The psychology of judicial sentencing

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Pour Thérèse Dupuis et Bob Pease

À tous deux, nous voulons exprimer notre amour et notre reconnaissance pour tout ce qu'ils nous ont donné

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CHAPTER 1

Judges and psychologists

Man is a rational animal ... so at least I have been told. Throughout a long life, I have looked diligently for evidence of this statement, but so far I have not had the good fortune to come across it, though I have searched in many countries. (Russell, 1950)

A judge passing sentence thereby shows he has made a decision. It is an important decision, not only for the offender. A judicial sentence is an expression of power on behalf of society, made in its name. In most countries, including the United Kingdom, the more severe sentences are imposed by citizens acting alone. A distinguished judge, Lord Devlin (1979), wrote,

> When I talk of the law-maker I mean a man whose business it is to make the law, whether it takes the form of a legislative enactment or of a judicial decision, as contrasted with the lawyer whose business it is to interpret and apply the law as it is. Of course the two functions often overlap; judges especially are thought of as performing both.

Atiyah (1983) stresses the amount of law which is made by lawyers rather than legislators.

In the United Kingdom, sentences are constrained by law in only one way, by specifying a maximum sentence. Maximum sentences are so severe as to be irrelevant to ordinary sentencing practice (Advisory Council on the Penal System, 1978). This is not surprising. The origins of the maxima lie in legislation restricting the scope of the death penalty during the second quarter of the nineteenth century (Thomas, 1978a, b). Judicial discretion has been further increased by the simplification of substantive law which David Thomas (1978a, b) identifies as the 'overriding legislative policy' of recent years. Judicial discretion increases as distinctions come to be made in the minds of sentencers rather than in statute. An appellate system is the obvious way of controlling judges' decisions. In the United Kingdom the appeal against judges' decisions is to other, more senior, judges.

In short, the judge has great freedom in his stewardship of power. Whether by default or intention, there is little challenge to his role. Yet, acting in concert, judges can subvert the penal purposes of the legislature. They can do this by discharging their powers to sentence in ways which the law permits. Recently, when attempts to reduce the use of custodial sentences have been made, increasingly frantically, by successive governments, the power of the judiciary to frustrate such attempts has been clear. This power makes an understanding of the psychology of judicial sentencing a matter of compelling practical interest. Little such understanding appears to exist. As the criminologist Don Gottfredson (1975) put it, 'it would be difficult to find other decision problems affecting critically the liberty and future and lives of large numbers of people in which decisions are made with so little knowledge of the way in which they are made'. Before justifying the involvement of psychologists in the analysis of sentencing decisions, let us first look at the lawyers' contribution to the literature on sentencing.

The legal literature on sentencing

Much of this literature has involved the articulation of general 'principles' of sentencing. For example, David Thomas's standard work (1979a) sets out the results of a detailed and penetrating examination of the decisions of the Court of Appeal (Criminal Division) and enunciates the principles manifest or latent in them. These are arguably the principles which should inform the decisions of all criminal courts. Sir Rupert Cross's *The English Sentencing System* (1975, 1981) also offers a set of generally understood principles of sentencing. Fallon (1975) and McLean (1980) both analyse sentencing practice from their position as serving members of the judiciary. More recently Ashworth (1983) sets principles of sentencing in the context of penal policy generally. Ashworth is critical of the arrogation to themselves by judges of penal policy decisions, and of the tenuousness of the influence of the Court of Appeal on sentencing decisions made lower in the system.

The literature on sentencing, the most notable contributions to which are mentioned above, is more modest than one would like. This may reflect the low importance which practising lawyers attach to sentencing. It may also reflect the speed with which a court typically arrives at a sentencing decision in contrast to the much greater time

taken to convict in a contested case. Lord Devlin (1979) even suggests that sentencing is usually easy. 'In the majority of cases, there is little room for choice.' Yet sentencing principles seem to give enormous scope for choice. For example, in his description of tariff sentencing (i.e. sentencing based primarily on the seriousness of the offence) Thomas (1979a) gives a flavour of the tone of the literature. 'A tariff sentence will normally be upheld, without regard to the problems and needs of the offender, for a wide range of offences, *in some cases* with a degree of consistency which suggests a firm policy' (emphasis added). This implies substantial inconsistency, which may be the result of the disparate sentences of a large number of judges who see themselves as having 'little room for choice'.

