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## **Chapter 10. Visible and Invisible Sentencing**

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### **Introduction:**

This chapter develops a conceptual approach which understands sentencing as a collective practice which is generated by a number of actors, not only judges. Sentencing is seen as a series of decision making practices which are made visible in publicly available accounts. This way of seeing sentencing has significant implications for understanding conventional accounts of discretion. This chapter argues that discretion is best understood as a mode of justification based on trust in the invisible work of actors. Sentencing guidelines add a more visible, rule –based form of accountability which does not replace discretion but works alongside it as a complementary mode of justification.

### **1.0 The Discourse of Individualised Sentencing**

Most of the literature on sentencing is written by scholars working within a legal paradigm concerned to elucidate the formal legal status of sentencing and with formulating proposals to make judicial sentencing more “law-like”. ( Ashworth 1983, Roberts 2011, Frase 2013). The focus is understandably on the authoritative legal decision maker, the judge. Judges operate as independent individuals<sup>1</sup>. They are not bureaucrats whose task it is to implement government policy. They have no corporate voice nor corporate identity. It is not surprising, therefore, that sentencing is usually represented as a decision making process carried out by

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<sup>1</sup> In political theory, judicial independence means that the judicial branch of government is independent from the executive and legislative branches. However many public law scholars (Ewing 2013 ) now accept that this theoretical separation of law and politics is not sustainable in practice. Further, the fact that the judicial branch is independent does not absolve individual judges of the responsibility for ensuring that appropriate attention is devoted to ensuring a measure of consistency in sentencing. Sentencing policy, in UK jurisdictions at least is made, de facto, by judicial sentencing practices.

an individual actor, a judge. Judges are the authoritative performers of sentencing. They are legally responsible for the allocation of sanctions. They are also acutely aware of the need to justify their decisions. Sentencing decisions need to be presented as just decisions<sup>2</sup>. In their judgements, they frequently allude to their perceptions of the complexities of sentencing decision making, their obligation to consider all of the facts and circumstances of each individual case, and the unique nature of each case.

The judge is often portrayed as having the lonely job of deciding what type and severity of sanction is appropriate for a case. The judge has to reach a judgement about the seriousness of an offence, the harm it has caused and the appropriate penalty to achieve a range of aims, many of which are contradictory. The discourse of “individualised sentencing” argues that each case is unique and that a just sentence can only be reached by the consideration of the detailed facts and circumstances of each individual case. Judges craft a bespoke sentence which fits the distinctive combination of facts and circumstances which make up the case and which generates a sanction which achieves a “just” sentence. This at least is the view of sentencing presented by judges in the discourse of individualised sentencing<sup>3</sup>. On this judicial account of sentencing, sentencers are held to exercise very wide discretion. Individualised sentencing in non-guideline jurisdictions and even in some jurisdictions with guidelines (Hutton 2013b, Frase 2013) is not governed by many rules.

This discourse of individualised sentencing provides both an empirical description of how judges perform their sentencing work, i.e. their decision making, and a normative account of what is to count as a “just” sentencing decision. The practical and normative work used to generate sentencing decisions is variously described as “intuitive synthesis” (R v Williscroft), holistic craft work (Tata 2002) or “subjective rationalities” (Aas 2005). The public are invited to place their trust in the office of the judge. Judges are uniquely qualified to deploy these mysterious cognitive processes and thereby to deliver just sentencing decisions. On this account there is no gap between the ideal of justice and the practice of justice.

## **2.0 Sentencing as Collective Action**

This discourse of individualised sentencing struggles to explain the extent of pattern and consistency found in sentencing, where there are few rules. How can the exercise of discretion by individual judges produce broad patterns of consistency in sentencing? Does it make sense to understand sentencing decisions as being the product of the agency of individual judges? Or alternatively, are these decisions somehow generated by neo-liberal ideology (Wacquant 2011), or by a Culture of Control (Garland, 2001) and if they are, how do these structural explanations take effect at the level of courtroom sentencing decisions?

