

## Strathprints Institutional Repository

Tata, Cyrus (2002) *Accountability for the sentencing decision process : Towards a new understanding*. In: *Sentencing and Society*. Ashgate, Aldershot, UK, pp. 399-420. ISBN 0754621839

Strathprints is designed to allow users to access the research output of the University of Strathclyde. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. You may not engage in further distribution of the material for any profitmaking activities or any commercial gain. You may freely distribute both the url (<http://strathprints.strath.ac.uk/>) and the content of this paper for research or study, educational, or not-for-profit purposes without prior permission or charge.

Any correspondence concerning this service should be sent to Strathprints administrator: <mailto:strathprints@strath.ac.uk>

## Chapter Nineteen

# Accountability for the Sentencing Decision Process – Towards a New Understanding<sup>1</sup>

Cyrus Tata<sup>2</sup>

### Summary

Traditionally, legal academic writing and scholarship has tended to regard sentencing discretion as lacking sufficient structure and coherence. This lack of coherence, it has been argued, means that there is a lack of genuine openness and accountability in sentencing decision-making. According to this view, an important job of the sentencing scholar is to uncover the penal philosophies, which are said to drive individual sentencers' interpretations of case-factors. Therefore, it is said that transparency and accountability can only be achieved by explanations of sentencing in analytical and penal-philosophical terms.

This chapter suggests the need to develop a new approach to understanding the decision process, which is neither rule-less, nor, explained by the weighting of discrete individual case factors, or, combinations of discrete case factors. Arguing that accounts given by sentencers are necessarily socially produced, the chapter advances the case for a fundamental reappraisal of explanations of the structure of the sentencing decision process.

The chapter begins by describing the scholarly dissatisfaction with the coherence of sentencing discretion and the various methods intended to increase the coherence in the structure of sentencing discretion. Each of these methods has encountered serious criticisms. The second section examines the elusive search for 'coherence' in sentencing. It argues that judicial defensiveness does not provide a sufficient explanation for the apparent lack of openness in sentencing. Instead, basic assumed categories of sentencing have had an obscuring effect. These categories represent a series of dichotomies: 'the offence plus the offender'; 'aggravating versus mitigating factors', 'penal philosophy versus non-coherent judgement' and 'discretion versus rules'. In the third section the reader is invited to consider why attempts

to introduce greater transparency and accountability have largely disappointed advocates of transparency, and are likely to continue to do so without a re-conceptualisation of sentencing accountability. Using this re-conceptualisation the chapter attempts to begin to open out new and under-explored questions for sentencing research and policy.

### Introduction

The concept of 'accountability' is axiomatic to modern legal thinking. If decisions are to be just they should be explicable through reasoned explanation. This chapter reappraises the conventional wisdom which supposes the sentencing decision process to be incoherent or lacking structure because of penal-philosophical disagreement. One objective of this chapter is to challenge the assumed conception of 'coherence'. In doing so it attempts a more critical evaluation of the efficacy of penal-philosophical explanation and calls for greater legal transparency, and thus interpretation of accountability for the sentencing decision process.

Sentencing decision-making has often been assumed by legal scholars to be a relatively formless process with little or no coherent structure. A generation after Marvin Frankel's 1972 "law without order" polemic against the "arbitrary fiat"<sup>3</sup> of the discretionary power of individual judges, the suspicion of excessive and therefore order-less judicial discretion endures. For example, Miller (1989, p. 20) depicts sentencing as a mysterious and hidden process of decision-making. Jareborg (1995, p. 22) states that new sentencing legislation in Sweden replaced "... a black box ...". Von Hirsch (1987, p. 4) claimed that under indeterminate sentencing in the US sentencing patterns "... emerged largely by happenstance ... . There was no coherent pattern of sentences sought". In his book on the development of Minnesota's Sentencing Guidelines, entitled *Structuring Sentencing*, Parent explains that his intention is to convey

... the message that sentencing can be rationally guided by a system of law to replace ... wide-open discretion that prevailed in the past. Discretionary sentencing ... conferred unguided discretion ... [which] allowed anarchy among judges and produced both arbitrariness and unwarranted disparity [sic] (Parent 1988, pp. 2-3).

I will argue that the accepted wisdom of a lack of coherence in fact presupposes one particular understanding of the use of legal discretion. If sentencing is not seen to be governed by formal legal principles and official procedures it

has been labelled as 'chaotic', 'incoherent' and 'unstructured'. The purpose of this chapter is to suggest different ways of making sense of sentencing discretion, which permits a rethink of transparency and accountability for the decision process. In so doing, I will suggest that using philosophically-derived justifications for punishment should not be assumed to be the only or main theoretical way to understand sentencing practice and judicial discourse about that practice.

The sentencing reform movement throughout the western world has been inspired, at least in part, by the concern among sentencing scholars that the sentencing decision process is inadequately structured and coherent. The major approaches to reform have understood the sentencing discretion through particular legal, cognitive and philosophical categories. Their dominance of these categories has obscured other useful ways of thinking which may in turn help to interpret the troubled history of sentencing reform policy. First, however, I will explain the scholarly dissatisfaction with different methods to encourage greater coherence in the sentencing decision process.

### **1 Dissatisfaction with Coherence of Sentencing Discretion and the Search for Reform**

In historical terms sentencing in western jurisdictions has undergone a considerable programme of reform (e.g. Ashworth 1995; Tonry 1996; Tonry and Hatlestad 1997). The main thrust of this programme has been to reduce alleged disparity in sentencing (e.g. Blumstein et al. 1983; Tarling 1979; Tonry 1996; Tata and Hutton 1998) and also to ensure 'truth in sentencing'. However, given the liberal-legal conception of judicial independence, there has not been a concerted academic call to direct judges to decisions in specific cases. Indeed even the advocates of stricter numerical guidelines and of 'expert systems' have stressed that their work should not be seen as an attempt to appropriate the proper exercise of judicial discretion but rather simply as an 'aid' or way of helping judges to 'structure' the use of discretion in individual cases. Thus, none of the major methods of reforms, discussed below, consciously intends to remove the judicial power to make the sentencing decision in individual cases. Rather, they claim to 'inform' so as to 'structure' that discretionary power (Ashworth 1995; Tonry 1996; Cavadino and Dignan 1997, p. 105). The implication is that sentencing is insufficiently or inadequately 'structured': deficient in reasoned explanation by the sentencers. There have been three main methods intended to inform so as to better the structure of sentencing

discretionary process: appeal court leadership, legislatively legitimised guidelines and judicial information systems. How has the academic literature evaluated these three methods' attempts to better inform the structure of sentencing?

1 *Institutional Consistency: Appeal Court Judgements*

Scholars of legal doctrine have been concerned to describe and explain the use of sentencing discretion by analysing Appeal Court Judgements. This has been a rich source of academic commentary and the attempt to try to extract more general even universal 'principles' about how sentencing can and should operate. Indeed, over the last 15 years or so the Court of Appeal of England and Wales may arguably have begun to try to present some kind of observable jurisprudence of sentencing involving 'Guideline' judgements intended to provide sentencers with starting points in similar cases (Thomas 1995). However, two main inter-related limitations of this method to explain and enhance the structure of sentencing discretion have been identified. These two limitations are: weak impact of Appeal Court judgements on first instance sentencing, and secondly, deficiency in principled coherence of Appeal Court behaviour.

*Limitation one: weak impact of appeal court decisions on first instance sentencing* Ascertaining knowledge about the influence of Appeal Court 'policy' on first instance sentencing practice is problematic. Although Appeal Court judgements are collated together with academic commentaries in sentencing texts (e.g. Nicholson 1992; Walker and Padfield 1996; Kelly 1993), or, as part of an on-going digest, these are essentially case-by-case presentations of Appeal Court sentencing rather than 'normal' sentencing practice in 'similar cases'. For example, commenting on Thomas' sagacity about the England and Wales Court of Appeal, von Hirsch (1987, p. 194) carefully observed that it is "not certain to what extent trial courts and magistrates actually follow the Court of Appeal's opinions in unappealed cases, and the extent of such compliance or non-compliance has not been systematically measured". More recently, Ashworth (1998) notes that there has been no research into the effectiveness of the England & Wales Court of Appeal Guidelines in fostering consistency of approach with Appeal Court Guidance. Although Tonry (2001, p. 24) generously concedes that "many English judges and informed observers believe that guideline judgements do influence sentencing patterns", he has to point out that "there is no credible evaluation literature" of their impact.

However, there are a number of reasons to expect that compliance is limited. First, Appeal Courts are reluctant to 'interfere' with first instance sentencing even if that original sentence is not one which the Appeal Court itself would have imposed. Writing about sentencing in Canada, Brodeur (1989, p. 28) has observed that "... unless a Court of Appeal sees reason at least to double the sentence or cut it by half, it will generally uphold the decision of the trial judge". Similarly, Doob (1990, p. 10) noted that Appeal Court judges try not to "tamper with sentences unless they are more than twice as long or less than half as long as they should be". In the South African context, Hutton (1998, p. 320) suggests that the previous reluctance of the Appeal Court to intervene in a first instance sentence, unless it was held to be "shocking or startlingly inappropriate" is unlikely to change under the new regime.