Why should we not take the legal literature as it stands? Why not accept the principles which the academic lawyers infer from the reasoning of senior judges? The first answer to that question has little to do with psychology. It is that the (perforce) abstract and diffuse enunciation of sentencing principles offers limited scope for understanding sentencing in the individual case. To the idiosyncratic sentencer the principles may represent a repertoire of usable justifications of sentence. They offer little prospect of control over his idiosyncrasy. Nor do they present much opportunity for identifying him as idiosyncratic. David Thomas makes a fundamental distinction between tariff sentences, based on offence characteristics, and individualised sentences, based on offender characteristics. The range of application of the two sentencing modes is specified only in the broadest terms. In accepting such a distinction, different sentences in the same circumstances, and the same sentence in different circumstances, can be justified merely by reference to different sentencing principles.

A second reason for scepticism about judges' expressions of sentencing principles does derive from the work of psychologists. The literature of cognitive psychology has shown, clearly and repeatedly, that people in general simply do not have enough access to their own thought processes for us to take their reasons seriously. The evidence for this strange and subversive claim will be touched on immediately and set out more fully in Chapter 3.

The mystique of decisions

Wilkins *et al.* (1972) describe the decision-making process as a one-way screen.

> When we are looking towards it we know without any doubt that we have not passed through it, but when we look backwards, while we know we have passed through, the time, method or occasion of 'passing through' usually avoids us ... The linguistic conventions by which we describe the uncertainty we have before 'deciding' ... 'I have not yet made up my mind' (a construction analogy), 'I am still in doubt' (a locational analogy) ... 'I do not know which side to come down on' ... There is, perhaps, as rich a selection of phrases in which we can indicate that we have decided ... 'I have made up my mind', 'On balance I would say' and so on ... But consider the process of the act and deciding. We have no such phrases which refer to the decision-making operation.

In their analysis of problem-solving in civil law, Crombag *et al.* (1975) tried to elicit accounts from skilled problem-solvers. They concluded:

> While skilled problem-solvers may not be able to tell us explicitly how they proceed while solving a problem, they are able to complete the solving itself. If we ask them to think aloud while solving a concrete problem and if we keep a record of this thinking aloud in written protocols, the analysis of the protocols might lead us to a formal description of what, in fact, is done. We have tried this, rather informally, but the results were disappointing. The most striking result was that what was said while thinking aloud created a rather chaotic and unsystematic impression. Often a person seemed to have a solution, although a provisional one, at an early stage, for which he subsequently tried to find supporting arguments. Moreover, during the reasoning process, the subject did not seem to complete one part after the other, but rather to jump wildly back and forth.

In interviews with Crown Court judges (Fitzmaurice, 1981), one judge mused thus: 'When a judge passes sentence ... there are so many things which he has got to take into account ... it's just in what I call the mental mixer of sentencing.' This sort of description is echoed by judges interviewed by Ashworth *et al.* (1984): 'Most judges described it as an instinctive process, using such terms as "instinct", "experience", "hunch" and "feeling".' In the authoritative *Encyclopaedia of Crime and Justice*, edited by Stanford Kadish (1983), Judge Marvin Aspen describes sentencing thus:

> Sentencing is anything but a simple task. Many diverse data must be considered by the judge: other material must be consciously excluded from the

sentencing equation. After this tortuous process, the judge will render a reasoned sentence that is subject to one final 'litmus' test: is the sentence what is best for society? If it is, then the judge has performed well.

It is the instinctive mental mixer's description of its own mode of operation that has provided much of the data for the development of principles of sentencing. It can be argued that a reconstruction of the sentencing process (in the form of giving reasons for sentence) is necessary in the cause of justice (Wilkins, 1984). What is argued here and will be argued more fully in Chapter 3 is that the giving of reasons for sentence may be a good idea, but, if so, it is not because the reasons thus generated are the real reasons for passing sentence, or are credible as the reasons. It is because the giving of reasons may reveal the sentences as *defensible* in terms of a principle or set of principles. It is remarkable that, in their reconstruction of complex mental events which they have experienced, people can take themselves seriously, be taken seriously by others, be confident and inspire confidence, and even deny the complexity of those events (see, for example, Devlin, 1979, on sentencing). The evidence, which will be reviewed later, makes it clear that the ability to reconstruct mental processes accurately is limited, occurring only when certain criteria are fulfilled, which are not fulfilled by the situations in which judicial sentencing takes place. This means, in short, that we either have to believe that judges are superhuman and that our understanding is satisfactory (in the same way that God's superiority makes him ineffable and consequently makes theology necessarily imperfect), or alternatively that judges share the cognitive frailties of other people, in which case research into the principles of sentencing must be put on a sounder footing, or based less on judicial accounts. Given judicial power, and given the opacity of the mental processes underpinning sentence, the practice of judicial sentencing demands scrutiny from all concerned citizens, not least the professional psychologist.