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<sup>2</sup> To say that sentencing decisions are justified by claiming that they are just is more than a little awkward. This begs the question of what criteria need to be satisfied to deliver “justice”.

<sup>3</sup> See this recent judgement of the High Court of Australia for a classic judicial articulation of individualised sentencing, PASQUALE BARBARO v THE QUEEN SAVERIO ZIRILLI v THE QUEEN [2014] HCA 2

Sociology has long grappled with the duality of agency and structure. To what extent are actions determined by social structures and to what extent are they the product of individual agency? Structuration theories (Giddens 1986, Archer 2003) are sophisticated attempts to understand the interplay between these two levels. For Giddens, actions both reproduce existing structures and at the same time produce new structures. The aim is to avoid the stasis of over-deterministic structural theories while at the same time avoiding the loss of the idea of collective action which can be the result of an exaggerated focus on individual agency. Bourdieu's concept of habitus (Hutton 2006) is also an attempt to deal with this conundrum by delineating a zone between agency and structure within which the two interact with each other, but how they do so is not clear.

In this chapter, following the work of Latour (Latour 2005) sentencing is understood as collective action, as the product of the actions of human and non-human actors (Hutton 2013a). Sentencing is not exclusively a judicial function. The sentencing process starts at earlier stages of the criminal process (McConville et al 1991, Stenning 2008) and requires the work of other criminal justice practitioners and the work of laws, professional rules, guidelines or memoranda, professional standards, formal templates and other documents designed to shape the practices of criminal justice professionals (see Bastard and Dubois 2015 this volume). Conventionally, human actors would be conceived as using, referring to, implementing or applying these documents. However, these documents make a difference in the world independently of the actions of human agents. Often, in the language of structural sociology, these non-human agents are seen as either providing resources for human actors or as constraints to the freedom of actors to do otherwise. However this is to privilege human agency as being the originator of action. It pre-supposes that if the "constraints" were not there, human actors would act differently. It implies that without these "things", social life would be otherwise. This may be true, but what "otherwise" would it be? Not the random maverick preferences of individuals. Individual agency does not pre-exist the world in which individual agents operate. The social world is generated by the interactions of people and things, by what Pickering has called "the dance of agencies" (Pickering 1995 in Cooren et al 2006). This is another metaphor for the relationship between structure and agency, but this time the duality is scrapped. The search for the source of agency is halted. Understanding the production of social life is achieved by the empirical study of the exercise of agency by both human and non-human actors.

The work of sentencing may be described as a process of "qualification", that is a process of deciding whether a report of an event –in-the-world belongs to a legitimate category: whether the reported "unique" event qualifies as an example of some general class. Qualification is a means of moving from the particular to the general and the criminal justice process is a means of moving from a unique-event-in-the-world to a case which can proceed in court and from there to a sentence to be administered.

"operations of qualification also constitute the basic cognitive operations of social interaction, social coordination requires a continuous effort of comparison, agreement on common terms and identification." (Boltanski and Thevenot (2006)p1)

What does sentencing look like from this vantage point? What can we see of the dance of agencies? The answer is that we can see the documents which are generated in the process of constructing a case. This begins with police officers and criminal law and ends with the release of the offender from obligations imposed by penal sanctions. Sentencing is thus continuous with the criminal justice process itself. The sentencing judge is presented with a case file containing specific pieces of information, prepared by other criminal justice actors to fulfil their professional and legal obligations (Hawkins 2003). So although a sanction is allocated to a unique individual citizen, sentencing is based on the information contained in the case file. Police officers generate a file containing information about the alleged offence, offender, witnesses and other evidence. This file is sent to the prosecutor's office where a decision is made about prosecution and further material added to the file. By the time it reaches the court, the case is a file of documents<sup>4</sup> which presents discrete pieces of information about the offence and the offender. In order for the case to proceed through the criminal justice process, certain legal requirements have to be met. A criminal offence has to be identified, evidence that the offence has occurred and that the offender committed the act has to be assembled etc. The compilation of a "case" can be seen as the production of a series of documents. Each document enables movement to the next stage of the process. Criminal justice professionals process information into existing classifications which provide them with an account which serves their professional purposes, for example, to demonstrate that the criteria for establishing a criminal offence have been satisfied, to ensure that the rules of evidence and procedure have been correctly complied with, to demonstrate that social work practice guidelines have been followed. These are all forms of public justification for their decision making. The unique event in the world becomes a series of defensible accounts which form a more or less familiar criminal case. The work of professionals can be seen as a series of visible translations from the particular unique event-in the world to a criminal case, which shares much in common with other cases. So the case documentation can be seen as a series of accounts which provide a public justification for decisions taken which can be checked and verified. The case is the outcome of a series of decisions and it is the only visible account we have of the decision making processes. As Hawkins notes, "past decisions are used as raw material for present decisions" (Hawkins 2003 p198).

