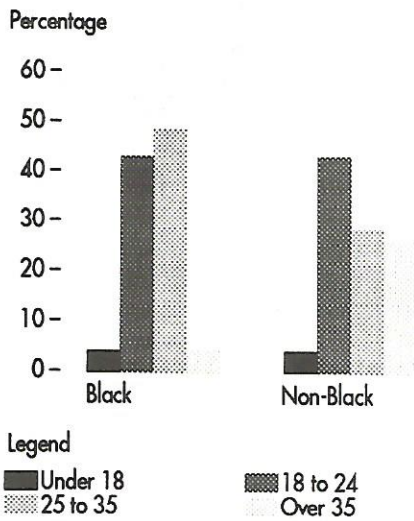
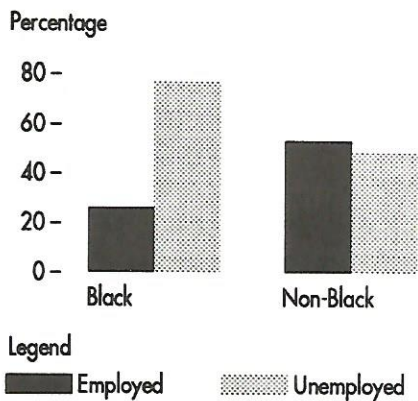


Figure 2
Sample Population
Showing Employment Status
by Race



case. This was generally incomplete or often simply left blank.

The isolation of the information systems of different jurisdictions (e.g., County and City), especially the criminal record system, presents a problem for researchers attempting to gather data. Each sector has its own computer system whose data is not available to the other jurisdiction. For example, it is possible for an offender to be tried and convicted in a County Court in Truro one day, and the next day appear in a Halifax Court on another charge, yet have no record of the previous conviction.

Description of Sample

The population for this study (n = 177) is comprised of Black offenders (n = 51) and non-Black offenders (n = 126) almost all of whom have been charged under Section 294(b) of the *Criminal Code*. Since the intent of the study was to examine disparity in sentencing, only persons who had been convicted were included in the sample. The total number of occurrences falling under Section 294 of the *Criminal Code* for Halifax in 1986 and 1987 was slightly over 7,000 for each year (data supplied by the Halifax Police Department). This number includes not only occurrences eventually brought to prosecution, but also unsolved crimes, cases that were investigated but found not to be of substance, or cases for which insufficient evidence existed to lay a charge. Of this number, 594 males were brought to court in 1987 to answer charges under this section of the *Criminal Code*. Once the sample size for non-Blacks was reached data collection ceased for this category of persons. Given the small charge/occurrence ratio, our Black sample represents almost a complete sample of Blacks charged with this offence for the period of the study.

Typically, the sample is composed of males under the age of 29 years (69 percent), who are single (75 percent) and unemployed (56 percent). The majority also tend to be from a lower socio-economic status area (63 percent) and to have been charged with theft under the amount of one thousand dollars [s.294(b)] (96 percent). Only a very small number (four percent) of cases have been charged with theft over one thousand dollars [s.294(a)] and these were retained in the analysis. The greatest proportion of the sample (55 percent) were first offenders.

Figure 1 shows sample population age by race. A large portion of the Black sample falls in the age group of 25-35 years (49 percent) with a slightly smaller portion (43 percent) in the 18-24 years group. The largest percentage of the non-Black sample is in the 18-24 years (43 percent) group with the remainder being spread between the 25-35 years (27 percent) and the over 35 years (26 percent) group. A

Figure 3
Sample Population
Showing Education Attainment
by Race

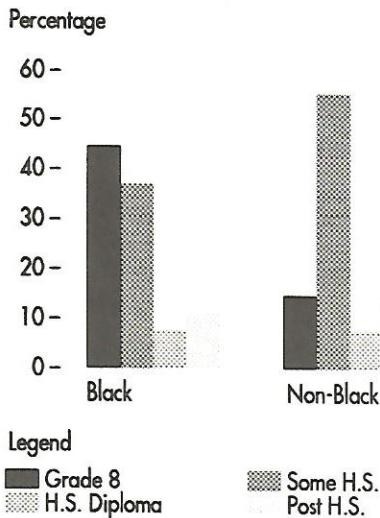
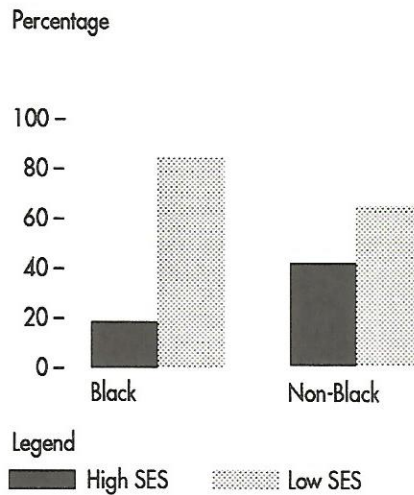


Figure 4
Sample Population
Showing Socio-economic* Status
by Race



* The average value of residence, as determined by Statistics Canada Census Tracts (1986) has been used here as a proxy for socio-economic status.

Figure 5
Sample Population
Showing Civil Status by Race

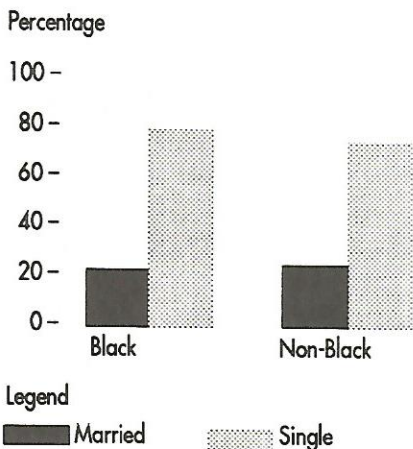
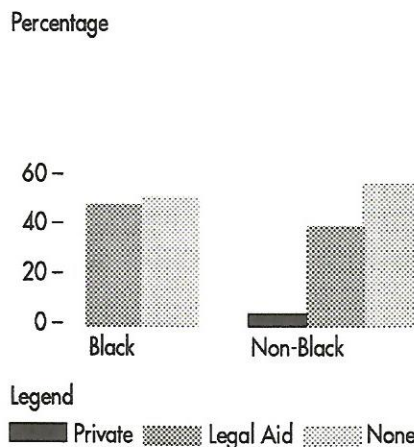


Figure 6
Sample Population
Showing Type of Counsel by Race



comparison of the two samples shows that the greatest difference occurred in the over 35 years category.

