



THE UNIVERSITY *of* EDINBURGH

This thesis has been submitted in fulfilment of the requirements for a postgraduate degree (e.g. PhD, MPhil, DClinPsychol) at the University of Edinburgh. Please note the following terms and conditions of use:

- This work is protected by copyright and other intellectual property rights, which are retained by the thesis author, unless otherwise stated.
- A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.
- This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author.
- The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author.
- When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given.

**Narratives of crime and punishment: a
study of Scottish judicial culture**

Fiona E. Jamieson



Ph.D.

The University of Edinburgh

2013

Declaration

I declare that I am the sole author of this thesis and that it has not been submitted to this or any other University for any other degree or professional qualification.

Fiona Jamieson

Word count: 99, 868

For Tom, Anna and William

Acknowledgements

I would like to thank my supervisors Professor Richard Sparks and Dr Anna Souhami for their guidance and support. Richard has provided much wise counsel and critical insight throughout the progress of this thesis, and Anna's perceptive guidance at key stages has been extremely helpful. In particular, I thank them both for their encouragement in the final stages of this process.

I owe a huge debt of gratitude to the group of retired judges who participated in this project and who were most generous with their time and patience. I valued greatly their wisdom, good humour and forthrightness. I also honour the memory of two members of the group who are no longer with us, but whose enthusiasm and support in the earliest stages of this research I greatly appreciated. I remember them both with respect and affection.

I gratefully acknowledge financial support for this PhD from the ESRC and the Law School at the University of Edinburgh. The Law School has been a supportive and stimulating environment for this research and I thank my fellow PhD students Kirsteen Mackay, Ellie Bates, Zoe Picton-Howell and Katrina Morrison for their enduring friendship and support. I also thank Andy Aitchison and Richard Jones for their interest and encouragement over the years. Special thanks to Eileen Jones and Susan Deery for their sisterly support and to my mother Anne Dando for her unstinting kindness.

Finally, I thank Tom and our children Anna and William for their love and forbearance throughout this PhD. The final stage of completing this thesis took longer than expected because of events that knocked us all sideways, but William's resolve and Anna's support were inspirational to witness. I thank Tom, as ever, for everything.

Abstract

This thesis explores recent Scottish penal culture through the biographical narrative accounts of retired judges. Insights from the sociology of punishment are used to develop a more fully cultural approach to the judiciary and to sentencing practice. This entails a view of the judiciary as a complex institution whose practices reflect tension and compromise, and which recognises judges as bearers of penal culture through their sentencing practices. The aims of the research are twofold: to provide insight into the changing conditions of judging in Scotland and into the judicial role in criminal justice. Narrative research methods were used to interview retired judges and gain contextual accounts of judicial life and practice. This approach focuses on subjectivity and on individual responses to experiences and constraints. Reflecting the judicial role in punishment, an interpretive position based on the hermeneutics of faith and suspicion is used to evaluate and interpret these narrative accounts.

This conceptual and methodological framework is used to explore aspects of judicial occupational culture including training and early experiences, the status of criminal work, judicial conduct, collegiality, the influence of criminological research on sentencing practice, and the relevance of the 'master narrative' - judicial independence - to sentencing. It is also used to explore the frameworks of meaning and vocabularies of motive which judges bring to penal practice. What emerges from these judicial narratives is firstly the entanglement of individual life histories and organisational imperatives. Secondly, a picture emerges of a judicial habitus that includes complex motivations, some openness to new approaches, and capacity for reflecting on the conditions which structure and constrain criminal justice practice. This suggests the reflexive judge may be an important vector of penal change and there are implications for judicial training, penal reform and for the dissemination of criminological and criminal justice research.

Contents

Chapter 1: Introduction	1
Summary of thesis	4
Chapter 2 Judicial culture and sentencing.....	8
Introduction	8
Section 1 Knowledge and understanding of the judicial world	8
Section 2 Concepts of culture	15
Section 3 Culture and Sentencing research.....	22
Section 4 Judicial culture	32
Conclusion	37
Chapter 3 The Narrative Project	43
Introduction	43
Section I The empirical framework	44
Section 2 Narrative Research.....	58
Section 3 Judicial narratives: faith and suspicion	76
Conclusion	90
Chapter 4 The reflexive judge and the judicial habitus.....	94
Introduction	94
Section 1 Habitus	96
Section 2 Reflexivity.....	110
Section 3 Habitus, field and capital.....	115
Conclusion	127
Chapter 5 Twentieth Century Judging	132
Introduction	132
Section 1 The early years: judicial ‘influences	132
Section 2 The emerging habitus.....	142