The construction of the case carries with it an unavoidable sentencing function. By the time the case reaches court, the sentencing options are significantly narrowed because the unique event-in the world has now been translated through a series of decision making processes into a more or less typical sort of case. The research reported in McNeill et al (2009) shows how social enquiry reports are written for the courts by social workers<sup>5</sup>. The report writers are

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<sup>4</sup> Latour notes the importance of documents or forms for the production of social life, "a form is simply something which allows something else to be transported from one site to another. Form then becomes one of the most important types of translations." (Latour (2005) 223.

<sup>5</sup> Social Enquiry Reports are now known as Criminal Justice Social Work Reports following the Criminal Justice and Licensing (Scotland) Act 2010. There is a revised template for social workers to complete. These changes accompany the introduction of a single community sanction, the Community Payback Order, to replace the

required to comply with national standards for the production of reports which prescribe a format and style. Within these strictures there is scope for social workers to both second guess judicial decision makers and try to influence the judicial decision by their use of language. However there was evidence that social workers developed a sense of the appropriate sentence for the case, a decision usually made on the basis of a routine assessment of the seriousness of the case and the record of the offender. There was scope in some cases to seek to nudge the court towards what might seem like an unlikely non-custodial sentence where the social workers felt there was scope to work with an offender with a long criminal record but also occasions where the social worker felt that there was simply no scope to work with an offender who was almost certain to receive a custodial sentence. The account provided in the SER performs a significant part of the work of sentencing. It is a further translation of the prosecution case into an account which is clearly focussed on a relatively narrow range of potential sentencing outcomes.

What the discourse of individualised sentencing describes as “unique” events in the world comprised of a singular set of facts and circumstances are translated into more or less routine criminal offences defined by particular pieces of evidence. Judges have no unmediated access to “what really happened”. All they have is the information which has been presented to them in the documentation ( and to what was said in court<sup>6</sup>). An offender will usually appear in court and may in some circumstances give evidence or make a personal statement but more commonly most of the information about the offender will come from reports contained in the case file (van Oorschot, 2014). These professional practices generate an element of consistency in sentencing. Most regular court practitioners will have a sense of “the going rate” for typical offences although this is always tacit and impossible to measure (as in non-guideline jurisdictions at least, there is no benchmark against which to distinguish warranted from unwarranted disparity).

If this sociological account of sentencing decision making is correct, it presents a challenge to the discourse of individualised sentencing and to conventional understandings of judicial discretion.

### **3.0 Discretion and Practice**

Individualised sentencing is held to involve the exercise of wide discretion by judges. But what does discretion mean? It is often taken to refer to the practice of sentencing decision making, that is, to the cognitive processes exercised by judges. However, if sentencing decision making is not solely performed by judicial actors, but is more accurately conceived as a form of collective action described above, then discretion is not only exercised by judges but by all of the other actors involved in the decision making processes. In practice,

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previous range of community options. The essential functions of the report, to provide information for the court and advice on the appropriate requirements of the order remain much the same. Evaluation of these reforms is currently in progress.

<sup>6</sup> Where a trial has taken place, there will be much more oral communication available to the judge which will provide a richer narrative about the offence and the offender. However this case file will continue to structure the event and the offender into a more or less typical example of a criminal case.

the extent of discretion available to judges is much more constrained than the discourse of individualised sentencing would suggest. This chapter argues that discretion should be understood as a mode of accountability, that is, as a way of justifying sentencing decisions, rather than a way of describing the practice of decision making ( Lipsky 1980).