Figure 2, on previous page, illustrates the sample population with regard to employment status and race. For the purposes of our study, students were included among the employed and retirees among the unemployed. A large percentage of Blacks (Figure 2) were unemployed (77 percent), while only a small number (23 percent) were employed. Non-Blacks also show a large percentage of unemployed (48 percent), but this is considerably smaller than the proportion of unemployed in the Black sample. The non-Black sample shows 52 percent employed and is also comprised of a larger percentage of students (19 percent) than the Black sample (six percent).

The Black population typically shows a lower level of educational attainment (Figure 3) than the non-Black population. More Blacks (45 percent) had a less than grade nine education than non-Blacks (16 percent). Non-Blacks (20 percent) have completed some post-secondary or university education more so than Blacks (ten percent).

The average value of residence, as determined by Statistics Canada Census Tracts (1986) has been used here as a proxy for socio-economic status.

In order to include a measure of socio-economic status, the

average value of the dwellings in the offender's census tract location - as calculated from Statistics Canada's Census Tracts (1986) has been used as a proxy. Figure 4 shows the much lower socio-economic status of the Blacks, with a significant number (82 percent) in the low category. Non-Blacks are more likely (60 percent) to be in the high socio-economic category.

The two populations are very similar with respect to the ratio of married to single persons (Figure 5). The Black subsample shows a slightly smaller percentage (22 percent) of married and a slightly larger percentage of single (78 percent) individuals than non-Blacks.

Figure 6 graphically illustrates the type of legal representation for both populations. No Blacks, in this sample, were represented by private counsel, and they were more likely (49 percent) to be represented by a Nova Scotia Legal Aid lawyer. Non-Blacks were more likely (55 percent) to have no legal representation in court.

Table 1 shows the number of prior convictions of the sample population by race. All priors were entered for each case, starting from the most recent, until a total of six was reached. Any more than this number was considered to be of no real value for the purpose of this study since a greater number was thought to have little effect on sentencing. A significant percentage of both the Black (39 percent) and non-Black (62 percent) sample were first offenders, with the former showing a lower proportion. The Black sample contained a greater number of frequent offenders with six or more prior convictions (35 percent) than the non-Black sample (ten percent). A similar pattern is displayed for both populations with a clustering at both ends of the conviction continuum and smaller numbers in the middle, which may indicate the difference between those who commit a crime and learn from their error and others who become chronic offenders.

Sentencing

The *Criminal Code* imposes upon the judiciary - those authorized to commit to trial, try, and sentence one accused of an offence - a series of norms which must be considered when arriving at a sentence. They are, in order of priority: the protection of the public, the deterrence to the convicted and others who might be inclined to commit a similar crime, and the reform or rehabilitation of the convicted. The last should not be understood altruistically: in our modern epoch the administration of justice is a public expense, as are secondary effects of this administration (*e.g.*, an imprisoned man's family requiring social assistance). In any case, "the public is protected by the right sentence which deters others and reforms" (*R.v. Morrisette and Two Others* (1970), 1 C.C.C. (2d) 307 (Sask.

Table 1
Sample Population Showing
Number of Prior Convictions
By Race

Priors	Black	Non-Black
None	39.2% (20)	61.9 (78)
One	13.7% (7)	10.3 (13)
Two	2.0% (1)	8.7 (11)
Three	3.9% (2)	5.6 (7)
Four	2.0% (1)	0.0 (0)
Five	3.9% (2)	4.0 (5)
Six	35.3% (18)	9.5 (12)
Total	100.0% (51)	100.0 (126)

() - Represents number of people.

C.A.); quoted in Salhany, 1984:383).

In complying with these norms, and arriving at an appropriate sentence, judges must consider many details of the accused and the circumstances of the offence. Among these will be:

- 1) the gravity of the offence,
- 2) the character of the act itself,
- 3) the penalties provided by the Code,
- 4) the age of the accused,
- 5) his or her character,
- 6) previous criminal activity,
- 7) family and dependents,
- 8) whether the crime was deliberate or issued from impulse,
- 9) the effect of punishment as a deterrence to the convicted and others,
- 10) the possibility of reforming the convicted,
- 11) the extenuating circumstances, and so on. (*R v. Morrisette, op. cit.*)

The protection of the public from injury to their person or property, by conduct that has been deemed illegal, is readily accepted as the basic purpose of sentencing (Salhany, 1984).

The *Criminal Code* does not specify the particular sentence to be handed down in each case; nor, on the other hand is the judge free to impose whatever he or she deems appropriate once the accused is convicted. Rather, the Code specifies broad restrictions on sentencing for each offence according to where the latter falls within certain wide divisions of the Code. The major division is between summary and indictable offences (although there are a few that may proceed as either at the pleasure of the Crown); this division replaced, at the turn of this century, the old division between misdemeanors and felonies. Offences punishable by summary conviction are, in general, considered to be less serious than those proceeding by indictment, indicated in part (as the name suggests) by the rapidity with which summary offences may be dealt with. The subject of our study of sentencing is an offence punishable by summary conviction, s. 294(b)(ii), which refers to theft of property valued under, or over, one thousand dollars.