Secondly, Doob (1990, p. 10) shows that this reluctance to 'interfere' (which is meshed with individual judicial 'ownership' of sentencing), can easily provide sentencers with a false sense of security. Appeal Court permissiveness encourages first instance sentencers a false comfort in the conclusion that because very few of his/her sentences are appealed, and even fewer successfully, the sentencer is 'in line' with normal practice (e.g. Tata and Hutton 1998).

Thirdly, given their sense of distance from the Appeal Court and the unlikelihood of appeal first instance sentencers may not necessarily wish to emulate the view of the Appeal Court, if it is believed by first instance sentencers to lead to substantive injustice.

Fourthly, Guideline Judgements in England and Wales, (the jurisdiction to have pursued the technique with more vigour than any other), are very limited in scope. They remain "clustered around serious offences which tend to attract substantial prison sentences" rather than areas of everyday sentencing – notably burglary, theft etc. (Ashworth 2001, p. 74).

*Limitation two: deficient in 'principled coherence'* A second main limitation has been popularised by academic criminal lawyers who have advocated greater systematisation and coherence in Appeal Court decision-making (e.g. Henham 1995, 1996; 1998b; Ashworth 1995; Fox 1994). Appeal Courts in common law jurisdictions have tended to stress the limits of extrapolation of the judgement to other cases. Either it is argued that the judgement cannot be compared with other cases; or, in 'leading' or 'guideline' judgements the court has said that a tariff can be established but that it can only apply when cases share the specific combination of 'facts'. The fundamental problem with this approach is in the inherent interpretability of legal 'facts' (Ashworth et al.

1984). Thus as long as Appeal Courts hold to the fiction that because each individual case is unique (in some sense) therefore sentencing each case is a 'unique' exercise,<sup>4</sup> first instance sentencing will elude attempts to systematise the extrapolation of Appeal Court Guideline.

On the basis of Appeal Court (including 'Guideline') Judgements, it tends to be difficult to identify clearly any overall systematic pattern, or, attempt to structuring of sentencing overall. Academic lawyers have repeatedly called for greater overall coherence based on some kind principled reasoning (e.g. Ashworth 1995; Henham 1995, 1996; Fox 1994; Stith and Cabranes 1998). Yet, why does this incoherence of Appeal Court Judgements persist? The conventional explanation is that incoherence is due to a lack of penal philosophical consensus: different judges pursuing diverging penal philosophies. However, this hypothesis cannot, in itself, fully explain the lack of philosophical coherence in a single Appeal Court judgement, or, indeed the diverging philosophies expressed by a single judge from one case to another.

## 2 *Legislative and Administrative 'Guidelines'*

The attempt to 'structure' sentencing through the use of non-judicial legal controls (such as legislative and administrative guidelines and mandatory penalties) has failed to render the sentencing discretionary process more transparent.

Probably the single most dramatic response to perceived lack of coherent structure in sentencing has been the introduction of the numerical guidelines in the US. Whether guidelines in their various forms can and do reduce 'disparity' even on their own definitions of disparity is hotly debated. However, numerical guidelines have not in themselves provided sentencing scholarship with a more satisfactory explanation of how judges use the discretion which the guidelines have to permit. Legal discretion necessarily remains indispensable to the interpretation, and operation of numerical guidelines, and the opportunities for creative compliance are extensive. The vast literature on 'departures' from the guidelines demonstrate the inherent malleability of the supposed clarity and firm structure. Writing about guidelines and 'mandatory' sentencing, Mears (1998, p. 673) states that a major

... limitation of sentencing research is the relatively scant attention that has been given to ... the unintended uses and effects of ... recent sentencing reforms. That various reforms generate uses and effects unintended by legislatures is difficult to contest [sic].

Even the apparently most clearly structured of reforms (such as mandatory penalties and determinate sentencing) allow plentiful opportunities for creative uses of discretion to subvert and circumvent surreptitiously what may be regarded as the worst excesses of a substantively unjust system of guidelines (Tonry 2001, p. 21).

[T]here is sufficient empirical evidence to suggest that internal resistance and deliberate evasion of the new pertinent rules have been prevalent in the United States. No specific type of sentencing reform has demonstrated the ability to achieve a substantial level of internal support for the reform; to establish the most effective form of statutory or administrative authority to promote compliance ... (Wicharaya 1995, p. 161).

Yet while many judges and others may protest publicly and some may find subtler ways to ensure "creative compliance" (McBarnett and Whelan 1997), other judges (or the same judges in different instances), appear to convince themselves that their 'hands are tied' and refuse to exercise the discretion available. Numerical guidelines may have coincided with a change in sentencing not through the force of legality. Rather, many judges appear to have convinced themselves (seemingly on the basis of compliance with the perceived dominant view), that in certain types of cases they have lost their discretion.

Provine (1998) suggests, there may be striking parallels with Robert Cover's (1975) study of judicial decision-making under the Fugitive Slave Act. "Time and again, the judiciary paraded its helplessness before the law; lamented harsh results yet nonetheless declined to use their legal discretion to make 'ameliorist' solutions possible" (Cover 1975, pp. 5–6).

Provine (1998) documents that on the one hand, although sentencers in the US Federal Courts are appalled by the substantive racial injustice of the aspects of the guidelines combined with mandatory penalties for crack cocaine,<sup>5</sup> they nonetheless generally tend to decline to use their discretion so as to subvert, or, at least ameliorate the worst racial effects (e.g. in the way that is described above by Wicharaya). Under certain circumstances judges may defer to their sense of the dominant political rhetoric even though they may say they hate to do so, and in fact, the law continues to permit far greater freedom than they claim.

Indeed, the selective admission and denial of the ever-presence of discretion (even in a supposedly highly restrictive scheme like the Federal Guidelines), is redolent of the reaction of the judiciary of England and Wales to the 1991 Criminal Justice Act. It was commonly claimed both by rank-and-file and magistrates and the Lord Chief Justice that the legislation "tied

the hands" (Taylor 1993) of sentencers even though, as with the US Federal Guidelines, departures for 'exceptional circumstances' featured throughout the scheme. Indeed, creative use and interpretation of judicial discretion seems to have been highly selective (Ashworth 1998).

Neither presumptive numerical guidelines nor mandatory penalties have succeeded in illuminating or more clearly structuring the judicial discretionary decision process. Changes in the use/non-use of discretion appear to have resulted only because judges may choose to assume (erroneously) that substantive discretion has largely been eliminated.<sup>6</sup> At other times, judges may feel able routinely to circumvent or ameliorate the guidelines. Thus guidelines appear not to have achieved the greater clarity in judicial use of discretion which sentencing scholarship has long sought.

Controversies in achieving reform through both numerical guidelines (Tonry 1996; Alschuler 1991; Frase 1995; Miller 1995; Doob 1995; Nagel and Johnson 1994; Nagel 1990; McDonald and Carlson 1996); and in narrative guidelines (Brownlee 1994; Thomas 1995) have been very well documented and have led to interest in 'systems' of providing aggregate data about sentencing to sentencers (Tata 1998b). Although US-style numerical guidelines have influenced thinking around the globe there has been remarkably little systematic emulation of that approach to reform.<sup>7</sup> In recent times outside of the USA another method of pursuing structure has been pursued. Aggregate information systems have been developed to provide judges with information about what previous sentencers decided when faced with similar cases.

### 3 *Aggregate Information Systems*

The idea of providing sentencers with information on what their colleagues have done when faced with similar cases is not a new one. In 1953, Norval Morris suggested that trial judges be provided with data on sentences imposed so that judges could "see clearly where they stand in relation to their brethren" (Morris, 1953, p. 200, quoted in Frase 1997, p. 366). However, it was not until the 1980s that systems were developed (unsuccessfully) in Canada by John Hogarth in British Columbia (Hogarth 1988); and, by Tony Doob in other Canadian provinces (Doob and Park 1987; Doob 1990). More recently, there have been two jurisdictions, which have implemented an SIS; New South Wales (Potas et al. 1998) and Scotland (Hutton et al. 1996; Tata 1998), with interest from a number of other jurisdictions (see, for example, Morgan in this volume).

All systems of providing judges with information are inescapably normative: they measure disparity according to how those systems define 'disparity'. The implication is that if there is systematic information about previous practice then judges should be 'informed' by it. Some commentators have suggested that, given the relative dearth of systematic aggregate information about sentencing practice "judges ought not only to be provided with, but would positively delight in, access to detailed information [about sentencing practice] [sic]" (Zdenkowski 1986, p. 232); and others have appeared to recommend at least the serious consideration of the greater dissemination of systematic aggregate information (e.g. Hedderman and Gelsthorpe 1997; Henham 1998a, pp. 351–2; Morgan in this volume; Ashworth 1997a; Ashworth 1995, pp. 340–41). However, to argue that there is a relative dearth of available, good quality and systematic information about 'normal practice' available to sentencers is only one part of the overall question of whether there is a 'need' for such information.