Conclusion	154
Chapter 6: Judicial Sensibilities: Crime, the Criminal and Criminal Justice.....	157
Introduction.....	157
Section 1 Criminological categories of thought.....	157
Section 2 The Drug Court	170
Section 3 Influences on the Judicial Habitus: Having a ‘dimension’	173
Conclusion	178
Chapter 7: The Master Narrative: Judicial Independence.....	181
Introduction.....	181
Section1: Judicial Independence: The Master Narrative	181
Section 2: Sentencing in Practice.....	187
Section 3 Sentencing as a collegiate practice.....	204
Section 4: Sentencing as a signifying practice.....	213
Conclusion	232
Chapter 8 Conclusion.....	236
Section 1 Narrative research and the study of judicial lives	237
Section 2 Judicial culture	241
Section 3 The reflexive judge	245
Bibliography.....	253

Chapter 1 Introduction

When you believe... that power in law resides in fields of practice, it is important to speak of places and people as well as ideas.

John Bringham, 'The Constitution of Interests'

The judicial role is inherently ambiguous, casting the judge not only as defender of society's institutions but also as guarantor of their fairness (Kirchheimer, 1961). This role is no less complex in the criminal courts where the judge performs the role of professional punisher as well as guarantor of due process, rights and the rule of law.¹

Williams (1983:143-4) captures some of this complexity when he describes

'...the eternal tension in the position of the judge. He is supposed to be an impartial adjudicator, applying the existing law and protecting the rights and liberties of the subject; but he is also a State instrumentality – in the wider sense, an organ of government. In general it is the second concept of the judge's role that shapes judicial attitudes on the issue of fault in the criminal law.'

Reflecting some of these tensions, the judiciary occupies an ambivalent place in criminology and penal scholarship - theoretically central, yet often empirically marginal. On the one hand, sentencing theory, policy and practice are relevant to many current debates such as the politicisation of crime and penal policy, the growth in prison populations and the transformation of traditional penal values; moreover, the normative framework of criminal justice processes continues to be a central focus of criminological and penal scholarship. These concerns ensure that the processes and mechanisms of sentencing receive due scholarly attention; and increasingly, scholarship in the field seeks to explore these processes and practices in their social and cultural contexts.

However, the assumptions and stances about the judiciary which inform those debates appear sometimes to outrun our existing knowledge about the practices, motivations and dispositions of the individual judge and of the judiciary as an institution. Reflecting the 'cultural turn' in the sociology of punishment and in the social sciences more generally, many commentators on the broad issues identified above turn their attention to the changing dispositions and sensibilities of political, penal and social actors. The attempt to trace the meanings and effects of these

developments has also prompted interest in the occupational cultures of penal actors such as police, prison and probation officers, and the ways in which they have undergone adaptation and change.

Yet the cultural turn has prompted less empirical interest in the dispositions of sentencing judges, of judging as an occupation in criminal justice or about the judiciary in its institutional penal setting: in short, about the judicial *habitus*. If sentencing is ‘the crux of the crisis’ (Cavadino and Dignan, 2007), then explanations for rising imprisonment levels are found by commentators in the likely susceptibility of judges to political, public and media pressure, and in judges’ greater punitiveness – though not always subjecting these claims to empirical evaluation. The doctrine of judicial independence, the central organising principle of the institution, may hold important clues about these and related issues, but is dismissed as the ‘potent myth’ of a hegemonic judiciary (Cavadino and Dignan, 2007: 105).² In sentencing research, too, there is some received wisdom about the homogeneity of the judicial habitus - in terms of shared background, education and training - and its presumed influence over judicial outlook and practice. However, the connections between these positions are ambiguous and mostly unspecified.

All this suggests some lack of curiosity about the ‘internal organisation of the judicial world’ (Hall *et al*, 1978). In the foreword of a volume of essays entitled ‘Lawyers in their Social Setting’, MacCormick (1976: vii) argued for greater understanding of occupational cultures in law and recommended:

‘.... [the] study of the relationship between men of law and their social, institutional and educational settings, of the influences to which they are subject in different times and jurisdictions, and of the way in which they go about doing the law-jobs.’