Parliament provided for five maximum penalties within the Code, according to the severity of the offence: life, fourteen, ten, five, and two years imprisonment. For some offences that are considered grave, there is also a minimum sentence. Judges must arrive at a sentence within these maxima and minima according to the criteria indicated above. For 294(b)(ii), a summary offence, there is no minimum sentence; there are, however, maxima (*e.g.*, no fine greater

than two thousand dollars and/or, no jail term longer than six months). This was an advantage for our study in that it allowed for sentences which might more clearly reflect judicial attitudes by allowing greater scope (e.g., it allowed for discharges); on the other hand, it was somewhat of a disadvantage in that the great fluctuation in sentencing made sentence comparison difficult. In evaluating criteria for sentencing, we relied, for the most part, on the Report of the Canadian Sentencing Commission (1987).

The following section presents an analysis of the type of sentence received, cross-tabulated with a variety of factors which converge in the act of passing sentence.

Table 2
Type of Sentence by Race

	Black	Non-Black	Total
Absolute discharge	0.0% (0)	11.1 (14)	7.9 (14)
Conditional discharge	15.7% (8)	27.0 (34)	23.7 (42)
Suspended sentence	2.0% (1)	2.4 (3)	2.3 (4)
Fine	49.0% (25)	50.0 (63)	49.7 (88)
Incarceration	33.3% (17)	9.5 (12)	16.4 (29)
Total	100.0% (51)	100.0 (126)	100.0 (177)

() - Represents number of people.

Table 2 shows the type of sentence received by race; it is remarkable that of the total number (14) of the offenders who received absolute discharges, none were Blacks. A disproportionate number of non-Blacks also received conditional discharges and suspended sentences (30 percent) compared to Blacks (17 percent). Non-Blacks (50 percent) were as likely to receive a fine as Blacks (49 percent), but the latter are significantly more likely to be incarcerated (33 percent to nine percent).

In the Black sample the largest percentage received a fine (49 percent). The second largest percentage were incarcerated (33 percent). In the non-Black sample the greatest proportion (50 percent) received a fine, while the second largest received a conditional discharge or a suspended sentence (29 percent). The possible existence of discrimination in the type of sentence passed will be examined specifically in a later section.

Discharges

Section 294 of the *Criminal Code*, which does not have a minimum sentence nor is punishable by 14 years or life, allows for an accused, if the court considers it to be in the best interest of the accused and is not contrary to the public interest, to be discharged. Although a discharge is not considered to be a conviction, a record is nonetheless kept by the authorities of the discharge. The value of this

Figure 7
Sample Population
Showing Discharges by Race

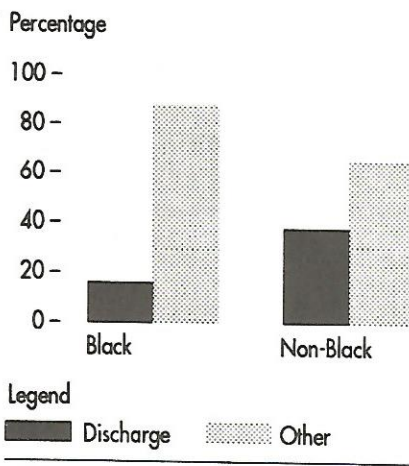


Table 3
Type of Sentence Received by
Those Who Had No Prior
Convictions and Race

Sentence	Black	Non-Black
Absolute discharge	0.0% (0)	17.9 (14)
Conditional discharge	40.0% (8)	38.5 (30)
Suspended sentence	5.0% (1)	3.8 (3)
Fine	50.0% (10)	37.2 (29)
Incarceration	5.0% (1)	2.6 (2)
Total	100.0% (20)	100.0 (78)

() - Represents number of people.

to accuseds is that they can honestly state (e.g., in job applications) that they have not been convicted of a criminal offence. This question, referring to a conviction, most often appears in documents relating to employment for which criminal involvement with the law is a serious if not absolute impediment. In effect, a discharged person is deemed not to have committed the crime. Application may be made, one year after the discharge was granted, to have the record of the discharge removed.

There are two types of discharges: unconditional (absolute) and conditional. In the case of conditional discharges, the court imposes certain conditions which must be met or the discharged offender will be brought back to court for sentencing. The usual conditions imposed by the court are a period of probation and/or a certain amount of community service work.

As an alternative to discharge, the court has the power to suspend the passing of sentence and to release the accused until stated conditions are fulfilled. In this situation (the so-called "suspended sentence"), a conviction is registered and the offender must live with a criminal record. The conditions imposed by the court, again usually probation or community service work, must be completed or else the accused will be returned to court and a sentence (a fine or imprisonment) imposed. The offender is not necessarily brought before the same judge, and the sentence may or may not be the same as the initial judge would have passed. In handing down a suspended sentence, the court regards the age and character of the accused and the nature and circumstances surrounding the offence.

Figure 7 shows the percentage of discharges (absolute and conditional) received by both populations. Blacks were granted a significantly lower (16 percent) proportion of discharges than non-Blacks (38 percent). Blacks also received more severe sentences (84 percent) than non-Blacks (62 percent).

An examination of those who had no prior convictions, and the type of sentence they received, discloses that 18 percent of non-Blacks received absolute discharges while Blacks received none (Table 3). Blacks with no prior convictions were most likely to be fined (50 percent) and to a lesser degree to receive a conditional discharge (40 percent). In this respect, recent discussion in the media has drawn attention to the number of people who are in jail in Nova Scotia because they cannot pay fines. Given the high rate of unemployment among the Black sample in this study, the question arises of how many of those fined have been jailed for default. Non-Blacks with no prior convictions are as likely to receive a conditional discharge (39 percent) as a fine (37 percent).