According to Doob and Brodner (1995, p. 378):

There is a natural tendency to explain away the problems of sentencing by asserting that, to a considerable extent, they are the result of a lack of knowledge. Hence it is sometimes argued that the problems of disparity could be lessened ... by providing additional information to judges about court practice and the 'tariffs' that are applied by their colleagues.

Essentially, then, Doob has argued that from his experience and also, he implies from similar fate met by Hogarth's system, judges do not perceive there to be a need for aggregate information about 'normal practice'. Since judges cannot be coerced into paying attention to such information systems, then judges do not perceive a 'need' for such information. In this situation, the fact that it might seem strange that there is so little systematic data about normal sentencing practice is immaterial to the incoherence of the sentencing decision process. According to Doob and Brodner, this lack of coherence has more to do with a lack of a coherent theory about the purposes of sentencing.

So far in this chapter we have seen that each of the three methods which attempt to inform so as to structure have encountered serious criticisms and have not illuminated the sentencing decision process. These flaws are attributed to a fundamental lack of coherence. It is to the quest for coherent explanation to which this chapter now turns.

## 2 The Quest to Explain the Sentencing Decision Process

### *Explanation through the (Normative) 'Aims' of Sentencing*

To 'explain' sentencing we have to begin, it is conventionally argued, with an explicit consideration of the goals of sentencing. However, the history of attempts to require sentencers to provide penal-philosophical 'reasons' for sentence has not been a happy one.

In her study of the 1982 English Criminal Justice Act and section 1(4) which required sentencers to state the reason, (e.g. protection of the public; failure to respond to noncustodial penalties; retribution), for passing a custodial sentence on a young person, Burney (1985) found that in 60 per cent of the sample the reasons given were incomplete, invalid or not given at all.

In a story that may be apocryphal, it [was] said that some magistrates courts [had] rubber stamps bearing the legendary 'nature and gravity of the offence' ... It is commonly observed that reasons are often expressed as terse formula ... rather than as thought out justifications specific to individual cases ... In short ... reasons tend to become bland, brief and standard (Fitzmaurice and Pease 1986, p. 36).

Although Ewart and Pennington suggest that this statement may be too emphatic, (for example 'seriousness of the offence' was by no means the only 'reason'<sup>8</sup> cited), their study of Crown and Magistrates Courts' reason-giving nonetheless found reason-giving to be superficial as a way of explaining the decision process. In common with an observation made by Ashworth et al. (1984), they concluded:

[t]his study demonstrates that it was unusual for sentencers to describe how factors of the case were weighed to produce the final sentence. Sentencers confine themselves to noting what contributes to the sentence chosen, rather than describing the grounds for rejecting alternatives (Ewart and Pennington 1988, p. 597).

This may well be familiar to the reader who has tired of reading or listening to sentencers routinely opaque 'explanation' that s/he "took all of the facts into account".

Why has there been such a marked reluctance by sentencers both individually and collectively to articulate their substantive reasoning? Given the central position accorded to the role of penal philosophy by most of the

sentencing discretion literature it is frustrating that judges are so unwilling to reveal the reasoning which led to the sentence imposed.<sup>9</sup> Disagreement between sentencers over the correct normative aims of sentencing has been the most cited cause.<sup>10</sup> It has normally been thought that sentencing practice tends to lack openly-stated aims, because there is no clear agreement about goals.

Indeed penal-philosophical goals are widely seen as the starting point to any theoretical understanding of sentencing behaviour. Open almost any English language introductory text on sentencing published over the last 40 years and the reader will most likely be presented with some kind of 'theory' section consisting largely of an exposition of the classic menu of penal philosophies as the starting point for explaining sentencing practice (e.g. Gottfredson 1999; Walker and Padfield 1996; Ashworth 1997c; O'Malley 2000; Boyle and Allen 1990; Henham 1996; Roberts 2000). The precise terminology may vary slightly, but it seems to be taken for granted that normative penal aims must be the starting point to any appreciation of the sentencing decision process. The credence of this assumption was empirically developed and legitimised by John Hogarth's seminal work published in 1971.

The legacy of Hogarth's *Sentencing as a Human Process* endures today as empirical justification for the view that the sentencing decision process lacks satisfactory explanation because of penal-philosophical disagreement between individual sentencers. Hogarth concluded that in their use, (implicitly or explicitly), of penal philosophy,

[t]here was a considerable amount of internal consistency in the thinking of magistrates. Once one knew the social purpose that a magistrate attempted to achieve through sentencing, the whole of the penal philosophy unfolded from that (Hogarth 1971, p. 361).

From the outset of *Sentencing as a Human Process*, Hogarth sets out implicit normative disagreement between individual sentencers as the problem:

In summary, the fundamental problems in sentencing arise from the fact that there is lack of agreement as to the social purposes that sentencing should serve, lack of evidence of effectiveness to achieve these objectives, and lack of uniformity in the way knowledge is used. In this situation it is not surprising that there is some uncertainty, confusion, and lack of agreement among judges in their approach to sentencing problems which, in turn, leads to disparity in sentencing practice (Hogarth 1971, p. 6).

Other sentencing scholars have also argued that until and unless there is agreement about the 'goals' of sentencing there cannot be either consistency

or coherence in sentencing practice. For example, Doob and Brodeur (1995, p. 378) argue that the provision of aggregate information to help judges orientate the tariff is "... fundamentally wrong. The problems of sentencing – disparity in particular – can be seen to relate to problems of accountability". Adapting Day's and Klein's (1987) work on accountability, Doob and Brodeur argue that it is the lack of a set of shared expectations and common currency of justifications which necessarily means a lack of substantive accountability in sentencing. To rectify this lack of accountability Doob and Brodeur call for a sentencing "'theory' or a set of guiding principles on sentencing and an explanation of how a sentence followed from the guiding principles" (1995, p. 384). Although Doob and Brodeur are explicit in arguing that incoherence is a matter of accountability, they are very far from alone in calling for greater 'coherence' in sentencing practice (e.g. Ashworth 1995; Henham 1996, 1997; Wasik; Fox 1994; Hutton 1998; Jobson and Ferguson 1987).

I would like now to invite the reader to examine this proposition further so as then to develop an alternate appreciation for this supposed lack of coherence. Judicial defensiveness will be suggested to be only partial explanation for this apparent lack of coherent transparency. Rather, I will suggest that the assumed categories, (including the standard menu of legal-philosophical justifications for punishment), of sentencing scholarship themselves limit and obscure appreciation of the decision process.

#### *Transparency, Openness and 'Reasons'*

*Is judicial defensiveness the main cause of a 'lack of transparent coherence'?*  
It might be argued that the lack of agreement about a set of coherent sentencing guiding principles and how a decision should follow those guiding principles is symptomatic of a judicial refusal to accept the need for openness in discussing sentencing practice (Fox 1994; Miller 1989; Parent 1988). For example, in his chapter in this volume on European sentencing traditions, Ashworth observes:

the paucity of empirical research on the decision-making processes of sentencers. As long ago as 1974 the Council of Europe report on Sentencing recognised the importance of detailed research into the motivations and practices of judges in the sentencing process (Council of Europe 1974, p.13), but there remains considerable judicial resistance to this in most member states, and there are still very few studies of sentencers which involve interviews and close observation.

Judges tend to be suspicious of anyone (especially academic researchers),

asking questions and exposing the limitations of their practice. This is due only partly to personal vanity. It is also due to a defensiveness about the implications of such enquiry. Judiciaries throughout the western world tend to be highly suspicious of empirical scholarly enquiry, especially in sentencing. Malleson (1999, p. 198), for example, states that

[t]o date, the judiciary has been insulated from any pressure to participate [in scholarly enquiry] since it has been legitimate for judges to refuse to co-operate in research on the grounds that it might undermine judicial independence.

Harlow found that non-cooperation is due to a “prevailing climate of hostility to critical appraisal” (Harlow 1986, cited by Malleson 1999, p. 198). Indeed, the history of empirical research into sentencing practice has been far from happy. Even where scholars have been able, after protracted and delicate negotiation, to gain access it is normally followed by judicial reaction (e.g. Ashworth et al. 1984; Hood and Cordovill 1992; Tata and Hutton 1998; Baldwin and McConville) and either complete refusal to participate, or, a forceful attempt to prevent the publication of at least part of the findings.<sup>11</sup> Some sentencers may seek to celebrate their individualistic independence by claiming to delight in their disparity. Broadly, the judicial approach to empirical sentencing research has been normally suspicious, even hostile.

However, although an individualistic brand of ‘independence’ is invoked as a way of preventing research from asking awkward questions and uncovering uncomfortable truths, there are, I would suggest, far more fundamental reasons for the apparent lack of coherent transparency. We need to think more critically about the ability of sentencers to ‘explain’ sentencing decisions according to the dominant categories and conception of sentencing scholarship. These categories represent a series of dichotomies: ‘the offence *plus* the offender’; ‘aggravating *versus* mitigating factors’;<sup>12</sup> ‘penal philosophy or non-coherent judgement’; and ‘discretion *versus* rules’.