Psychologists as handmaidens of the powerful

Psychology has tended to be a conservative discipline. One of the problems linked to the issue of power in psychology has been that the *rapport de force* is not always obvious. Sometimes it is. Durndell (1977) notes, 'Psychology as a whole is not necessarily oriented towards the *status quo*, but it has a strong tendency to be so, particularly because of the pressures that employers of psychologists are

liable to put on them in guiding research areas and techniques which are to be used towards the ends the employers desire.' Even when this is not so, there is a tendency to be conservative. Explanations given of psychological phenomena can themselves be the product of the respect for power. To give a famous example, we turn to one of the best known psychological principles, that of the Oedipus complex, taken by Freud (1922) from events described in Sophocles' play, *Oedipus Rex*. Oedipus kills his father, Laius, Freud argues, because of a jealous wish to possess his mother. In Sophocles' play, however, Laius is largely instrumental in causing his own death. He goads (in both senses) Oedipus, who retaliates with fatal results. Thus, in large measure, Laius' death resulted from his own bellicosity. Despite this, Freud takes the story as an illustration of the son's desire to kill the father. Popular culture as well as academic psychology has uncritically followed the conventional Freudian interpretation. Yet the conventional view fits the original story less well than does the alternative interpretation that the Oedipus myth is (if it is interpretable at all in terms of an understanding of the human condition) really about paternal envy and fear. Laius envied and feared the burgeoning strength and sensuality of his son, trying to kill or injure him with a two-pronged goad. The reader is invited to consider what Freud would have made of the two-pronged goad if Sophocles had placed it in Oedipus' rather than Laius' hands!

What has this got to do with the assertion that psychologists' interpretations can be the product of a respect for power? Fathers are more powerful than sons (physically until the son's adulthood, socially typically until the father's dotage). Unconscious wishes are more safely located in the psyches of sons than of fathers. Unconscious hostility is more safely located in the psyche of Oedipus than in that of Laius. What is meant by safety in this context? Safety here means the confidence of not suffering guilt or ridicule, the confidence that the blessings of the powerful will continue to be poured on the heads of those whose interpretations are acceptable to the powerful, unstemmed by the malicious biting of the powerful feeding hand. Consistent with this sort of interpretation is the fact that psychological research on decision-making in courts has tended to concentrate more on the decisions of jurors than on the decisions of judges (see Farrington and Hawkins, 1978). Perhaps judicial criticism of jurors by judges (see, for example, Baldwin and McConville, 1980) has been more likely to be translated into funded research than has jurors'

criticism of judges. It is no coincidence that we are unable to cite a reference for criticism in this direction, whereas we had to select a reference for criticism in the other direction from among many alternatives.

In so far as judges have been the subject of study, work has tended to concentrate more on alleged judicial idiosyncrasies than on common standards capable of application to judicial performance (for a recent exception, see Ashworth *et al.*, 1984). For example, Hogarth (1971), Hagan (1974) and Chiricos and Waldo (1975) were largely concerned with differences among sentencers in the philosophy and attitudes which they brought to bear on the sentencing task, and the relationship of those differences to judicial performance or principles of judicial performance. Such an approach is a valuable one in addressing the problem of unwarranted sentencing variation. However, it necessarily takes the average of current judicial performance or current sentencing principles as unproblematic. It is thus less threatening to the general run of sentencing practice than would be, for example, an examination of the scaling of offence against punishment, or a challenge to the assumption of the capacity knowingly to tell the truth about the principles underlying one's own performance as a sentencer.

Some judges regard the process of sentencing as uncomplicated. In the opinion of Lord Devlin, 'In the majority of cases there is little room for choice. The judge has only to fix the appropriate term of imprisonment by applying the tariff to the circumstances of the case.' Yet an article in the *Sunday Times* (Knightley, 1982) described how research at the Oxford University Centre for Criminological Research 'to examine from a judge's point of view how the sentencing process worked' had been 'blocked' by the judiciary. The Lord Chief Justice is reported to have told the distinguished leaders of the project that 'research would not tell judges anything they did not already know, and that they were not prepared to co-operate'. If this is an accurate record of the Lord Chief Justice's remarks, and a correct reading by him of the feelings of the judiciary generally, then even the most obviously relevant and well-founded research, conducted by those best equipped for the job, is not seen as capable of improving judges' understanding of what they do and their capacity to do it.

This is a profoundly depressing state of affairs. It seems important to establish that there are areas of judicial performance which can be illuminated by psychological research, if not on judges themselves,