It should be noted here that the individuals shown to have been incarcerated among the subsample of first offenders were transients

Table 4
Type of Sentence by Age and Race

Sentence	Black			Non-Black		
	Less than 18 yrs.	18-35 years	Over 35 years	Less than 18 yrs.	18-35 years	Over 35 years
Absolute discharge	0.0% (0)	0.0 (0)	0.0 (0)	40.0 (2)	8.0 (7)	15.2 (5)
Conditional discharge	50.0% (1)	14.9 (7)	0.0 (0)	60.0 (3)	28.4 (25)	18.2 (6)
Suspended sentence	0.0% (0)	2.1 (1)	0.0 (0)	0.0 (0)	2.3 (2)	3.0 (1)
Fine	50.0% (1)	46.8 (22)	100.0 (2)	0.0 (0)	52.3 (46)	51.5 (17)
Incarceration	0.0% (0)	36.2 (17)	0.0 (0)	0.0 (0)	9.1 (8)	12.1 (4)
Total	100.0% (2)	100.0 (47)	100.0 (2)	100.0 (5)	100.1 (88)	100.0 (33)

() - Represents number of people.

Table 5
Type of Sentence by Socio-economic Status* and Race

Sentence	Black		Non-Black		Total
	Low	High	Low	High	
Absolute discharge	0.0% (0)	0.0 (0)	11.4 (8)	10.9 (5)	7.8 (13)
Conditional discharge	14.3% (6)	22.2 (2)	20.0 (14)	41.3 (19)	24.6 (41)
Suspended sentence	0.0% (0)	11.1 (1)	2.9 (2)	2.2 (1)	2.4 (4)
Fine	57.1% (24)	11.1 (1)	51.4 (36)	43.5 (20)	48.5 (81)
Incarceration	28.6% (12)	55.6 (5)	14.3 (10)	2.2 (1)	16.8 (28)
Total	100.0% (42)	100.0 (9)	100.0 (70)	100.1 (46)	100.1 (167)

() - Represents number of people.

*The average value of residence, calculated from Statistics Canada's Census Tracts (1986) is used here as a proxy.

who had been remanded into custody until their trial. The time spent in jail was deemed by the judge to be the "sentence served".

Age

The age of an offender is generally taken into consideration only in cases of extreme youth or old age (Trudell, 1986). Table 4 shows type of sentence by age groups. The majority of both populations are between the ages of 18 and 35 years and only a very small number are under 18 years of age (young offenders).

Blacks in the largest age group are most likely to have been fined (47 percent) and, to a lesser degree, to have been incarcerated (36 percent). Non-Blacks in the largest age group, on the other hand, are most likely to have been fined (52 percent) and, to a lesser degree, to have received a conditional discharge. The small numbers in the other cells in this Table makes further analysis unreliable.

Socio-economic Status

The role that socio-economic characteristics play in sentencing has been widely discussed in the

literature of sociology and criminology. The disadvantaged are generally considered to be unfairly treated and to be in a vulnerable position in a court of law. In order to establish some measure of socio-economic status, the average value of the dwellings in the area where the offenders resided was entered as a coded value using

Statistics Canada Census Tracts (1986).

Table 5 shows that Blacks in the low socio-economic category were most likely to have been fined (57 percent). This once again raises the question of their ability to pay the fine, and prompts consideration of their possible incarceration upon failure to do so. The number of Blacks incarcerated is disproportionate considering the ratio of the two populations.

A somewhat similar situation applies to the non-Blacks, for which the largest percentage fined (51 percent) were in the low socio-economic category. The largest percentage (14 percent) of non-Blacks incarcerated were also in the low socio-economic category. Nevertheless, non-Blacks, whether of low or high socio-economic status, were clearly more likely to obtain discharges.

Table 6
Type of Sentence By Civil Status and Race

Sentence	Black		Non-Black		Total
	Married	Single	Married	Single	
Absolute discharge	0.0% (0)	0.0 (0)	15.2 (5)	9.7 (9)	7.9 (14)
Conditional discharge	9.1% (1)	17.5 (7)	15.2 (5)	31.2 (29)	23.7 (42)
Suspended sentence	0.0% (0)	2.5 (1)	6.1 (2)	1.1 (1)	2.3 (4)
Fine	63.6% (7)	45.0 (18)	54.5 (18)	48.4 (45)	49.7 (88)
Incarceration	27.3% (3)	35.0 (14)	9.1 (3)	9.7 (9)	16.4 (29)
Total	100.0% (11)	100.0 (40)	100.1 (33)	100.1 (93)	100.0 (177)

() - Represents number of people.

Civil Status

As already shown, a judge usually takes into consideration when sentencing whether the offender has a family or other dependents to support (Table 6). In examining the type of sentence by civil status (married or single), married Blacks were found to have received, to a slight degree and only as far as incarceration is concerned, lighter sentences than single Blacks. This situation does not hold true for married non-Blacks, who are just as likely as their single counterparts to be

incarcerated or fined.

Prior Convictions

In considering the previous record of the accused, the court considers the effect of the previous sentences in acting as a deterrent. If leniency has been shown previously, but the accused persists in criminal behaviour, then a harsher sentence may be considered as a deterrent. In general, though, it is assumed that the offender has paid for the previous crimes and the court will avoid punishing the accused twice. However, a judge, in perusing past offences, does see if the present offence is related to one or more of the past offences,

Table 7
Type of Sentence By Number of Priors* and Race

Sentence	Black			Non-Black			Total
	None	Less than 3	Over 3	None	Less than 3	Over 3	
Absolute discharge	0.0% (0)	0.0 (0)	0.0 (0)	17.9 (14)	0.0 (0)	0.0 (0)	7.9 (14)
Conditional discharge	40.0% (8)	0.0 (0)	0.0 (0)	38.5 (30)	16.7 (4)	0.0 (0)	23.7 (42)
Suspended sentence	5.0% (1)	0.0 (0)	0.0 (0)	3.8 (3)	0.0 (0)	0.0 (0)	2.3 (4)
Fine	50.0% (10)	100.0 (8)	30.4 (7)	37.2 (29)	70.8 (17)	70.8 (17)	49.7 (88)
Incarceration	5.0% (1)	0.0 (0)	69.6 (16)	2.6 (2)	12.5 (3)	29.2 (7)	16.4 (29)
Total	100.0% (20)	100.0 (8)	100.0 (23)	100.0 (78)	100.0 (24)	100.0 (24)	100.0 (177)

() - Represents number of people.