MacCormick’s call for greater study of lawyers’ occupational lives prefigures our contemporary use of concepts such as *habitus* and *culture* but has some relevant pointers for contemporary judicial scholarship. Of particular note, MacCormick suggests that a rounded understanding of these dimensions of occupational lives requires the exploration of three domains: law’s normative structure; the means by which these normative systems are made operative by ‘men of law’; and the

historical, political and sociological contexts of these activities. The lack of research about judicial decision-making is, however, a source of continuing frustration for sentencing scholars. Warner (2006), for example, notes that interviews with judges are still ‘quite rare’, and Ashworth (2003; 2011) continues to call for more research into ‘why judges and magistrates do what they do’ and warns that the dearth of research into the practices of sentencers represents ‘a major handicap to proper development of theory’ (Ashworth, 2011:344). Although judicial resistance presented a significant barrier to sentencing research in recent decades (see Ashworth, 1995; 2003; Baldwin, 2000; Hughes, 2000), much has changed since 1980 when Lord Lane (quoted in Warner, 2006: 257) declared that there were no areas of sentencing which required research. Indeed, it is now common at conferences and other public events to hear judges themselves call for more research (see also Kibble, 2008).³ Even so, this bleak assessment of contemporary judicial scholarship was recently offered:

‘... there is little domestic scholarship on how judges work in or out of the courtroom. Likewise, almost no empirical scholarship exists on how individual judges or panels of judges arrive at their published decisions. At the same time, the senior judiciary have maintained their distance, air of mystery and cloak of secrecy. Public judicial reflections on the art of judgment writing are exceptional. Domestic judicial biography and autobiography is poorly developed. Essential archives of senior members of the judiciary are more likely to be destroyed than preserved and opened for inspection and analysis. Last, but by no means least, the divide that separates legal scholars from the judiciary is rarely crossed and when crossed tends to be circumscribed by elaborate performances of respectable fascination and polite deference respectively’.

(Moran, 2012: 287)

It is possible to take issue with some aspects of this assessment, such as the extent of domestic scholarship on judicial decision-making. There are also some signs that the judiciary is opening itself up to greater scrutiny (see, for example, the recent *Judiciary of Scotland* website). Moran’s analysis, however, does capture our limited knowledge about how judges work ‘out of the courtroom’ and about judicial lives and careers in their biographical context. Indeed, it is striking that the concept of ‘judicial culture’ has not gained a stronger hold in the language of judicial scholarship. Moreover, current research about occupational aspects of judging – such

as appointment, training and experience, and about canonical stances and doctrines – tend to focus more on their civil rather than criminal dimensions. This leaves some contexts of judicial work in penal practice relatively unexplored, particularly the relevance of the ‘master narrative’ of judicial independence to penal practice, and about the shaping effect of early experience on the judicial habitus – and vice versa.

This thesis explores dimensions of judicial culture through the biographical narrative accounts of a group of 12 retired judges whose experience on the Scottish bench spans the second half of the twentieth century, and in some cases the earliest years of the twenty-first century.⁴ The aims of the research are twofold: firstly, to provide insight about the changing conditions of judging in Scotland and secondly, about the judicial role in criminal justice. These narratives provide historically specific understanding about these social conditions of judging and the judicial governance of criminal justice during this recent period of Scottish penal history. More broadly, these accounts also provide insight about the occupational culture of the judiciary in its penal context, some of its organisational practices, and about the challenges and demands of the judicial role.

Summary of thesis

I begin, in Chapter 2, by considering the ‘cultural turn’ in the sociology of punishment, and the elusive place of culture in sentencing research. I trace some of the implied meanings-in-use of the concept and argue that although much work in this field impliedly addresses cultural dimensions of judicial work, the concept of *judicial culture* has value in designating a discrete field of inquiry in penal scholarship. I then set out the ways in which, thus employed, the concept encompasses (at least) two key dimensions of the judicial role: values, meanings and perceptions, and also the daily routines, institutional practices and occupational dynamics of judicial work. I outline the advantages of a more fully cultural approach which directs greater attention to the judge as a socially and historically situated actor, and to the judiciary as a complex institution.

In Chapter 3 I outline the ethnographic narrative approach which I use to interview the participants and explain the particular value of this approach for studying judicial

culture. I provide details of the empirical framework of the project, the framing and scope of interviews, and consider the relational dynamics of the interviews and the relevance of the judge-prosecutor relationship. I then discuss the principal claims and features of the narrative approach, provide a working definition of 'narrative' and an overview of the functions which narratives can serve for individuals and organisations. I conclude this chapter with a discussion of the tension between the normative orientation of narrative research – towards the stories of the marginalised – and the position of the judiciary as a dominant elite. To reflect the dual role of the judge in penalty, I offer an interpretive position based on the hermeneutics of faith and suspicion.