Gelsthorpe and Padfield quote the definition of discretion from the Oxford English Dictionary,

*“the liberty or power of deciding according to one’s own judgement or discernment”*  
(Gelsthorpe and Padfield 2003 p 3)

This definition refers to the “liberty or power” available to a decision maker. In other words, this is a political and legal capacity: the capacity and/or authority to make a decision without providing an account based on demonstrating adherence to rules. Discretion then might be thought of as the absence of a requirement to refer to rules in the provision of an account of a decision making process. In other words, discretion is not the exercise of judgment itself, but the capacity or power to do so. Discretion operates in the space famously described as the “hole in the doughnut” by Ronald Dworkin. Decisions made within the doughy substance of the doughnut need to be justified by reference to rules. Decisions made in the space in the middle which is not governed by rules, are justified by reference to the exercise of professional discretion. In this space, accountability for the exercise of judgment rests on trust in the office of the decision maker, which in sentencing is the judge.

However, Gelsthorpe and Padfield identify another way of conceptualising discretion. They argue that the implementation of rules necessarily involves the interpretation of both facts and rules. This process of interpretation involves the exercise of discretion. So discretion and rules are not distinctive modes of accountability as Dworkin argued, but rather seen by Gelsthorpe and Padfield as decision making practices which are much harder to distinguish one from the other.

Hawkins also uses the term discretion to describe the practices performed by legal actors to “translate” words into actions.

“To understand better how law works, how the words of law are *translated* into action, it is essential to know how legal discretion is exercised.” (Hawkins 1992 p44 my emphasis)

There is a difference between conceiving of discretion as a legal capacity and discretion as an interpretive practice. These are not the same things. When describing discretion as an interpretive practice, Gelsthorpe and Padfield refer to discretion as the difference between “the formal position and the actual practice”. In other words, discretion helps to understand the way in which law “in the books” is translated into actions in the world, to use Hawkins’ terminology.

How can we research these practices? How can we find out how laws are implemented or how rules are put into practice? We can look at the outcomes of practices: the cases which have been compiled, the decisions which have been made, the reports which have been written, the judgements which have been delivered etc. We can also interrogate the decision

makers, report writers and case compilers and ask them about their perceptions of their actions. The interrogations focus on the meanings expressed by the actors. We try to see the social world which they are creating through their eyes. We are interested in how the actors make sense of both the rules and the facts and how they perceive themselves applying rules to facts to reach decisions.

*“...where lawyers think in terms of the role of legal rules in achieving outcomes, social scientists tend to think rather in terms of decision goals or decision processes.” (Hawkins 1992 p14.)*

From a social science perspective, rules do not by themselves generate particular practices. Hawkins quotes Lempert, “rules are not inexorably influential” (Hawkins 1992 p18). That is, actors are not always oriented to rules when they act. For example, police officers may perceive a need to resolve a problem of disorder. They do not see themselves as implementing the law so much as solving a problem in a legitimate fashion. They need to be able to provide an account of their actions that is lawful. Rules are a means of generating an account which justifies the choice of a decision maker.

To return to the idea of sentencing as collective action, the documents produced by actors at each stage of the process can be seen as accounts which justify their decisions by reference to the relevant rules/templates/memoranda/codes of practice etc by which their decisions are held accountable. All of these actors exercise discretion in both of the senses identified by Gelsthorpe and Padfield. They interpret rules and fact situations and make judgements about whether or not rules apply to the facts and if so how they should be applied. They also generate documents which provide legitimate justifications for their decisions. These are different but neither are accurate accounts of their decision making practices. They are different forms of justificatory accounts.