*The ‘offence-offender’ dichotomy and penal-philosophical aims* Much of the literature calling for coherence assumes that sentencers are motivated in their decision-making by a consideration of options from the classic menu of the aims of punishment. Yet, do sentencers decide sentence on the basis of even crude penal-philosophical theories or principles, or are these too abstract ever to be operationalised as determinants of everyday social practice? Let us briefly examine an essential distinction commonly assumed as a basic unit of enquiry. This taken-for-granted distinction is fundamental to desert theory: ‘the offence’ and ‘the offender’.

Logical 'coherent' sentencing is normally assumed to either begin with, or, ought to begin with, consideration of the offence, *then* orientate a sentence which is adjusted in the light of the nature of the offender. For example, in advancing a more principled approach to the problem of determining the 'custody threshold' Ashworth and von Hirsch (1997, p. 1999) recommend: "After the seriousness of the offence has been properly assessed, the next step would be to make an appropriate adjustment for previous criminal record". While this typical division of the sentencing decision process into two basic units of analysis ('offence' and 'offender'), may be appropriate to legal and penal-philosophical discourse it is doubtful that it is a meaningful way of capturing the routine social practice of the decision process. In his research into the flow of criminal cases and the character of court organisational culture, Feeley observed that, "... for a charge to assume meaning it must be given substantive content by a description of the incident and information about the defendant's character, habits and motivation" (Feeley 1979, pp. 160-61). Sentencers must necessarily make judgements about the moral responsibility and moral character of 'the offender' if they are to understand and interpret the seriousness of 'the offence' before them. The operational abstraction of 'offence' and 'offender' from the whole case is impracticable.

One of the main tenets of desert theory is that it is unethical to punish or treat offenders on the basis of what they might be 'expected' to do (von Hirsch 1993) rather than on what they have done. Instead desert theory proposes that sentencing ought to be proportional to the seriousness of the current offence(s). Seriousness is to be judged on the basis of the harm of the offence and culpability of the offender. However, it is far from clear that the implementation of desert (or indeed other philosophical theories of punishment) is achievable in routine practice which *necessarily* produces organisational imperatives which are strongly embedded in court activities (Ulmer 1997; Mears 1998; Eisenstein and Jacob 1991). Attempts to try to implement legislation inspired by desert have run into judicial hostility and public controversy (e.g. Brownlee 1994). It is normally implied that this hostility is a problem of judicial conservatism: a deep reluctance to relinquish the power which is associated with substantive discretion (e.g. Ashworth 1998).

Yet, how in practice are sentencers expected to implement the requirement to ignore the question of expected future behaviour of an offender? In estimating seriousness of the harm and culpability of 'the offence' the sentencer necessarily judges the offender's moral character and history and practices. For example, in trying to make sense of culpability the sentencer also judges the motivation, intention, and awareness, and thus

necessarily the social situation of the offender in committing the offence. The attempt to abstract these considerations from the context of the 'whole offence story' tends to assume a singular kind of offender abstracted from his/her social identity and social representation (Hudson 1995; Tata 1997; Tonry 1996; see also the Hutton/Hudson debate in this volume). Von Hirsch recognises that social deprivation, for example, may reduce culpability, but simply states that there would be considerable difficulties in producing specific criteria (von Hirsch and Roberts 1997, p. 235, fn. 14; von Hirsch 1993, pp. 106–8).

Numerical sentencing guidelines illustrate perhaps the starkest attempt to abstract 'the offence' and 'the offender' from each other. In operating numerical sentencing guideline grids the sentencer is required to divide the case into two distinct parts ('offender' and 'offence') so as to plot the sentence. Such grids are irreducibly "two-dimensional" (Tonry 1996) in their conception of sentencing as 'offence' plus 'criminal history/offender'. It is possible to produce an analytical representation of the decision process, (the most elaborate versions of which have been developed by Lovegrove 1997). Yet although it is analytically *possible* to abstract information into the categories of 'the offence' and 'the offender', it does not follow that the sum of the parts is the same as the whole case. For example, so-called 'offender' categories (such as social background, character, family, employment status etc.) necessarily confer meaning and explain 'motivation' and intention, and thus 'offence' characteristics such as harm and culpability.

Thus, we should not expect judicial articulation of the decision process (i.e. 'reasons') using these analytical terms ('offence' as distinct from 'offender') to be sophisticated, meaningful, or, coherent. Asking judges to 'explain' sentencing decisions by way of an implicit analytical model (using 'offence' as distinct from 'offender' and other supposedly discrete 'factors' or variables), effectively requires judges to 'explain' the production of judgement in artificially abstracted terms. Of course, judges employ these analytical terms in the writing of official judgements, but as scholars repeatedly demonstrate these opinions are often bland, terse and superficial. In so doing, this 'legal-analytical' 'offence/offender' dichotomy obscures the social production of the sentencing decision process as a purposive, routinely intuitive and holistic process based on a necessarily limited number of meaningful normalised (or typified) plots (e.g. Sudnow 1964; Moody and Tombs 1992), or what may be described as 'Typical Whole Case Stories' (Tata 1997). In these more interpretive sociological terms the sentencing decision process is rendered comprehensible, predictable and patterned.<sup>13</sup>

Penal-philosophical aims of sentencing do not explain adequately the routine practice of judgement (as opposed to abstract normative analysis). However there are further, even more fundamental reasons why sentencers have been so reluctant openly to provide 'coherent reasons' for sentencing. These lie in to how legal scholarship has tended to understand discretionary legal judgement, and secondly, in the production of judicial accounts of the exercise of that discretion. First, let us briefly consider how legal scholarship has tended to understand discretionary legal judgement, and how sentencing scholarship might "escape the legal paradigm" (Lacey 1992).

*Order and disorder in sentencing: the privileged position of legality and the social-routine uses of (sentencing) discretion* Much of the literature seeks to understand the sentencing decision process using legality<sup>14</sup> as the natural starting point of enquiry. Many enquiries explore 'extra-legal factors'. Such enquiries necessarily begin with legality as their basic starting point. This approach is redolent of Dworkin's vision of discretion is as "like the hole in a doughnut, [which] does not exist except as an area left open by a surrounding belt of restriction" (Dworkin 1977, p. 31). Operating in that gap or hole, according to this metaphor, are 'extra-legal factors'. The concern has been to 'tame' and 'confine' those 'extra-legal factors'. Yet this 'legal plus extra-legal' approach still begins with an implicit concern to distinguish 'law' from 'non-law' to analyse behaviour as either 'legal' or 'extra-legal', 'law' from 'discretion' or, in Dworkinian terms to distinguish the doughnut from the hole.

Rather than regarding official principles, sources and analytical legal reasoning as the basic starting point for an understanding of discretionary legal behaviour, we can instead look to the way in which discretionary actors are not mainly actors determined by legality but fundamentally social actors at the same time. Importantly, these two roles are exercised *simultaneously* and, in routine practice, impossible to distinguish from each other. In this conception, 'discretion' and 'rules' are not counterposed as opposites. Rather 'rules' are inherently open, malleable and discretionary while 'discretion' is inherently patterned, systematised, and rule-governed. Thus from this understanding legal principles, legal doctrine and legal rules are not necessarily the assumed starting point in describing, explaining or indeed reforming the sentencing decision process. It becomes less viable to talk of 'more' or 'less' discretion or rules; and of 'a balance' between rules and discretion. Rather, sentencing research might focus more on: regularities in speech and behaviour; the construction of sentencing customs and folk knowledge; and the normalised construction of cases. In so doing, research may be more likely to reveal a

sociological portrait of the decision process, which is more comprehensible, coherent and meaningful than by presuming legality to be the natural starting point of enquiry and then adding in extra-legal 'factors'. When, as sentencing scholars, we begin to escape the 'rules "versus" discretion' mind-set, the implications for how we might appreciate judicial reason-giving, crystallise.

Thus far, I have argued that we have too easily assumed an analytical interpretation of cases mediated by individual penal philosophies, rather than as constructed and holistic. Legal rules and discretion have been supposed as opposites: a supposition which makes sense in the abstract but far less so in detailed sociological empirical enquiry. As long as we persist with a legal-analytical approach we will continue to be disappointed by the quality of judicial reasoning and thus disappointed by the apparent lack of coherent accountability and transparency. In the next section I try to develop new ways of thinking about accountability which permit new questions for research.

### 3 The Call for Openness

It is normally argued by sentencing scholars that the reasons for decisions are shrouded behind a veil of mystery and if sentencing is to be 'coherently structured' then that veil must be lifted. For example, Miller (1989) argues for the further development of written sentencing Opinions by federal US judges because "[w]ithout an opinion practice, sentencing in a guideline system remains hidden – just under a more modern veil" (Miller 1989, p. 21).