In Chapter 4 I extend this discussion to some of the broad questions which arise about the judicial role – about the discourse of powerful actors, the weight to be placed on their subjective accounts of experience, and the objective realities of social life which shape that discourse and limit their practice. I consider the usefulness of Bourdieu's conceptual framework of *habitus, practice and field* to explore these questions, against the frequently levelled charge of latent determinism which would militate against the exploration of change. Drawing on Bourdieu's (1999) later work *The Weight of the World*, I argue that the genesis of change in the judicial habitus may lie in the capacity of individual judges to reflect on the conditions which structure and constrain their own role in penal practice.

I then move on to detail the analysis of my findings from interviews with retired judges in Chapters 5, 6, and 7. In these sections I explore the judges' stories of their early years as lawyers for what they suggest about the formation and shaping of the judicial habitus – questions about social class, diversity, the status of criminal work, judicial conduct and training. Recognising judges as the bearers of penal culture, I examine the frameworks of meaning and vocabularies of motive which the judges employ when discussing crime, the criminal and penal practice. If the place of the judiciary in criminological thought is interesting for what it indicates about judicial role conceptions, then the place of criminology in judicial thought carries additional interest. I consider here the nature of judges' engagement with penal research and some of the uses to which judges may put the information and ideas they receive. In

the final section, I introduce the ‘master narrative’ of judicial independence and consider its relevance to sentencing practice. I then explore several dimensions of sentencing practice which arise from these narratives: discretion, rationality, intuition, emotions, and collegiality. I consider briefly developments in neuroscience which have implications for the understanding of human judgement, and point to the scope these insights provide for extending our knowledge of sentencing practice. In the final section, the discussion of sentencing as a signifying practice takes us back to the question of judicial independence and to judicial responses to the ‘social question’.

In the final chapter I draw some conclusions from these narrative accounts and consider the implications for judicial training, for the dissemination of criminological and penal scholarship, and for penal change.

¹ Criminal justice scholarship, and sentencing research in particular, relies on the pragmatic construction of the ‘criminal’ or sentencing judge and their trial and sentencing functions. In Scotland, judges do not, for the most part, specialise in either civil or criminal work, and their daily work often involves a mix of civil, criminal and other adjudicatory functions. Some sense of this broader judicial role is gained in the narrative accounts presented here. This stands in some contrast to the conventional account which imagines the sentencing task to entail a discrete set of skills and values.

² More nuanced analyses consider the relevance of judicial insularity for the discussion about ways in which criminal justice systems respond to calls for increased penal severity (Lacey, 2008; Loader and Sparks, 2010).

³ Ashworth (2003) and Baldwin (2000) describe judicial hostility and resistance to sentencing research in the 1970s and 80s; the abandonment of pilot projects, the curtailing of on-going research and the resulting *froideur* in relationships between social science researchers and the judiciary. Ashworth notes that more seems to have been achieved in Scotland during this period and suggests that although the climate in England began to change in the 1990s, research into Crown Court practice there is still not productive.

⁴ I use the generic term ‘judges’ to refer to two (out of three) branches of the Scottish judiciary: Sheriffs, and Senators of the College of Justice. The third branch consists of the lay Justices of the Peace and a small number of legally qualified Stipendiary Magistrates who deal with minor criminal matters in the Justice of the Peace Courts.

The post of Sheriff is held by approximately 142 practising solicitors and advocates. When dealing with summary criminal business, Sheriffs sit alone and have sentencing powers of up to 12 months

imprisonment and fines of up to £10, 000. They can also impose compensation in respect of alarm and distress, injury and financial loss. When hearing solemn (indictment) cases, the Sheriff sits with a jury and can impose a custodial sentence of up to 5 years.

There are approximately 34 Senators of the College of Justice who preside over the High Court of Justiciary. All are solicitors or advocates. In the High Court, the judge has unlimited powers in relation to financial penalties and can impose a custodial sentence of any range up to, and including, life imprisonment.