*No more than six priors were entered on the data sheet.

Table 8
Type of Sentence by Employment* Status and Race

Sentence	Black		Non-Black		Total
	Employed	Unemployed	Employed	Unemployed	
Absolute discharge	0.0% (0)	0.0 (0)	15.9 (10)	6.7 (4)	8.0 (14)
Conditional discharge	25.0% (3)	12.8 (5)	34.9 (22)	20.0 (12)	24.1 (42)
Suspended sentence	8.3% (1)	0.0 (0)	3.2 (2)	1.7 (1)	2.3 (4)
Fine	50.0% (6)	48.7 (19)	44.4 (28)	53.3 (32)	48.9 (85)
Incarceration	16.7% (2)	38.5 (15)	1.6 (1)	18.3 (11)	16.7 (29)
Total	100.0% (12)	100.0 (39)	100.0 (63)	100.0 (60)	100.0 (174)

() - Represents number of people.

*Employed category includes those reporting as Student. Retired is included in the Unemployed category.

and it is difficult to expect that such recurrences will go unnoticed by the bench. In such cases, priors will lessen the weight a judge gives to the reform, or rehabilitation, component of sentencing norms. Again, if the accused has been free from crime for a considerable period, the court will take this into consideration.

It is clear that Blacks with a lengthy criminal record (70 percent) were significantly more likely to be incarcerated than non-Blacks with similar records (29 percent) (Table 7). Members of both populations with no previous criminal record, as noted above, are most likely to receive a discharge, but non-Blacks more so than Blacks.

Employment

In many instances, particularly those involving pre-sentence reports and community service orders, the court is contemplating a more lenient sentence, commonly because the employment status of the offender brings up the matter of secondary penalties. Table 8 examines sentence by employment status and race. For the purposes of this study, students were placed in the "employed" category since it was assumed the court would consider their employment

future in much the same manner it would an employed individual. A strong feature of this Table is the greater number of Blacks who are unemployed. There were three times as many unemployed Blacks as there were employed, in contrast to non-Blacks where there are more

employed than unemployed. Employed Blacks were more likely than unemployed Blacks to receive a lighter sentence. This finding is similar for the non-Black sample. The unemployed of both populations were more likely to be incarcerated.

Table 9
Type of Sentence by Education* and Race

Sentence	Black		Non-Black		Total
	Low	High	Low	High	
Absolute discharge	0.0% (0)	0.0 (0)	6.5 (4)	18.5 (5)	7.0 (9)
Conditional discharge	12.1% (4)	42.9 (3)	22.6 (14)	48.1 (13)	26.4 (34)
Suspended sentence	0.0% (0)	14.3 (1)	1.6 (1)	7.4 (2)	3.1 (4)
Fine	42.4% (14)	42.9 (3)	58.1 (36)	25.9 (7)	46.5 (60)
Incarceration	45.5% (15)	0.0 (0)	11.3 (7)	0.0 (0)	17.1 (22)
Total	100.0% (33)	100.1 (7)	100.1 (62)	99.9 (27)	100.1 (129)

() - Represents number of people.

*Low education level includes all those who have not completed high school and all others are included in the High category.

Education

The employment prospects of an offender may be damaged by receiving a criminal conviction by excluding them from entering certain educational programs. Appeals to the court are often made for leniency if the offender claims to be considering, or is embarked on, a program of study. Again, criticism has been levelled at the courts by social scientists who argue that only the affluent can take advantage of such programs and that the economically disadvantaged are discriminated against for not having the educational background, or the financial support, to pursue such

educational attainment.

The lower educational level of the Black sample and their greater likelihood of being incarcerated are demonstrated in Table 9. The small numbers in this Table for the Black sample prevents any conclusive analysis. Non-Blacks in the low education category were most likely to be fined and those in the high category were most likely to receive a conditional discharge. On the surface, the educational level of the offender appears to have made a difference in the sentencing for this offence.

Counsel

It is the responsibility of counsel to see that the client's interests are served during the sentencing hearing. For example, although the suspended sentence and the conditional discharge are, as a matter of penalty, very similar, it would be up to counsel to make a case that the secondary penalty (say, affecting employment) to the client would be sufficient to merit the lighter sentence.

Again, counsel may point out the client's inability to pay a fine, the harshness of an optional incarceration, but also the client's willingness to do community service work, thus making a suspended sentence or discharge an acceptable alternative. This is usually conveyed by counsel to the bench by suggesting that a pre-sentence report be requested, and by indicating the circumstances which would indicate that a discharge or suspended sentence would be more appropriate.

Counsel's role in sentencing should be active, not passive, but in such a way as to not circumscribe, or even to give the appearance of circumscribing, the authority of the bench to pass sentence. It is often the case, however, among better judges, that the circumstances pertinent to sentencing are solicited from counsel prior to sentencing. Many judges feel the responsibility of passing a fair and just sentence adequate to the offence is somewhat alleviated by including the opinion of counsel prior to sentencing, since the interests of the accused are presumably thereby included in whatever sentence is meted out. It also satisfies the judge that all information pertinent to the sentencing has indeed been considered.

All this must be considered, too, in the context of a request by the Crown for a particular sentence. The judge must weigh all these factors. Some judges like passing a sentence agreeable to all; others operate more autonomously.