... The best way to overcome suspicions and criticisms raised by a system where the decision process was 'hidden' is to create a system that is public ... [In a system] that does not require explanation for the vast majority of cases, the ability of observers to gain confidence in the system is inherently limited (Miller 1989, p. 20).

In a similar vein, Fox (1994) welcomes the "*dissection*" of cases by judges in Victoria as "... being more informative about the manner in which they reach their decisions. Such openness can only benefit the jurisprudence and psychology of judicial sentencing" (Fox 1994, p. 510).

#### *Thomas' Conflation of 'Reason' with 'Reason-giving'*

This tradition of sentencing scholarship concerned with judicial reason-giving can be traced to the immense work of David Thomas. In his highly influential

1963 advancement of *The Case for Reasoned Decisions*, Thomas forcefully argued that the open and public giving of reasons will deliver an improved quality of reasoning in sentencing decisions.

If a judge is under an obligation to formulate and state the reasons for his decision, it will be necessary for him to arrive at a decision for which proper reasons can be given ... The immediate effect of an obligatory statement of reasons [would remove] the danger of sentences based on an immediate emotional reaction to some feature of the offence (Thomas 1963, pp. 246–7).

On the face of it, the suggestion that requiring judges to give reasons means that decisions will be better “thought through” (Thomas, p. 247) seems obvious: make the judge think about it and s/he will come up with a more logically reasoned (as opposed to emotional) decision. This view envisages sentencing as an essentially individualistic, asocial process in which the decision-maker wrestles with sentencing as basically a problem of reasoning.<sup>15</sup> In Thomas’ conception, reasons given are assumed simply to be the articulation of reasoning: there is very little consideration afforded to *the process of how* reasons are produced and presented. Instead it is assumed that once reasoning has been completed then reasons are divulged. It is perhaps ironic that although Thomas’ work has long been critical of a mechanistic approach to sentencing reform, his conception of the provision of reasons is itself mechanistic: the judge simply conducts his reasoning and then gives his reasons. However, the view that the ‘reason’ for a decision given in court is a simple unmediated expression of the judge’s thinking is highly questionable. If we accept that (even to some extent) sentencers, like other discretionary legal actors, not only operate in the context of a ‘social world’ but also that the use of this discretion is socially produced,<sup>16</sup> then the conflation of reason-giving with the simple exposition of ‘reasoning’ becomes untenable.

On the broader canvas of reason-giving, Kenneth-Culp Davis’ influential *Discretionary Justice* (1969) can be located in a similar tradition to Thomas. Davis marshalled a forceful critique of legal discretion as a force for arbitrary and lawless decision-making. Discretion, in Davis’ view, could not be eliminated (it was a ‘necessary evil’) but had to be “confined, structured and checked” (Davis 1969, p. 26). Although Thomas has not been nearly as hostile to legal discretion as Davis, both have advocated that the best way to avoid the arbitrary use of discretion is through the requirement upon officials for greater transparency in decision-making. In their focused critique of Davis’ prescription, Robert Baldwin and Keith Hawkins (1984) call for a re-

examination of assumptions about legal discretionary behaviour. "Such is [Davis'] approach that his argument almost boils down to a simple plea for greater openness ... [calling for] 'open standards, open findings, open reasons, open precedents [sic]'" (Baldwin and Hawkins 1984, p. 575). As attractive as this may be, Hawkins and Baldwin suggest that it is too simplistic to suppose that mandating 'openness' will enhance the quality of substantive (as opposed to procedural) justice. "What decision-makers may articulate as 'criteria' or 'principles' may amount to no more than justifications for judgements already reached on other grounds" (Baldwin and Hawkins 1984, p. 583).

Similarly, Fitzmaurice and Pease (1986, p. 45) observe that in sentencing "[I]f reasons have a place in court, it is because they are defensible, not because they are true". Thus the requirement to give reasons for a decision does not therefore mean that the decision itself is a simple revelation of the decision process, nor, does it mean that the process becomes more logically reasoned. The formal requirement of reason-giving may satisfy a formal notion of accountability which may tell the researcher little about how the decision maker arrived at the decision. So, how might research progress the understanding of accountability for the use of sentencing discretion?

#### *The Social Production of 'Accountability'*

A more interpretive sociological conception of accountability can be informed by the recognition that all decision-makers who provide explanations or accounts of their decisions do so in a way, which is dependent on the purpose(s) and audience(s) for whom it is intended. Writing about the news media as an integral part of criminal justice, Ericson (1995) argues for the need to distinguish two conceptions of 'accountability'. One (formal) view is of accountability as entailing an obligation to give an account of activities within one's ambit of responsibility. Another understanding has led to the coinage of the term,

*account ability*: the capacity to provide a record of activities that explains them in a credible manner so that they appear to satisfy the rights and obligations of accountability. Clearly, the formal obligation to give an account does not ensure uniformity in the ability to give an account. The ability varies, for example, by what has to be accounted for; who makes the demand ...; who is the intended audience ...; and the spatial, social, cultural and communications format capacities to make an account (Ericson 1995, p. 137).

In thinking about the practice of *account ability* there is no reason to suppose that judges are a complex subdivision of the human race deserving a theory of their own (van Duyne 1987). In their everyday interactions human beings are:

[R]eflexive, knowledgeable agents who perpetually adjust their senses of rights and obligations to organizational contingencies such as knowledge resources, ... political interests, authority structures, communication formats and occupational cultures (Ericson 1995, p. 136).

In this way (and since every account necessarily requires selection), *account ability* necessarily invokes the continual practice of revelation and secrecy.

So rather than simply seeing the giving of reasons as a means of revealing 'the real' reasons for a decision<sup>17</sup> and providing greater transparency the focus of enquiry is shifted to questions of negotiation, context, perceived audience expectations and so on. Judges should be expected to give a rather different style of account of sentencing practice to different audiences (for example to each other; to themselves; to academic researchers), according to the purpose and context of the account. In this way, rather than seeing the provision of sentencing 'reasons' for sentencing decisions as a simple mechanistic action we might view it as a necessarily shifting, subtle and negotiated process whose expression of reality is contingent on the social situation. Thus, reasons, which are given in open court, are defensible rather than the unmediated 'truth'. What is the nature, then, of this audience? Briefly the judgement is for public consumption, the person sentenced; court officials and 'Court Workgroups' (Provine 1998; Eisenstein and Jacob 1991). Parts of it may be quoted in the mass media; sentencers and academic lawyers give it some scrutiny. One symbolic expectation is that the judgement maintains the supposed 'law-like' features: linear logic; based in abstract moral-philosophical principles. Thus, the text of Appeal Court Judgements may tell us more about the needs of responding to expectations about the symbolic character of law as providing definition, certainty, closure. At the same time judgements remain open in character and perform a balance between two visions of justice: between, in Weberian terms, formal and substantive justice. These two visions of justice are in perennial and irresolvable tension.<sup>18</sup>

Thus, I would suggest that the reluctance to provide explicit and transparent reasoned judgements need not be explained by judicial defensiveness. It is highly questionable that sentencers operate (or ever could operate), according

to philosophical theories of punishment and abstract analytical categories of the case or that indeed it is possible for them to identify a single narrative or reason for a sentencing decision. True, judges are normally required to provide an account for their decisions to a variety of audiences, but this is distinct from simply reporting the stream of consciousness of thinking in deciding sentence. Rather, I would suggest that these accounts are necessarily mediated, constructed and reconstructed according to the audience and requirements of the ability to account for the decision.

Every act of publicity for accountability is also an act of selection and distortion in which some things are left out and some alternative formulations are ignored ... Communications do not stand apart from reality. There is not first reality and then second communication about it. Communications participate in the formation and change of reality. Facts arise out of communication practices ... (Ericson 1995, pp. 137–44).

In this conception, accountability is seen as necessarily a selective and negotiative phenomenon, rather than being about a straightforward revelation of a notional objective truth. Inevitably, it is not possible to explain or articulate some notionally 'complete' or singularly accurate, full and unmediated pattern of consciousness of the sentencer. Necessarily this must be a selective process mediated by the social production of account-giving.

In this light, it is problematic to expect that the sentencer (or indeed any discretionary decision-maker), ought or is able to apply a sentencing theory grounded in philosophical justifications for punishment. The account supplied by a sentencer cannot be a simple reflection of the decision process, but necessarily mediated by the particular context. Philosophically-derived principles are employed post hoc to enable a credible appearance of accountability. We might instead envisage the sentencing decision process as an intuitive one, which constructs and reconstructs 'typical whole case stories' rather than a linear, logical, analytical or formal process about 'unique' cases (Tata 1997).