Chapter 2 Judicial culture and sentencing

Introduction

In this chapter I explore the concept of ‘judicial culture’ which is an anchoring concept for discussions throughout this thesis. This term is infrequently encountered in criminology and penal scholarship, although some implied meanings-in-use can be traced. The explicit identification of the concept in this thesis therefore calls for some clarification, and an indication of its intended meaning and use. In this chapter I consider the various implied uses and meanings of the concept of culture in penal scholarship for their relevance to the study of judicial work, suggest reasons for the relative neglect of culture and in particular of judicial sensibilities, and consider the relevance for contemporary debates in penal scholarship.

Section 1 Knowledge and understanding of the judicial world

The ‘cultural turn’ in the sociology of punishment could be said largely to have passed the judges by. This oversight is reflected in the narrow frame of reference sometimes used to evaluate the judicial role, with little sense of the frameworks of meaning or value they bring to their work, of agency and interaction in their daily routines. Moreover, little is known about the personal challenges and demands of sentencing, of the historical or social context of the conditions of judging in recent years, and in relation to sentencing reform, there is a tendency to identify the judiciary as part of the problem but rarely part of the solution.

The relative lack of knowledge we have about the judicial role is partly explained by difficulty in gaining access to the judiciary for research purposes. The justification for the relative inaccessibility of judges usually lies within the conventions and institutional arrangements which inhibit judges from speaking publicly.¹ Access to judges may no longer be quite as problematic for researchers in the UK as it was during the latter part of the twentieth century, but the chequered history of relations between the judiciary and researchers may account for some of the limited view.²

Judicial biography

The legal conventions which inhibit judges from speaking publicly about judicial lives and careers are taken seriously by Scottish judges; even, it appears, in retirement. Thus, judicial biography and autobiography provide surprisingly few sources of insight about judicial lives and careers in their historical and social contexts. As subgenres of legal biography, these literary forms share many of the defining features as well as some of the associated problems of that broader field. In the common law world, the development of legal biography in the common law world has been uneven and sporadic, and an intellectual school or discipline in the field has yet to become firmly established.³ The resulting dearth of historiography in the field makes categorisation difficult, and there appears to be significant diversity of style, method and purpose (Parry, 2010). Scholarly ambivalence towards the biographical enterprise in law explains much of this halting development, yet the lives and careers of judges continue to hold broad appeal for the general public. This interest generates work by a range of writers beyond the academic field which chronicles and interprets judicial lives with varying degrees of emphasis, insight and evaluation.

Parry (2010) observes that judicial biographies tend to be a complex mix of two different writing traditions in legal biography. The first is the ‘empirical’ approach which is primarily event or fact focused and which chronicles the life of the individual judge. The second is the ‘intellectual history’ tradition which focuses on frameworks of ideas and beliefs and on the individual judge’s contribution to the development of law. In the common law world (except America) judicial biographies tend towards the empirical life-story writing tradition, typically charting the individual’s progression to the bench and evaluating the significance of this journey in the context of the individual’s life and character.⁴ This approach may also direct attention towards notable aspects or events of the judge’s career, but does not usually represent any comprehensive evaluation of their intellectual contribution (Parry, 2010) or broader social commentary.

Contemporary judicial biography and autobiography is a limited field of enquiry, however, and in England may be a tradition which has largely ‘run out of steam’ (Girard, 2003:106).⁵ A modest increase in judicial autobiography in the twentieth century may be explained by the decline in serious scholarly interest in biography during this period, and may also reflect a changing political climate in which there is greater media and public interest in, and criticism of, judges. In these circumstances, autobiography may provide judges with an opportunity for giving their own accounts of events (Girard, 2003).

Many of these features and cyclical patterns of the genre can be observed in the contemporary field of Scottish judicial biography. Almost all recent biographical work relates to 18th and 19th century Scottish judges with few, if any, studies of their twentieth century successors.⁶ Notwithstanding the absence of contemporary scholarly work, there is a small collection of autobiographical work by a number of judges whose careers spanned the mid-to-late twentieth century period of Scottish criminal justice history (see Stott, 1991; 1995) and Wheatley (1987). These studies are revealing for the strict demarcation their authors make between their early political careers and subsequent judicial office, suggesting not only a narrow interpretation of politics (as ‘party’ politics) but an assumption that immunity from the sway of politics, however narrowly defined, is achievable. Collectively, these writings reflect the common motivation towards autobiography, as observed by Girard: ‘I have lived a satisfying and interesting life and I want to share it with a wider audience’ (2003:101).⁷