#### **4.0 Visible and Invisible work: The generation of accounts**

*“It is important to recognise the existence of interaction between the different parts of the system, that the ‘output’ of one stage provides the ‘input’ for another.....” (Bottomley 1973 in Gelsthorpe and Padfield 2003 p11))*

*“No work is inherently visible or invisible. We always “see” work through a selection of indicators...” (Starr and Strauss 1999 p9)*

Starr and Strauss make the apparently obvious observation that social scientists have no unmediated access to the cognitive processes of actors. The work performed by actors is only visible through the traces that they leave behind. So the decisions made by police officers about arrest and charge are visible in the reports which they file, the decisions of prosecutors are made visible in the case files they prepare for court, the decisions of judges are made visible in the sentences which they pass (see also Tata 2002).

This is true of all social action. Action is not immediately visible, it is only made visible through its products. We see decisions, but not decision making. We see reports but not the processes which were used to produce these reports. Our access to these invisible processes is

only gained through the accounts provided either by observers or by the actors themselves. Observers' accounts are external perceptions, actors' accounts are post hoc narratives which may be their best good faith efforts in explaining their actions or may be justifications/idealizations/rationalisations. However they should not be taken as objectively accurate descriptions of cognitive processes because actors do not have access to the methods by which their decisions are reached, only to stories of these processes. This does not mean that the accounts are not useful, just that they are not necessarily accurate. So invisible work is necessarily invisible. There are good reasons for its continued invisibility. There are limits to our capacity for knowledge of the world. Requiring the production of accounts cannot make all invisible work visible. It makes new public accounts visible, but leaves invisible work un-accounted for.

We cannot "know" how actors make decisions because we do not have direct access to their cognitive processes only to their accounts of their actions. As described above, sentencing decisions are generated by a chain of what Latour (2005) calls translations. Accounts are generated to move from one stage in the chain to another. These accounts are produced to satisfy a range of demands on professional decision makers. Legality is one of these demands but it is not so much the demand to produce any particular legal outcome as the need to ensure that an account is lawful. If work is invisible, then all we can do is trust the professional competence of the worker. If, however, it becomes visible, these visible traces are available as an account of the work and our trust can be founded on this account.

In the production of a "case" for the court, some elements of the work of criminal justice practitioners have been made visible, other elements remain invisible. Some information has been included and some excluded. The judge has no access to the invisible work of practitioners nor to information that has been excluded. The judge makes a decision on the basis of the material presented to the court. So criminal justice practitioners participate in sentencing through their work in constructing a criminal case file. Routine cases will frequently generate a routine decision, more or less predictable to regular court actors. While there is always, in formal legal terms, scope for the judicial decision maker to diverge from the going rate, this is likely to happen relatively infrequently. Where a report has been prepared for the court recommending a community sanction, much of the sentencing work has already been performed by the report writer. Although the court is of course not legally obliged to follow the recommendation of the report, recommendations will be followed in a substantial majority of cases<sup>7</sup>. In other words, sentencing decisions are the product of the work of a number of criminal justice actors performing their routine bureaucratic tasks within the cultural frame of the local courtroom.

## **5.0 Invisible Work and Accountability**

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<sup>7</sup> Hawkins (2003) gives an interesting example from the work of Padfield, et al (2003) of how routine bureaucratic decisions of one agency (the Prison Service) have an impact on the future decisions of another agency (the Parole Board). Decisions made by the Prison Service which allocated prisoners to open conditions appeared to have an influence on Parole Board decisions. The Parole Board released no prisoner who was not in open conditions, and only one prisoner who was in open conditions was not released by the Parole Board.

Much of the work which goes into sentencing is invisible. For example, in Scotland, a Criminal Justice Social Work Report (CJSWR) is prepared through the completion of a standardised template and must contain prescribed items of information. However it also conceals invisible professional judgements made by the report writer, for example, about the “suitability” of the offender for a particular community sanction (McNeill et al 2009). The sentencing decision of the judge is invisible in the sense that the propriety or justice of the sentence is asserted on the basis of a narration of relevant facts and circumstances. None of the “workings out”, so to speak, are made visible.

It is tempting to call this invisible work, holistic or craftwork (Tata 2007). The difficulty with this is that it tends to exaggerate the influence of individual cognitive work on sentencing outcomes. It is as if the individual judge somehow exists outside of the social context of sentencing. That the judge, as it were, begins the sentencing decision making process afresh, assessing information as if this information has not already been processed by other actors. Sentencing is seen as purely a matter of individual cognitive work.