The effect of having legal representation is demonstrated in Table 10. While Blacks with no counsel and those with counsel from Nova Scotia Legal Aid did not differ by percentage in avoiding incarceration, having counsel is associated with the greater likelihood of discharge. It should be noted here that, because of the demands put on the resources of Nova Scotia Legal Aid, first offenders are often not represented, since available counsel is reserved for those clients who are facing a more severe sentence and possible incarceration; this would account, in part, for the

Table 10
Type of Sentence by Type of Counsel and Race

Sentence	Black			Non-Black		
	None	NSLA*	Private	None	NSLA	Private
Absolute discharge	0.0% (0)	0.0 (0)	0.0 (0)	8.7 (6)	11.8 (6)	33.3 (2)
Conditional discharge	3.8% (1)	28.0 (7)	0.0 (0)	24.6 (17)	29.4 (15)	33.3 (2)
Suspended sentence	3.8% (1)	0.0 (0)	0.0 (0)	0.0 (0)	3.9 (2)	16.7 (1)
Fine	57.7% (15)	40.0 (10)	0.0 (0)	59.4 (41)	41.2 (21)	16.7 (1)
Incarceration	34.6% (9)	32.0 (8)	0.0 (0)	7.2 (5)	13.7 (7)	0.0 (0)
Total	99.9% (26)	100.0 (25)	0.0 (0)	99.9 (69)	100.0 (51)	100.0 (6)

() - Represents number of people.
*NSLA refers to Nova Scotia Legal Aid.

association of legal aid representation with harsher sentences. Among non-Blacks, private counsel was strongly associated with more lenient sentences while the advantages of having or not having

Table 11
Type of Sentence by Presence of Pre-Sentence Report and Race

Sentence	Black		Non-Black		Total
	Yes	No	Yes	No	
Absolute discharge	0.0% (0)	0.0 (0)	16.7 (6)	8.9 (8)	7.9 (14)
Conditional discharge	75.0% (6)	4.7 (2)	63.9 (23)	12.2 (11)	23.7 (42)
Suspended sentence	0.0% (0)	2.3 (1)	2.8 (1)	2.2 (2)	2.3 (4)
Fine	25.0% (2)	53.5 (23)	13.9 (5)	64.4 (58)	49.7 (88)
Incarceration	0.0% (0)	39.5 (17)	2.8 (1)	12.2 (11)	16.4 (29)
Total	100.0% (8)	100.0 (43)	100.1 (36)	99.9 (90)	100.0 (177)

() - Represents number of people.

legal aid representation were not ascertainable since other variables such as the number of priors, employment status, et cetera, were not simultaneously controlled for.

Pre-Sentence Reports

A Pre-sentence Report (PSR) or Community Service Order (CSO), may be requested by the court to assist in sentencing.

These reports are submitted to the bench after the presentation of evidence against the accused.

The PSR is usually written by a probation officer, who assesses - on the basis of interviews with the

offender, his or her parents, relatives or other pertinent persons-character, social situation, social attitudes, and in fact anything in the accused's life that might be relevant to the sentencing. It may be requested by a judge (if the offender is unrepresented), but is more often requested by counsel in hopes that a positive report will ameliorate the sentence the client would have received in the absence of such a report. Part of the effect of the PSR is to personalize the offender to the judge which in and of itself usually has a mitigating effect on sentencing if the report is at all positive.

The PSR and the CSO are identical with the exception that the CSO has been specifically requested to ascertain if the offender is able, or merits, a sentence which includes community service work. The PSR is more general in application, although little more so in content, and is the one more commonly requested prior to sentencing if and when it is relevant.

Since the discharge and the suspended sentence are arguably the lightest sentences, the PSR is requested by counsel when there is the possibility of some harsher sentence being passed, by the bench when there is some question whether or not the offender is capable by circumstances and character of complying with the conditions of a sentence, or lastly (by the bench) to ascertain whether or not the offender merits such a sentence at all (as in the case of an absolute discharge). PSR's are almost always favourable.

Our study shows that Blacks with pre-sentence reports were most likely to receive a conditional discharge (75 percent) and those with no report were most likely to be fined (54 percent) (Table 11).

Non-Blacks with pre-sentence reports were also most likely to receive a conditional discharge (64 percent) and those without one to be fined (64 percent).

Pre-sentence reports are generally not requested for frequent offenders, and so their influence on those who were incarcerated (mostly frequent offenders) cannot be estimated. An overall examination of this Table shows that Blacks are disproportionately less likely to have had the benefit of a pre-sentence report.

Discrimination in Sentencing

Our quantitative analysis of sentencing has indicated that the most likely event in which overt discrimination may have occurred is in the granting of absolute discharges. We will now examine this finding in greater detail.

Examining the profile of cases of absolute discharge, one finds that the age of those non-Blacks who received absolute discharges was typically between 18 and 35, although there was a spread over all age categories. They were most likely to have low socio-economic status, to be single and employed, to have a high level of educational attainment, to have had counsel, but more likely not to have had the benefit of a pre-sentence report. In an attempt to analyze this situation more closely, a boolean matrix was generated to determine by vector-comparison if any member of the Black sample had a profile (on all variables) exactly similar to any of the non-Blacks who had received absolute discharges and, consequentially, "should" also have been eligible for this sentence.

The relevant variables from the study were arranged, for each case, in vector-fashion. A comparison matrix was formed for all those cases receiving absolute discharge (14). The remaining cases (163) were taken one at a time and compared on a case by case, vector by vector basis with the discharge cases. This procedure produced a boolean matrix which allowed comparison of all cases for all variables on the basis of those values possessed by the discharges.

For all variables considered in the study, there were no exact matches from the subsample of Blacks; that is, the vectors representing the values of the study variables differed in significant ways from the discharge vectors.

There were six exact matches in the non-Black subsample, suggesting that, with regard to the variables studied, six non-Blacks were eligible for discharge but did not receive it.