Several scholars in the field make a strong case for the value of judicial biography, emphasising the political and rhetorical power of judges in the common law world, and the potential of biography to provide important insight about the workings of the judiciary and the norms and values which shape their practices (Burnside, 2009; Girard, 2003). It is argued that biographies containing significant historical contextual detail – in the empirical tradition of providing a ‘window on an age’ – have the potential to make a significant contribution to socio-legal history (Girard, 2003).⁸

Conceptions and representations of judging

The very act of undertaking a judicial biography can be said to involve an implied acceptance of the operation and influence of personal and social values in the business of judging, despite the tenacity of legal doctrines emphasising judicial neutrality and the rule of law, rather than of men (Burnside, 2009). This realist approach can be contrasted with the legal formalist approach which is characterised by a largely *asocial* treatment of law:

This philosophy portrays law as an internally coherent and self-contained logical system - a "seamless web" of tightly linked principles, free from class interests and other social influences. Separating law from society, the legal formalist perspective emphasizes abstract doctrines and ahistorical rights, all of which are applied in a uniform, rational, and consistent manner by a neutral and autonomous judiciary.
Suchman and Edelman (1996: 907)

Tamanaha (2010) argues that despite the pervasive influence of the formalist and realist models, their polarisation represents something of a straw debate: the models do not represent the true nature of judging which is closer to a form of 'balanced realism'.⁹ In criminological research, however, it is possible to trace some of the ways in which these conceptual models continue to shape and inform some of our current understandings of the judicial role in sentencing, and may have the effect of limiting the scope of enquiry in the field.

Faith in judgement: the judge as 'Sovereign Self'

Many of the transcendental doctrines, rituals and symbols of legal positivism centre on the figure of the judge and the institution of the judiciary, and represent something of a formal legal carapace. This is a formidable legacy and ties the figure of the judge closely to both the symbolic and material legitimacy of the law. The conception of the judge embodied here is an autonomous figure who remains largely impervious to values extraneous to law; the conception of judgement itself is based on a positivist, textual adherence to legal precedent and interpretation of law. This model largely denies much scope for judicial creativity and maintains a belief (or expectation) in law's immunity from politics, and in the universality of law and legal norms.

The significance of this model lies in its legitimating aspect. It is the basis of conventional juridical and political discourse about the judicial role, and forms the crucible of rights and due process advocacy. In this approach, the potential of law and the judicial role in criminal justice is largely expressed as an assertion of liberal legal values: these are due process, the protection of human rights, and commitment to strong ‘Olympian’ versions of judicial independence (Lacey, 2008). This is the framework of the liberal legal paradigm which informs a significant amount of criminal justice and criminological analysis and is advocated as a means of moderation and insulation from the excesses of popular and political sentiment (Loader and Sparks, 2010). This model of judgement has further significance in the context of the increasingly connected agendas in economy, international relations and domestic law which, as Melossi (2008) observes, entail something of a ‘steering role’ for penalty. Where employed as a form of domestic and international judicial governance, this model draws heavily on the positivist conception of judging.

In its specific application to sentencing research, the positivist model tends to occlude the role of cultural influences in judging, and minimises any constitutive aspect or creative dimension of the judicial role in sentencing. Further, displaying some Kantian wariness of intrusion into rationality, this model eschews the question of emotion in judging and tends to imply a lack of curiosity about the ontological life of the judge. The interpretive orientation in this type of research is animated by *faith* in law and legal judicial values.

Suspicion of judgement: the hegemonic legacy

By contrast, one model still dominant in criminological scholarship is rooted in an attitude of suspicion towards the judiciary and is in part a response to the positivist conception of judgement and adjudication outlined above. Here, the conception of the judge has a typecast quality almost as singular as that of the positivist model, but there is more emphasis on judicial intransigence and protectionism, particularly in relation to sentencing reform. This school of thought has its origins in the Critical Legal School which represents a general critique of the indeterminacy of law. This model of judging has strong legal realist underpinnings, draws heavily on the

hegemonic function of the sentencing judge - the rhetorical and legitimating aspect of the role, and the mythologizing concepts of judicial independence and the rule of law - and makes the coercive aspect of the judicial role central to its study.¹⁰ Importantly, this model informs a set of assumptions about the judicial habitus, particularly those ingrained dispositions and attitudes, patterns of thought and behaviour which are presumed to be shaped by class, background and training. This conception of the judicial role is rooted in an attitude of suspicion and scepticism, and has some important implications for sentencing reform and research.