In his research on sexual story-telling, Plummer (1995) concludes that story telling is about constituting and reconstituting identity of the story teller. In this sense the story tells us more about the teller than the ostensible story. If sentencers' stories about sentencing are transient, elusive and ephemeral (as academic lawyers have revealed they are), then this reflects the shifting and social situationally-specific nature of the sentencing judge's identity. Sentencing judges continually emphasise the 'balance' of sentencing between the demands of consistency and equality as against the demands of doing

justice to 'unique' individual cases.<sup>19</sup> These two visions of justice are in perennial tension in Modern Law: they contradict each other and cannot be logically reconciled. However, sentencing judges play out this tension in the performance of account-giving.<sup>20</sup> Indeed, the ability to be able to literally flip between these visions is played out in the sentencing information system for Scottish judges (Tata et al. 1998). They value being able literally to flip between a formal vision of justice in sentencing (graphs and tables of sentencing patterns) and a substantive vision of justice (individual sentenced cases).

As we have seen there has been a tendency to suggest that the reluctance to give substantive reasons or explain sentencing is due to the arbitrary, unstructured practice of sentencing due, as Doob and Brodeur (1995) argue, to a lack of any shared set of penal-philosophical justifications. However, like Plummer, Ericson (1995) points to the socially constructed and necessarily shifting nature of stories. Stories or accounts of decision-making are not a fixed historical account of the sentencing decision, but are contextually dependant and mediated. This helps to explain the difficulty which empirical researchers and scholars of sentencing judgements have had in eliciting 'coherently reasoned' (i.e. in terms of normative aims of sentencing) explanations from sentencers when asked about specific cases or issues. It also helps to explain the difficulty experienced in jurisdictions, which have attempted to require judges to state openly their reasons for a sentence.

### **Conclusions**

Legal accountability is axiomatic to modern law. There has been considerable academic dissatisfaction with the quality and openness of this accountability. Efforts at reforming sentencing by informing sentencing discretion have tended to disappoint scholars. Appeal Court judgements have limited impact on first instance sentencing and the judgements themselves are found to be deficient in principled reasoning. Seemingly more rigorous reforms like numerical guidelines inescapably allow for discretion, while information systems have tended to eschew philosophical principles. Thus even through these reforms, sentencers have been deemed to have failed to 'reveal' how they decide sentence. This can be only slightly understood by defensiveness and the judicial self-perception, which values individualistic independence. It is more fully explained by the taken-for-granted expectation that judges explain their decision-making according to a legal-analytical approach; normative penal principles; and the counter-pose of rules and discretion.

Rather, I have tried to show in this chapter that judicial explanation of the sentencing decision processes is necessarily socially produced. In so doing, I have sought to problematise the notion that the sentencing process lacks coherent structure. I have tried to make explicit the inescapably fluid and ambiguous account of the use of sentencing discretion. Rather than seeing 'coherence' as a simple one-dimensional, mechanical and exclusive property of legal rules, this chapter has argued for an understanding of the accounts of sentencing as socially produced. Narrative accounts of the decision process by the decision-maker are not simple factual presentation of the linear decision process, but necessarily socially constructed and reconstructed by situation, expectations of the audience; self-identity of the narrator (or storyteller). According to the standards of the legal-analytical view of the decision process, sentencing may appear to be order-less and chaotic, but a more sociological and interpretive approach permits a far more structured and meaningful understanding. This may for example help to explain the limited success of sentencing reforms worldwide (Tonry 1996).<sup>21</sup>

To expect sentencers to be able to provide the reasons for sentencing based on philosophically-derived justifications for punishment is to suppose an asocial fixed reality of story telling rather than one which is socially constructed and reconstructed. Perhaps it might be valuable, at least, to accept that the quest for defined and settled philosophical reasoning at the crux of sentencing is inherently and inevitably elusive. We might instead concentrate more attention towards the specificities of how sentencing accounts are socially produced and performed together with the process of the social preparation of cases and their implicit sentencing agendas.

## Notes

- 1 I am grateful to Julian Roberts, Tony Doob, Travis Pratt, Ralph Henham, Fergus McNeill and David Tait for their comments on an earlier draft of this chapter and its ideas, and to Jan Nicholson for her diligent formatting of this chapter.
- 2 Co-director of the Centre for Sentencing Research, Senior Lecturer, Law School, University of Strathclyde, Glasgow, Scotland, UK. E-mail: cyrus.tata@strath.ac.uk.
- 3 Frankel 1972, p. 8.
- 4 Although every individual person is unique, no case is or can be completely unique. Sentencing is inescapably comparative and the claim that 'every case is unique' is incompatible with the emphasis judges place upon experience. Further, the criminal process systematises, streamlines and normalises cases into a typical number of limited plots.
- 5 See Tonry 1996 and 1995 and Provine, in this volume.

- 6 In her article, Provine (1998) asks why many judges seem to fail to resist law that they seem genuinely to despise given that the law allows them ample opportunities to resist routinely. Drawing a parallel with Robert Cover's examination of judicial non-resistance to slavery, Provine highlights the importance of Court Workgroups (see also Eisenstein and Jacob 1991).
- 7 Readers should consult Neil Morgan's chapter in this volume, which discusses recent developments in Western Australia.
- 8 In a contestable definition, Ewart and Pennington (1988, p. 587) assert: "A reason for sentence is defined as a factor which the sentencer clearly stated to be one which was taken into account in deciding sentence".
- 9 Of course it would be possible to attribute this unwillingness to lack of time: judges are simply too busy. Yet the movement to require judges to give reasons, especially where they 'depart' from an official norm, seems to provide powerful counter-incentive. Moreover, 'incoherent' reason-giving is routinely uncovered in documents which judges spend time crafting (e.g. Court of Appeal judgements).
- 10 By aims or goals in this context I am referring to the standard normative menu including desert/retribution, rehabilitation, general and/or individual deterrence, incapacitation, denunciation, etc.
- 11 For example, in a study of individual patterns of sentencers in three of Scotland's Sheriff Courts (Tata and Hutton 1998), at the completion of the study, the sentencers objected vehemently to publication of the research. They objected not so much to the comparison of their individual (anonymised) sentencing patterns, but to the publication of interview data reporting their *responses* to presentations of their sentencing patterns (defined according to previously agreed narrative and numerical 'scales of seriousness') compared with those of their colleagues. The publication of the suggestion that sentencers may not be able to estimate accurately their own sentencing patterns appears easily to outweigh concern that they may be disparate from their colleagues.
- 12 I have addressed briefly elsewhere (Tata 1997) the meaningfulness of 'aggravating and mitigating factors' and so will not repeat that material here.
- 13 It is vital to underline that the recognition that sentencing as a sociologically intuitive, typified and holistic process is quite different from saying that sentencing cannot be understood or is a matter of individual whim.
- 14 By 'legality' I mean the concern with legal doctrine enshrined in cases, statutes and legal principles.
- 15 Interestingly, this image of the individual producing the sentence (as opposed to social or organisational productions) fits easily with judges' cherished notion of individualistic independence discussed earlier. Notwithstanding its immense and original contribution, it may be in part because of Thomas' implicit conception of sentencing as a fundamentally individual process that his work finds such resonance among judges, and, above all others, appears as standard text on the book-shelves of English-speaking judges across the world.
- 16 See for example: Ulmer 1997; Mears 1998; Eisenstein and Jacob 1991; Provine 1998.
- 17 As supposed by Behaviourist methodology which necessarily relies on the analytical representation of the decision process discussed earlier.
- 18 These competing visions of justice in sentencing are manifested in two images of sentencing discretion. The response for example of the NSW and Scottish Appeal Courts to the institutionalisation of their judicial decision support systems manifests a firm and "resolute ambivalence" (Tata 2000). These Appeal Courts carefully and deliberately neither rule out nor embrace the use of such systems.

- 19 Although every individual person is unique no case is or can be unique. Sentencing is inescapably comparative and the claim, as exposed by Hood (1962) is incompatible with the emphasis judges place upon experience. Further, the criminal process systematises, streamlines and normalises cases into a typical number of limited plots. Yet the point here is not whether the stories judges tell about themselves are tenable or not but simply that they tell them by way of constructing the performance of sentencing.
- 20 In his essay in this volume David Tait emphasises the performative (rather than legal, philosophical, or cognitive) character of sentencing.
- 21 It might be suggested that this does not provide a prescription for sentencing reform. Indeed, this chapter is limited to trying to understand scholarly disappointment with 'the structure' of sentencing discretion. In understanding the future of reform we might consider incorporating this re-think of accountability.