A second run of boolean comparison was carried out with a subset of the study variables (*viz.*, age, priors, education, and employment). It was considered that this smaller set of variables constituted the most obvious criteria by which sentencing leniency is justified. In

this comparison run there were six matches between the Black subsample and the discharge group. The boolean matrix allowed us to identify the exact location of the differences between the restricted and general matrices. For the Black subsample the differences were primarily in the factors one would have anticipated to be relevant to absolute discharge; namely, a plea of not guilty or an unfavourable pre-sentence report. To this extent we felt that we had satisfactorily accounted for the observed fact that no Blacks received absolute discharges in terms of the court process itself. It must be noted, however, that this leaves open the question of whether or not the study variables were merely proxies for structural discrimination which was operative before the accused arrived in court.

A similar run with the subset was carried out with the non-Black subsample. In this run there were 35 exact matches, suggesting again that many non-Blacks were eligible, on the basis of the restricted set of variables, for absolute discharge but did not receive it. What most attracted attention was that a perusal of the comparison matrix showed that the relevant criteria which accounted for these 35 not being exact matches for the complete vectors were not legalistic, as in the case of Blacks, but were clearly socio-economic. For example, many differed solely with regard to status as determined by living address. This suggested to us that the relevant differences with regard to non-Blacks were differences immediately issuing from their class-status rather than a lack of successful outcomes of, for example, pre-sentence reports.

We hesitated to draw any further conclusions from the boolean comparisons, except that socio-economic factors appeared to be directly relevant to obtaining an absolute discharge. That is to say, even in the case of the Black subsample, although employment status did not directly account for missed matching, the pre-sentence report which did account for missed matches contains significant portions which address and evaluate the offender's socio-economic status. In this sense, the relevance of socio-economic status was directly visible for non-Blacks, whereas this same factor could appear for Blacks under the, now, proxy variable of a pre-sentence report.

The implications from this boolean matrix comparison are that there are often other persons with attributes similar to those receiving absolute discharges who themselves are not so favoured. Precisely how common this is depends in large measure on the number of variables matched. On a purely individual level non-Blacks and Blacks alike are affected. Still it needs to be reemphasized that no Blacks received an absolute discharge. Moreover, it is clear that having counsel, being employed and possessing relatively high educational attainment are all associated with absolute discharge. For each of these factors there is evidence that Blacks are systematically

Table 12
Results of Regression Analysis
Using Type of Sentence
(Discharges and Others)
as the Dependent Variable

Predictor Variables	Beta Weights	Level of Significance
Prior convictions	.48	.000
Education	-.32	.001
Age	.16	.01

deprived in society which suggests that the justice system may operate with a structural bias against Blacks. The boolean analysis does not allow us to conclude that, structurally, there is no racial discrimination in sentencing.

Regression Analysis

A regression analysis was performed to examine the predictability of those variables (priors, education, age, civil status, race, socio-economic status, counsel, and employment) considered influential in sentencing, together with the type of sentence received (discharges and others). At the zero order correlation level, the only variables found to be related were priors, education, employment and age.

When all the variables were entered into a stepwise regression analysis, only priors, education and age were found to be significant. These variables were able to explain 33 percent of the variance.

Conversion of the coefficients produced in the regression analysis into beta weights allowed comparison between the independent variables regarding their respective effectiveness as predictors. The beta weights and levels of significance are shown in Table 12.

Summary

The focus of this study has been sentencing disparity in the Nova Scotia criminal justice system. The sample (n = 177) has been drawn from Black (n = 51) and non-Black (n = 126) males charged and convicted under Section 294 of the *Criminal Code*.

The Black subsample typically showed higher levels of unemployment, lower levels of educational attainment, to be more likely to have come from a lower socio-economic background, and to have had a greater number of prior convictions.

Examination of the type of sentence received by race has shown that of the total number (14) of absolute discharges received, none were granted to Blacks. A disproportionate number of non-Blacks also received conditional discharges. Blacks are significantly more likely to be incarcerated.

Both Blacks and non-Blacks in the low socio-economic category were more likely to have been fined, which raises the question of their ability to pay a fine and of what percentage have been jailed for non-payment, creating a *de facto* "debtors prison". Non-Blacks in the high socio-economic category were slightly more likely to have received a discharge.

Our analysis of the role played by prior convictions in the type of sentence received has shown that Blacks with a lengthy criminal record were significantly more likely to be incarcerated than

non-Blacks with a similar record. As would be expected, offenders with no prior convictions were most likely to receive a discharge, but non-Blacks more so than Blacks.

The presence of a pre-sentence report or community service order has been shown to be of value to the accused as it most usually presents the offender in a positive light. Non-Blacks in our sample were more likely to have had the benefit of these reports, a factor which has been shown to have had a significant impact on the granting of discharges.

A boolean comparison matrix was generated to determine if discrimination was present in the granting of absolute discharges. No Blacks were found with profiles which exactly matched the profiles of those non-Blacks who had received absolute discharges. Six non-Blacks were discovered who had exactly similar profiles and in essence should have been eligible for the more lenient sentence. Construction of a second boolean matrix, with a restricted set of variables, disclosed six Blacks with profiles which matched those non-Blacks who received absolute discharges. When comparison was made with this restricted matrix for the remainder of the non-Black population a further 35 patterns were found which matched.

The implication here is that there are often other individuals, Black and non-Black, with attributes similar to those who receive absolute discharges who are not so favoured. The factors which are associated with absolute discharge, such as having counsel, being employed, and having high educational attainment, have been shown to be those of which the Black population is deprived. The boolean matrix, therefore, may be indicating the existence of a form of structural discrimination.

A stepwise regression analysis was performed which showed that prior convictions, educational attainment, and age were the best predictors of whether an individual would receive a lenient sentence (discharge) or a harsher sentence (suspended sentence, fine, or incarceration).

A possible limitation of this study is the small size of the Black subsample, which restricted the degree and type of analysis performed, although in some areas we feel that the analysis has been sufficient to allow some conclusions to be drawn from the data. For example, structural discrimination entering the courts from the larger society may preclude Blacks and non-Blacks alike from receiving the benefit of an absolute discharge. There is also an indication that Blacks, with previous record controlled for, are more likely to be incarcerated.