In the UK, this particular understanding of the judicial role has some rich historical antecedents. Thompson (1975) and Hay (1975) provide accounts of 18th century hanging judges and corruption with plentiful examples of the manipulation of the law by a ruling elite, aided by the symbolism and rituals of criminal law which conveyed the appearance of neutrality, equality before the law and mercy. These critiques draw attention to an important paradox of 18th Century justice: the 'bloody penal code' existing alongside a liberal administration and interpretation of the laws. In this way, the law could act both as a defence against arbitrary power *and* perform the central hegemonic role of creating a spirit of consent and submission to the criminal law.¹¹

Landmark texts of the 1970s and 1980s provide rich ethnographic studies of the rituals, relationships and discourse of magistrates and other court actors which together form the coercive structures necessary for the speedy construction of justice (Carlen, 1976; McBarnet, 1981; Griffith, 1997). Griffith's (1997) influential study of the judiciary in England and Wales was first published in 1977 and represents a powerful challenge to the political neutrality of the judiciary. This study can be located within the legal realist tradition which challenged the view that there was something distinctive about legal reasoning and questioned the extent to which judges were constrained in judgement. In the same tradition, Bourdieu's study of the juridical field provides the field of criminology with an influential account of the hegemonic function of the judiciary and of the judicial habitus (1987).

Among contemporary analyses of the penal crisis, the critique of Cavadino and Dignan (2002) represents perhaps the strongest interpretation of the hegemonic function of sentencers. According to this critique, the sentencing reform provisions in

the Criminal Justice Act (1991) fell prey to the destructive efforts of a hostile or unsympathetic judiciary by means of flagrant misreading of its terms and judicial non-cooperation. This powerful sentencing culture was motivated by a seemingly ‘insatiable’ judicial demand for prison places (2002:105), and the judges’ collective behaviour amounted to betrayal of the trust placed in them to exercise discretion responsibly (2002: 104). For Cavadino and Dignan, this points to the need for a strategy of ‘coercion and persuasion’ in relation to the judiciary (2002: 349).

This body of scholarship represents an important contribution to our understanding of the role of the judiciary in the penal field by drawing attention to some significant features. These include its rhetorical and legitimating aspect; the mythologizing aspect of concepts of judicial independence and the rule of law; the staging and construction of justice; the lack of diversity in the judiciary and the associated problems of legitimacy and representativeness. More broadly, these studies capture some of the real material effects of the power to punish vested in the sentencing judge, along with a general indictment of many of the processes of criminal justice. The realist model in sentencing displays scepticism towards the concept of judicial wisdom and intuition and emphasises the arbitrary nature of judicial decision-making.¹²

‘Suspicion’ in the context above can be more usefully re-cast as ‘critical’ and in this way performs the important task of challenging some taken for granted legal doctrines and precepts. This synthesis of scholarship also provides a set of assumptions about the judicial habitus – of ingrained dispositions and attitudes, patterns of thought and behaviour shaped by class, background and training - with some implications for the direction of research in the field and for sentencing reform.

It may be, however, that over-reliance on the hegemonic representations of the judicial habitus reproduces some of the inherent limitations of its conceptual basis. For example, a hegemonic model of judging carries certain assumptions about the homogeneity of dispositions produced by the habitus. This requires careful differentiation if habitus is not to become a concept with little scope for addressing

questions of agency in penal practice, or of the place of contest and struggle. In the same way, undue reliance on the realist model may also involve a temptation to overstate the arbitrary nature of judicial decision-making and a tendency to display deep scepticism towards any concept of judicial expertise, objectivity or practical wisdom.

The continuing influence of the hegemonic and legal realist model can be traced in the critique of discretionary sentencing, and may be reflected in distrust of judicial ‘virtues’ of independence, reason and deliberation, and of neutrality and judgement itself (Simon 2007: Franko Aas 2005). It may also explain some of the ways in which sentencing research appears not fully to reflect the ‘cultural turn’ in the sociology of punishment. In this next section I trace some of the uses of the concept of culture in sentencing research and indicate some of the elements of a more fully ‘cultural’ approach to the role of the judge in criminal justice.