## References

- Alschuler, A. (1991), 'The Failure of Sentencing Guidelines: A plea for less aggregation', *University of Chicago Law Review*, Vol. 58, pp. 901–51.
- Ashworth, A. (1995), *Sentencing and Criminal Justice*, 2nd edn, London: Butterworths.
- Ashworth, A. (1997a), 'Sentencing by Computer: What next?', *Criminal Law Review*, March, pp. 153–4.
- Ashworth, A. (1997b), 'The Value of Empirical Research in Criminal Justice', editorial, *Criminal Law Review*, August, pp. 533–4.
- Ashworth, A. (1997c), 'Sentencing', in M. Maguire, R. Morgan and R. Reiner (eds), *Oxford Handbook of Criminology*, New York: Oxford University Press, pp. 1095–135.
- Ashworth, A. (1998), 'The Decline of English Sentencing and Other Stories', symposium on *Sentencing Policy in Comparative Perspective*, University of Minnesota, May.
- Ashworth, A. (2001), 'The Decline of English Sentencing and Other Stories', in M. Tonry and R. Frase (eds), *Sentencing and Sanctions in Western Countries*, New York: Oxford University Press.
- Ashworth, A., Genders, E., Mansfield, G., Peay, J. and Player, E., (1984), 'Sentencing in the Crown Court: Report of an exploratory study', Occasional Paper No. 10, University of Oxford Centre for Criminological Research.
- Ashworth, A. and Hough, M. (1996), 'Sentencing and the Climate of Public Opinion', *Criminal Law Review*, Vol. 43, pp. 776–87.
- Ashworth, A. and von Hirsch, A. (1997), 'Recognising Elephants: The problem of the custody threshold', *Criminal Law Review*, pp. 187–200.
- Baldwin, J. and McConville, M. (1977), *Negotiated Justice Pressures to Plead Guilty*, London: Martin Robertson.
- Baldwin, R. (1996), 'Discretionary Justice and the Development of Policy', in D.J. Galligan (ed.), *Reader on Administrative Law*, New York: Oxford University Press.
- Baldwin, R. and Hawkins, K. (1984), 'Discretionary Justice: Davis reconsidered', *Public Law Winter*, pp. 570–99.
- Blumstein, A., Cohen, J., Martin, S. and Tonry, M. (1983) (eds), *Research on Sentencing: The search for reform*, 2 vols, National Academy Press.

- Bottoms, A. (1995), 'The Philosophy and Politics of Punishment and Sentencing', in C. Clarkson and M. Morgan (eds), *The Politics of Sentencing Reform*, New York: Oxford University Press.
- Boyle, C.K. and Allen, M.J. (1990), *Sentencing in Northern Ireland*, NI: SLS Publications.
- Brodeur, J-P. (1989), 'Truth in Sentencing', *Behavioral Sciences and the Law*, Vol. 7, No. 1, pp. 25-49.
- Brownlee, I. (1994), 'Taking the Strait-jacket Off: Persistence and distribution of punishment in England and Wales', *Legal Studies*, Vol. 14, No. 3, November.
- Burney, E. (1985), 'All Things to All Men: Justifying custody under the 1982 Act', *Criminal Law Review*, Vol. 32, p. 284.
- Cavadino, M. and Dignan, J. (1997), *The Penal System: An Introduction*, London: Sage.
- Conley, J. and O'Barr, W. (1990), *Rules versus Relationships: The ethnography of legal discourse*, Chicago: University of Chicago Press.
- Cover, R. (1975), *Justice Accused: Antislavery and the judicial process*, New Haven: Yale University Press.
- Darbyshire, P. (1997), 'An Essay on the Importance and Neglect of the Magistracy', *Criminal Law Review*, pp. 627-43.
- Davis, K-C. (1969), *Discretionary Justice: A preliminary inquiry*, Louisiana: Louisiana State University Press.
- Day, P. and Klein, R. (1987), *Accountability: Five public sector services*, Tavistock.
- Doob, A. (1990), 'Evaluation of a Computerized Sentencing Aid', Select Committee of Experts on Sentencing, European Committee on Crime Problems, Council of Europe, Strasbourg.
- Doob, A. (1995), 'The United States Sentencing Commission Guidelines: If you don't know where you are going, you might not get there', in C. Clarkson and M. Morgan (eds), *The Politics of Sentencing Reform*, New York: Oxford University Press.
- Doob, A. and Brodeur, J-P. (1995), 'Achieving Accountability in Sentencing', in P. Stenning (ed.), *Accountability for Criminal Justice*, Toronto: University of Toronto Press.
- Doob, A. and Park, N. (1987), 'Computerised Sentencing Information for Judges: An aid to the sentencing process', *Criminal Law Quarterly*, Vol. 30, p. 54.
- Dworkin, R. (1977), *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press.
- Eisenstein, J. and Jacob, H. (1991) *Felony Justice: An organizational analysis of criminal courts*, 2nd edn, Boston: Little Brown.
- Ericson, R. (1995), 'The News Media and Account Ability', in P. Stenning (ed.), *Accountability for Criminal Justice*, Toronto: University of Toronto Press.
- Ewart, S. and Pennington, D.C. (eds) (1987), *The Psychology of Sentencing: Approaches to consistency and disparity*, Oxford: Centre for Socio-Legal Studies.
- Feeley, M. (1979), *The Process is the Punishment: Handling cases in a lower criminal court*, Russell Sage Foundation.
- Fitzmaurice, C. and Pease, K. (1986), *The Psychology of Judicial Sentencing*, Manchester: Manchester University Press.
- Fox, R. (1994), 'The Meaning of Proportionality in Sentencing', *Melbourne University Law Reviews*, Vol. 19, Pt. 3, pp. 489-511.
- Frankel, M. (1972), *Criminal Sentences: Law Without Order*, New York: Hill & Wang.
- Frase, R. (1995), 'Sentencing Guidelines in Minnesota and other American States: A progress report', in C. Clarkson and M. Morgan (eds), *The Politics of Sentencing Reform*, New York: Oxford University Press.
- Frase, R. (1997), 'Sentencing Principles', in Tonry, M. (ed.) *Crime and Justice: A review of research*, Vol. 22, Chicago: University of Chicago Press.

- Gottfredson, D. (1999), *Exploring Criminal Justice*, Los Angeles: Roxbury Publishing Company.
- Hawkins, K. (ed.) (1997), *The Human Face of the Law: Essays in honour of Donald Harris*, Oxford: Clarendon.
- Hedderman, C. and Gelsthorpe, L. (eds) (1997), *Understanding the Sentencing of Women*, Home Office Research Study 170.
- Henham, R. (1995), 'Sentencing Policy and the Role of the Court of Appeal', *Howard Journal Criminal Justice*, 34, pp. 218–27.
- Henham, R. (1996), *Criminal Justice and Sentencing Policy*, Aldershot: Dartmouth.
- Henham, R. (1997), 'Protective Sentences: Ethics, rights and Sentencing Policy', *International Journal of the Sociology of Law*, 25(1), pp. 45–64.
- Henham, R. (1998a), 'Sentencing Policy and the Abolition of Parole and Early Release', *International Journal of the Sociology of Law*, Vol. 25, pp. 337–61.
- Henham, R. (1998b), 'Making Sense of the Crime (Sentences) Act 1997', *Modern Law Review*, Vol. 61, No. 2, pp. 223–35.
- Hogarth, J. (1971), *Sentencing as a Human Process*, University of Toronto Press in association with the Center of Criminology, University of Toronto.
- Hogarth, J. (1988), *Sentencing Database System: User's Guide*, Vancouver: University of British Columbia.
- Hood, R. in collaboration with Cordovill, G. (1992), *Race and Sentencing*, Oxford: Clarendon Press.
- Hood R.G. (1962), *Sentencing in Magistrates' Courts: A study in variations of policy*, London: Stevens.
- Hough, M. (1996), 'People Talking about Punishment', *Howard Journal of Criminal Justice*, 35, pp. 191–214.
- Hudson, B. (1995), 'Beyond Proportionate Punishment: Difficult cases and the 1991 Criminal Justice Act', *Crime, Law and Social Change*, 22, pp. 59–78.
- Hutton, N. (1996), 'Sentencing, Rationality and Computer Technology', *Journal of Law and Society*, 22(4), pp. 549–70.
- Hutton, N., Paterson, A., Tata, C. and Wilson, J. (1996), 'A Prototype Sentencing Information System for the High Court of Justiciary: Report of the Study of Feasibility', Edinburgh: HMSO/Scottish Office Central Research Unit.
- Jareborg, N. (1995), 'Swedish Sentencing Reform', in C. Clarkson and M. Morgan (eds), *The Politics of Sentencing Reform*, New York: Oxford University Press.
- Jobson, K. and Ferguson, G. (1987), 'Towards a Revised Sentencing Structure for Canada', *The Canadian Bar Review*, 66(1), pp. 1–48.
- Kelly, D. (1993), *Criminal Sentences*, Edinburgh: T&T Clark.
- Lacey, N. (1992), 'The Jurisprudence of Discretion: Escaping the legal paradigm', in K. Hawkins (ed.), *The Uses of Discretion*, Oxford: Clarendon Press.
- Lovegrove, A. (1997), *The Framework of Judicial Sentencing: A study in legal decision-making*, Cambridge: Cambridge University Press.
- Magistrates Association (1997), *Sentencing Guidelines*, April, London: Magistrates' Association.
- Malleson, K. (1997), 'Judicial Training and Performance Appraisal: The problem of judicial independence', *Modern Law Review*, Vol. 60, pp. 655–67.
- Malleson, K. (1999), *The New Judiciary: the Effects of Expansion and Activism*, Aldershot: Ashgate/Dartmouth.
- McBarnett, D. and Whelan, C. (1997), 'Creative Compliance and the Defeat of Legal Control', in K. Hawkins (ed.), *The Human Face of Law*, Oxford: Clarendon Press, pp. 177–98.