A further limitation of the study may be that the section of the *Criminal Code* selected for our study may not have been the best one to demonstrate the existence of disparity in sentencing. As we have

already shown, Blacks are more likely to be incarcerated and therefore the selection of a crime which results more readily in incarceration would perhaps have been more fruitful.

Concluding Observations

The cases which appear in our study were selected after a detailed inspection of over 1,000 files, both active and in the archives, of the Nova Scotia Crown Prosecutor's office.

In these files were most of the documents relevant to the case, although, as we have mentioned elsewhere in our study, the absence of information in places where it was required to be entered made our data collection more arduous than it need have been. Among the more important documents inspected were the Information (accusation) laid by some informant (usually a police officer), the "Confidential Instructions to Crown" (in which all details pertinent to the prosecution of the accused in court were assembled), the police "Occurrence Report" (documenting an investigation or arrest regarding the case at hand), the pre-sentence report (if any), the community service order (if any), transcripts of court proceedings, testimony of the police officers and witnesses, and the accused's statement (if any).

Above and beyond any of the results reported in this study, a number of impressions not readily quantifiable were gathered as a consequence of our reading these documents. We offer below the more important of these in hopes they will provide other researchers with suggestions for further study.

1.

It seemed clear to us from the statements of the police officers included in the files that Blacks - at least that group represented in our sample - understood themselves to be in an adversarial relationship with the justice system. The conversations and behaviours reported by the police indicated that before any significant action had been taken regarding the incident of the case, the Black suspect(s) felt a need to aggressively, or at least strongly, defend themselves before what was conceived to be a known adversary.

This became especially apparent when contrasted with the reportage regarding non-Black (essentially White) cases. Even when controlling for the severity of the offence under investigation, the circumstances surrounding the case (which surprisingly did not differ significantly), and the socio-economic status of the suspect, the behaviour of non-Blacks, although occasionally surly, never amounted to what appeared to be a consistent group attitude towards law enforcement officers. This was even more apparent in the

courtroom. Non-Black defendants appeared to be more aware of the tactical nature of the legal proceedings and changed their behaviour accordingly, whereas Blacks consistently maintained an adversarial stance throughout the court proceedings. The impression was that the adversarial relationship first encountered with the police was merely a part of an overall attitude towards the entire system governing the administration of justice.

Whether this adversarial attitude issues from the particular experiences of those involved with the law, or issues as a matter of socialization into a particular Black subculture whose attitudes are derived from an attempt to understand what appears to be a more or less permanently disadvantaged position within society - or both of these - are questions which merit consideration.

2.

As explained above, the discharge was initially created in 1972 to deal with first offenders. The principle idea behind its creation was that of secondary penalties; namely, that the social stigma associated with a criminal conviction can, and does, affect the livelihood of an offender to such an extent as to constitute an indirect sanction considerably more severe than the direct sanction represented by the sentence. Although it is not a burden put upon the law that it should take this into account in sentencing, it was recognized that in the case of first, and perhaps one-time, offenders such a secondary penalty should be taken into account when it is apparent that the offender will suffer consequences far beyond those issuing from a contemplated sentence.

This matter was originally dealt with by the suspension of sentencing. However, although it allowed the offender to avoid incarceration or the payment of a fine (which might draw attention to the case), the offender was still recorded as having been convicted of an infraction of the *Criminal Code*. This is an important point: the principal focus of secondary penalties is employment, and the usual form of the relevant question on applications or criteria for employment is based on having a conviction - as opposed to having a criminal record. A discharged person can truthfully answer that he or she has never been convicted of a crime (although such a person will still have a criminal record).

Although being convicted of a crime is generally viewed poorly by society, this view is more consequential in some circumstances than in others. It is especially consequential for a few specific kinds of employment (such as those requiring security clearance), but generally true for those jobs that constitute the positional property of society's middle class. That is to say, when the intent of the discharge is joined with the employment structure of our society, it becomes

apparent that discharges have greater consequences and are of more utility for the middle class or those aspiring to the positions normally associated with this class.

One possibly fruitful avenue of research would be to ascertain to what extent this may be true, and to evaluate the possibility that the discharge may, in part, have been the creation of a class seeking to protect itself from its own employment requirements in the event of an occasional infraction of the Code. This is not an unimportant matter, since eligibility for a discharge is not confined to shoplifting or other such minor infractions; it is available to all those judges considering infractions of the Code not specifying a minimum sentence or a maximum of 14 years or life.

Aside from possible future research, this also suggests that the results of our study, and others such as Renner and Warner (1981), although significant in their own right, must be approached with caution. If, as our impressions consistently suggest, the dislocations of our society - the employment structure and the educational attainment associated with it, the partial class monopoly on specific sorts of positional property, the historically disadvantaged position of entire subcultures, and so on - are imported whole or in part into the courtroom, especially that part relevant to sentencing, then the administration of justice would reflect these dislocations, and to that extent would partially assist in their preservation and continuation.

3.

Finally, as a particular point of further research following from these observations: an infraction of the Code such as that falling under Section 294 may not be of sufficient gravity to set in motion the type of phenomena we have sought to capture. It seems, from what has been said so far and the results of the survey forming part of this report, that racism is less a personal matter than it is a structural feature of the society as a whole. The minor nature of the offence represented by Section 294 may not excite in those participating in the court process any significant dispositions one way or the other, which is itself one of the bases of fairness. On the other hand, a study of an offence such as sexual assault, whose gravity and repugnance excite in us significant responses towards the accused, may provide the occasion for the emergence of dispositions which would reflect in a more direct manner structural discrimination. An initial perusal of the data suggests that not many convicted of sexual assault are discharged (there are various subsections of the assault section in the Code) nor are there fines. The usual result of a conviction is incarceration. This circumstance would allow the evaluation of not only structural determinants of discrimination but also an independent evaluation of the often asserted maxim that Blacks receive "more time for the same crime".

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