Another form of explanation attributes routine sentencing practices to the judicial habitus (Hutton 2006). Habitus is a metaphor which allows the analyst to avoid awarding causal priority to either structure or action and thereby avoids the stasis of either structural or individual determination. However a more fundamental problem with the metaphor is that it retains the split between structure and agency. The approach proposed here develops a sociological analysis of sentencing. That is not to say that sentencing decision making does not involve cognitive processes, nor to deny that individual judicial characteristics or values may have an impact on judicial sentencing practices. A sociological approach argues that sentencing is not reducible to matters of personality or cognition. It argues that sentencing is collective action, that is, the shared work of actors, human and non-human, engaged in criminal justice processes. The visible evidence of this work are the files produced by criminal justice practitioners which provide public justifications for their decision making. Most of the time, these processes generate routine decisions and there is modest scope in practice for judges to stray from the going rate. Of course, the “going rate” is neither fixed nor objective and in any given court culture it will accommodate a range or possible variations. There will also be cases which do not fit comfortably into routine categories. However these are questions for empirical investigation and in the absence of agreed sentencing guidelines, it is very difficult to establish a benchmark against which variation in sentencing can be measured.

Phenomenological or interpretive accounts of discretion are important (Tombs and Jagger 2006, Jamieson 2013). They provide us with accounts of how judicial actors understand and explain their sentencing practice. These accounts are generated to justify particular decision choices. Hawkins calls these naturalistic accounts. They challenge the goal-directed rational choice approach to understanding decision making. A naturalistic approach focuses on the moral or symbolic meanings held by actors, and on how information is framed and interpreted. However these accounts are not necessarily accurate accounts of the cognitive processes through which sentencing outcomes are generated. They tend to exaggerate the role of the individual judge and conceal the collective practices of sentencing.

Sentencers may describe their individual cognitive processes as “holistic”, but this should be understood as their account of their thinking and not as an objectively accurate description of cognitive processes. Judges interpret more or less familiar accounts presented in court papers and translate these into the next stage of the criminal process which is a sentencing decision. Hawkins’ naturalistic approach de-centres the individual from an understanding of decision making but there remains a focus on trying to describe the production of actions rather than the production of accounts.

## **6.0 Individual differences in judicial sentencing**

This does not mean that there is no scope for individual differences between judges (tough or lenient, retributive or rehabilitative etc), that sometimes similar cases are treated differently and different cases treated similarly, that for certain classes of case, for example those around the custody threshold, there is more scope for variation and unpredictability, but it means that there is considerably less scope than the conventional discourse of individualised sentencing would suggest.

Attempts to generate more predictable sentencing decisions by the proliferation and narrower specification of rules will produce more elaborate justificatory accounts which demonstrate that the processes defined by the rules have been observed and performed. The rules may or may not be successful in generating particular actions by decision makers, but all we will know is that legitimate accounts have been produced to justify the outcomes. The outcomes may or may not be closer to those desired by the rule makers (if it is possible to determine their desired goals). This, however, is an empirical question.

The argument here is that rules produce not actions but justificatory accounts for actions. So rules produce a process or formal version of justice rather than a substantive account. Decisions in the criminal justice system proceed through the construction of accounts. These accounts are performed by actors. These actors need to ensure that their accounts can be defended against potential criticism by some supervising agency whether this be their line manager, their colleagues, or other agents in the system with whom they have to work i.e. those who use their accounts to perform their own work in the criminal process. They will be aware to at least some extent that they need to be able to demonstrate that their decisions are compliant with the guidance which regulates their work and ultimately with law. They may or may not see themselves as implementing law, more likely they see themselves as generating accounts which are not unlawful. The extent to which their decision making is oriented towards implementing a legal rule is an empirical question but we should not assume that actors working in a legal context necessarily orient their actions towards implementing the letter of the law, even where from an external perspective it seems to observers that implementing law is the essence of their job. So police officers engage with an event which may require their intervention to restore or maintain public order/perceptions of safety. Their focus is on solving a problem and generating an account of their conduct which provides a legitimate justification for their actions.