- McDonald, D. and Carlson, K (1996), 'Does Race and Ethnicity Matter in Federal District Courts? An Evaluation of the Impact of Federal Sentencing Guidelines on Judicial Sentencing Decisions', Meetings of the Law and Society Association and Research Committee on the Sociology of Law, Glasgow.
- Mears, D. (1998), 'The Sociology of Sentencing: Reconceptualizing Decisionmaking Processes and Outcomes', *Law and Society Review*, Vol. 32, pp. 667-724.
- Miller, M. (1989), 'Guidelines Are Not Enough: The need for written sentencing opinions', *Behavioral Science and the Law*, 7(1), Winter.
- Miller, M. (1995), 'Rehabilitating the Federal Sentencing Guidelines', *Judicature: The Journal of the American Judicature Society*, January-February, Vol. 78, No. 4.
- Moody, R. and Tombs, J. (1992), *Prosecution in the Public Interest*, Edinburgh: Scottish Academic Press.
- Nagel, I. (1990), 'Structuring Sentencing Discretion: The new federal sentencing guidelines', *Journal of Criminal Law and Criminology*, 80, pp. 299-317.
- Nagel, I. and Johnson, B. (1994), 'The Role of Gender in a Structured Sentencing System: Equal treatment, policy choices, and the sentencing of female offenders under the United States Sentencing Guidelines', *The Journal of Criminal Law and Criminology*, Vol. 85, No. 1, pp. 181-221.
- Nelken, D. (1983), *The Limits of the Legal Process: A study of landlords and crime*, London: Academic Press.
- Nicholson, C.G.B. (1981), *The Law and Practice of Sentencing in Scotland*, Edinburgh: W. Green & Son.
- Nicholson, C.G.B. (1992), *Sentencing: Law and practice in Scotland*, Edinburgh: W. Green/Sweet and Maxwell.
- Parent, D. (1988), *Structuring Criminal Sentences: The evolution of Minnesota's Sentencing Guidelines*, Butterworth Legal Publishers.
- Parker, H., Sumner, M. and Jarvis (1989), *Unmasking the Magistrates*, Milton Keynes: Open University Press.
- Plummer, K. (1995), *Telling Sexual Stories: Power, change and social worlds*, London; New York: Routledge.
- Potas, I. (1997), 'Consistency of Approach in Sentencing: A Description of the Judicial Commission's Sentencing Information System', paper delivered to the Workshop on 'Decision Support Systems' under the auspices of The International Conference on Artificial Intelligence and Law, Melbourne.
- Potas, I., Ash, D., Sagi, M., Cumines, S. and Marsic, N. (1998), 'Informing the Discretion: The sentencing information system of the Judicial Commission of New South Wales', *International Journal of Law and Information Technology*, Vol. 6, No. 2, pp. 99-124.
- Provine, D.M. (1998), 'Too Many Black Men: The sentencing judge's dilemma', *Law and Social Inquiry*, Vol. 23, No. 4, pp. 823-56.
- Provine, D.M. (2002), 'Sentencing Policy and Racial Justice', in N. Hutton and C. Tata (eds), *Sentencing and Society: International perspectives*, Aldershot: Ashgate.
- Roberts, J. (1999), 'Introduction to Sentencing and Parole', in J.V. Roberts and D. Cole (eds), *Making Sense of Sentencing*, Toronto: University of Toronto Press, pp. 3-31.
- Rock, P. (1993), *The Social World of an English Crown Court: Witness and professionals in the Court Centre at Wood Green*, Oxford: Clarendon Press.
- Schild, U. (1998), 'Statistical Information Systems for Sentencing: A cookbook', *International Journal Law and Information Technology*, Vol. 6, No. 2, pp. 125-43.

- Schild, U. (2000), 'Statistical Information Systems: The Israeli approach', *International Review of Law, Computers and Technology* (Special Issue on Judicial Decision Support Systems), Vol. 14, No. 3, pp. 317–24.
- Scottish Office Home Department League Tables.
- Stith, K. and Cabranes, J. (1998), 'Fear of Judging: Sentencing guidelines in the Federal Court', Chicago: University of Chicago Press.
- Sudnow, D. (1964), 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office', *Social Problems*, Vol. 12, pp. 255–76.
- Tait, D. (1998), 'Judges and Jukeboxes', *International Journal of Law and Information Technology*, Vol. 6, No. 2.
- Tarling, R. (1979), *Sentencing Practice in Magistrates Courts*, Study No. 56, Home Office Research Unit, HMSO.
- Tata, C. (1997), 'Conceptions and Representations of the Sentencing Decision Process', *Journal of Law and Society*, Vol. 24, No. 3, pp. 395–420.
- Tata, C. (1998a), 'The Application of Judicial Intelligence and Rules to Systems Supporting Discretionary Judicial Decision-Making', *Artificial Intelligence and Law: An international journal*, Vol. 6, Nos 2–4, pp. 199–225.
- Tata, C. (1998b), "'Neutrality", "Choice", and "Ownership" in the Construction, Use, and Adaptation of Judicial Decision Support Systems', *International Journal of Law and Information Technology*, Vol. 6, No. 2.
- Tata, C. (2000), 'Resolute Ambivalence: Why judiciaries do not institutionalise their decision support systems', *International Review of Law Computers and Technology*, Vol. 14, No. 3, pp. 297–316.
- Tata, C. and Hutton, N. (1998), 'What "Rules" in Sentencing?', *The International Journal of the Sociology of Law*, Vol. 26, pp. 369–94.
- Tata, C., Hutton, N., Wilson, J. and Hughson, I. (1998), *A Sentencing Information System for the High Court of Justiciary of Scotland: Report of the study of the first phase of implementation and enhancement*, Centre for Sentencing Research.
- Taylor, Lord Chief Justice of England (1993), 'Judges and Sentencing', *Law Society's Journal*, Vol. 38, pp. 129–31.
- Thomas, D. (1963), 'Sentencing – The Case for Reasoned Decisions', *Criminal Law Review*, pp. 245–53.
- Thomas, D. (1995), 'Sentencing Reform: England and Wales', in C. Clarkson and M. Morgan (eds), *The Politics of Sentencing Reform*, New York: Oxford University Press.
- Tonry, M. (1995), *Malign Neglect: Race, crime and punishment in America*, New York: Oxford University Press.
- Tonry, M. (1996), *Sentencing Matters*, New York: Oxford University Press.
- Tonry, M. (2001), 'Punishment and Policies in Western Countries', in M. Tonry and R. Frase (eds), *Sentencing and Sanctions in Western Countries*, New York: Oxford University Press, pp. 3–29.
- Tonry, M. and Hatlestad, K. (eds) (1997), *Sentencing Reform in Overcrowded Times: A comparative perspective*, New York: Oxford University Press.
- Ulmer, J.T. (1997), *Social Worlds of Sentencing: Court communities under Sentencing Guidelines*, Albany: State University of New York Press.
- Van Duyne, P. (1987), 'Simple Decision Making', in D.C. Pennington, and S. Lloyd-Bostock (eds), *The Psychology of Sentencing: Approaches to Consistency and Disparity*, Oxford: Centre for Socio-Legal Studies.

- Von Hirsch, A. (1993), *Censure and Sanctions*, Oxford: Clarendon Press.
- Von Hirsch, A., Knapp, K. and Tonry, M. (eds) (1987), *The Sentencing Commission and its Guidelines*, Boston: Northeastern University Press, pp. 47–61.
- Von Hirsch, A. and Roberts, J. (1997), 'Racial Disparity in Sentencing: Reflections on the Hood Study', *The Howard Journal of Criminal Justice*, 36(4), pp. 227–36.
- Walker, M. (1995), 'Criminal Justice and Offenders', in M. Walker (ed.), *Interpreting Crime Statistics*, Oxford: Clarendon Press.
- Walker, N. and Padfield, N. (1996), *Sentencing: Theory, law, and practice*, London: Butterworths.
- Warner, D. (1990), 'The Role of Neural Networks in Law Machine Development', *Rutgers Computers and Technology Law Journal*, 16, pp. 129–44.
- Wasik, M. (ed.) (1997), *The Sentencing Process*, Brookfield, Vermont: Ashgate.
- Weatherburn, D. and Lind, B. (1996), 'Sentence Disparity, Judge Shopping and Trial Court Delay', *Australian and New Zealand Journal of Criminology*, Vol. 29, No. 2, August.
- Wicharaya, T. (1995), *Simple Theory, Hard Reality: The impact of sentencing reforms on courts, prisons, and crime*, New York: State University of New York Press.
- Wilkins, L., Kress, J., Gottfredson, D., Calpin, J. and Gelman, A. (1978), *Structuring Guidelines: Structuring Judicial Discretion. Report on the Feasibility Study*, US Justice Department, February.
- Zdenkowski, G. (1986), 'Sentencing: Problems and Responsibility', in D. Chappell and P. Wilson (eds), *Australian Criminal Justice*, Oxford: Butterworths.