In a non-guideline regime, using the method of individualised sentencing, the judicial decision simply expresses the propriety of the sentence for the case at hand and makes no reference as to how the case may be similar or indeed different from other cases. As with sentencing under a guidelines approach, cognitive actions and normative judgements are not made visible. Much of the impetus behind the sentencing reform movement which began in the United States in the 1970s (Frankel 1974) was a desire to make sentencing decisions more visible and therefore more accountable. Sentencing guidelines are a means of injecting accountability by establishing a relatively simple form of calculability which enables an account of consistency to be articulated. Visibility of sentencing work can only be generated through the production of these sorts of accounts. Criminal justice actors engaged in the process of generating a case could be required to produce different accounts of their decision making. These accounts will produce a different type of visibility, but still leave invisible that work for which no methods have been designed to generate visibility. In other words some sentencing work will always be invisible because it can only be made visible through the generation of accounts and accounts are always partial. This partiality is a problem for law which desires certainty. Individualised sentencing is one way of delivering certainty, but it is certainty based on a claim for authority in the office of judge who asserts the propriety of the sentence. Guidelines shift some of this authority to the abstract system of guidelines, so certainty comes from visible work which allocates a case to a classification or not and invisible work which places the case at a particular position on the range within the guideline (or departs from the guideline with reasons). Individualised sentencing and Sentencing Guidelines produce two different sorts of justificatory accounts for sentencing. Individualised sentencing claims justification based on trust in the invisible work performed by the office of judge. Sentencing Guidelines share this element of trust, but add to it, a claim for justification based on a public account of an acceptable range of variation within which judges are entrusted to exercise judgement.

**Conclusion: Rules, discretion and the regulation of sentencing practice.**

Martha Feldman asks, “How can decisions be responsive to the relevant features of a context without being *ad hoc*, unsystematic or incomprehensible?” (in Hawkins p163)

Sentencing is a process which is constructed out of a series of accounts of decision making by criminal justice practitioners. Each of these accounts is a justification for the presentation of a particular framing of an event in the world to meet professional and legal requirements of the construction of a criminal case. Each account addresses the problem posed by Feldman. Each account produces a visible record of work that was used to generate the account. Much invisible work is involved in the decision making processes of criminal justice actors. This is the exercise of discretion. Formal accounts make work visible, the work of discretion is invisible. Law does not regulate practice it regulates accounts of practice. We can only have access to accounts of practice and to the outcomes of practice, we cannot have access to the internal cognitive processes of individual decision makers.

Regimes of calculation cannot make everything visible. Beyond visibility lies the invisible. In sentencing, the decision is where accountability ends and trust begins. How much of an

account of sentencing choice is it appropriate to make visible and how much should remain a matter of invisible judgement? The degree of desired visibility is a matter of political choice and contest.

## References

- Aas, K. F. (2005) *Sentencing in the Age of Information*. London. Glasshouse Press.
- Archer, M. (2003) *Structure, Agency and the Internal Conversation*, Cambridge University Press, Cambridge.
- Ashworth, A, (1983) *Sentencing and Penal Policy* (George Weidenfeld & Nicolson Ltd).
- Bastard, J. and Dubois, C. (2015) Making sense of decisions? Collective action in the early release process in Hondeghem, A., Rousseaux, X. and Schoenaers F. (eds) *Modernization of the criminal justice chain and the judicial system: New insights on trust, cooperation and human capital*. Springer.
- Boltanski, L and Thevenot, L., (2006) *On Justification: Economies of Worth*. Princeton University Press Princeton and Oxford.
- Bottomley, K. (1973) *Decisions in the Penal Process*, Robertson.
- Cooren, F., Thompson, F., Canestraro, D. and Bodor, T. (2006) "From agency to structure: Analysis of an episode in a facilitation process." *Human Relations* 59(4) : 533-565.
- Ewing, K.D. The Resilience of the Political Constitution, 14 *German Law Journal* (2013), available at <https://www.germanlawjournal.com/index.php?pageID=11&artID=1596> accessed 15.05.15.
- Frase, R., (2013) *Just Sentencing*. Oxford. Oxford University Pres.
- Garland, D. (2001) *The Culture of Control*. Oxford. Oxford University Press.
- Gelsthorpe, L. and Padfield, N. (eds) (2003), *Exercising Discretion: decision-making in the criminal justice system and beyond*, Willan Publishing, pp.186-219.
- Giddens, A. (1986) *The Constitution of Society*. University of California Press.
- Hawkins, K. (1995) *The Uses of Discretion*. Oxford. Oxford University Press.

Hawkins, K. (2003) 'Order, rationality and silence: some reflections on criminal justice decision-making' in Gelsthorpe, L. and Padfield, N. (eds) (2003), *Exercising Discretion: decision-making in the criminal justice system and beyond*, Willan Publishing, pp.186-219.

Hutton, N (2006), *Sentencing as a Social Practice* in Armstrong, S. and McAra, L. eds. "Perspectives on Punishment: The Contours of Control". Oxford: Oxford University Press.

Hutton, N. (2013a) From Intuition to Database: Translating Justice. *Theoretical Criminology* 17:3. pp109-128, doi:10.1177/1362480612465767.

Hutton, N. (2013b) The Definitive Guideline on Assault Offences issued by the Sentencing Council for England and Wales: The Performance of Justice" in Ashworth, A and Roberts J.V. *Sentencing Guidelines*, Oxford University Press Oxford.

Jamieson, F. (2013) *Narratives of Crime and Punishment. A study of Scottish Judicial Culture*. Unpublished PhD thesis University of Edinburgh.

Latour, B (2005) *Reassembling the Social*, Oxford, Oxford University Press.

Lipsky, M. (1980) *Street-level Bureaucracy: Dilemmas of the Individual in Public Services*. New York, NY: Russell Sage Foundation.

McConville, M., Sanders, A. and Leng, R. (1991) *The Case for the Prosecution: Police Suspects and the Construction of Criminality*. London. Routledge.

McNeill, F, Burns, N, Halliday, S, Hutton, N, and Tata, C. (2009) Risk, Responsibility and Reconfiguration: Penal Adaptation and Mis-adaptation. *Punishment and Society* 11(4) pp419-442. Sage, London.

Padfield, N., Leibling, A., and Arnold, H. (2003) "Discretion and the release of life sentence prisoners." in Gelsthorpe, L. and Padfield, N. (eds) (2003), *Exercising Discretion: decision-making in the criminal justice system and beyond*, Willan Publishing, pp.186-219.

Pickering, A. (1995) *The Mangle of Practice*" University of Chicago Press, Chicago.

Roberts, J.V. (2011) (ed), *Mitigation and Aggravation at Sentencing* . Cambridge. Cambridge University Press.

Star, S.L. and Strauss, A. (1999) Layers of Silence, Arenas of Voice: The Ecology of Visible and Invisible Work, *Computer Supported Cooperative Work* 8 9-30.

Stenning, P. (2008) *The Modern Prosecution Process in New Zealand*. Wellington. Victoria University Press.

Tata (2007) Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process, *Social Legal Studies* vol. 16 no. 3 425-447

Tombs, J. and Jagger, E. (2006) "Denying Responsibility: Sentencers' Accounts of their Decisions to Imprison", *British Journal of Criminology* 46 (5): 803-821.

van Oorschot, I (2014) Seeing the Case Clearly: File-Work, Material Mediation, and Visualizing Practices in a Dutch Criminal Court , *Symbolic Interaction* Volume 37, Issue 4, Pages 439–623.

Wacquant, L. (2001) 'Deadly Symbiosis: When Ghetto and Prison Meet and Mesh', in *Punishment and Society*, 3: 95-133

### **Cases**

PASQUALE BARBARO v THE QUEEN SAVERIO ZIRILLI v THE QUEEN [2014] HCA 2

**R v Williscroft [1975] VR 292**