Section 2 Concepts of culture

The sociology of punishment

The new prominence given to the concept of culture in the sociology of punishment has contributed to the development of a substantial body of scholarship which draws attention to the cultural meanings and effects of penal institutions, policies and practices.¹³ Judges in their trial and sentencing functions occupy a central role in the exercise of penal power, representing a complex interplay of symbolic and material dimensions in the penal realm and in social life, but there is scope to further develop analyses of cultural aspects of their role with potential for greater understanding of sentencing processes and associated penal change.¹⁴

A comprehensive analysis of the sociology of punishment is not within the scope of this discussion, but I attempt to trace here some of the more significant meanings and implications in order to demonstrate the potential of a more fully cultural approach to the judicial role in sentencing, and to lay the foundations for the concept of ‘judicial culture’ developed throughout this thesis. The key elements identified for their significance are (a) the mutually constitutive relationship between punishment and

culture (b) the concept of penal sensibilities and (c) the place of conflict and diversity in penal culture.

Foremost (for the present study) of the insights gained from the sociology of punishment is that the relationship between punishment and culture is both constitutive and generative (Garland, 1990). The *constitutive* aspect of the relationship between culture and punishment provides the understanding that social institutions such as law or punishment (and their various organisations and fields of activity) stand in a complex position in relation to the wider social field; that despite representations or claims of autonomy, with seemingly bounded institutional logic and rationality, penal institutions are nonetheless embedded in, and shaped by, the broad cultural patterns of the society in which they are situated. The *generative* dimension of punishment provides the insight that penal institutions and practices also play an active communicative role in shaping, generating and reproducing some of those cultural sensibilities and values.¹⁵ Penal institutions, and their practices and discourses, can thus be understood as shaping social and cultural norms as well as embodying and expressing them.

Grounded in a Durkheimian understanding of the symbolic and expressive functions of penal practices, penal institutions and practices are in this way accorded a new cultural salience, as sites of ‘ritual performance and cultural production’, invoking and affirming particular conceptions of morality, social order and authority (Garland, 2006:420). Central to this understanding is the notion of *penal sensibilities*: cognitive dispositions and ways of feeling about punishment which are culturally shaped and patterned.¹⁶ These psychic ‘structures of affect’ (Garland, 1990: 213) are particularly relevant in this area of scholarship because of the psychological ambivalence and associated emotional responses which tend to be generated by questions of wrongdoing and its punishment. The awareness that cultural change carries with it some ‘psychic corollary’ (Garland, *ibid*) – new ways in which people relate to each other in altered environments and which may involve a range of psychological processes such as the development of self-control, restraint, empathy and moderation but equally feelings of anger, vengeance and anxiety – is most commonly used in this field to explore public and political responses to crime and punishment, but has some

evident, though relatively unexplored, force in relation to penal agents and other penal actors.

Finally, a cultural approach to punishment favours ‘overdetermined’ interpretations of practices and events – a multidimensional approach which is alert to the danger of assuming too much ‘settled hierarchy of purposes or causal priorities’ in its working practices and policies (Garland, 1990: 285). In this context, penal institutions are understood as complex organisations, involving a range of competing objectives and interests; the approach also acknowledges the ‘swarming circumstances’ and the on-going tension, contest and compromise which characterises penal policy and practice. In turn, this raises important questions of agency for penal actors.¹⁷

Taken together, these broad ideas about the mutually constitutive dimensions of penalty and of the sensibilities which shape its operation, contribute to an understanding of punishment as a ‘cultural artefact’, embodying and expressing the cultural patterns of society (Garland, 1990: 193). Garland’s principal antecedents in the conceptualisation of his cultural approach to punishment are Durkheim, Weber, Elias and Freud, and it is significant that these are writers in the broader shift in social theory towards an understanding of social action as both configuring and communicating meaning. This interest in the values and dispositions of penal actors can therefore be traced to the ‘interpretive turn’ in social sciences and humanities - the move away from ‘dreams of social physics’ (Geertz, 1983: 23) and ‘abstracted empiricism’ (Wright Mills, 1959) towards a hermeneutic or interpretive approach to social life: a way of giving ‘particular sense to particular things in particular places (Geertz, 1983: 232).¹⁸ This goes to the heart of the sociological enterprise and is more than mere contextualisation: it reflects the attempt to understand what is happening in the social world and to understand the meaning of particular social worlds for the participants (Valverde, 2006; Loader and Sparks, 2004; Garland, 2009).

This foundational understanding of the interplay between punishment and culture provides the basis for at least two connected general areas of inquiry in criminology. The idea that penal practices and institutions are culturally embedded leads quite logically to the task of tracing the development of ideas, rationalities and strategies in

the penal domain, with a view to showing the influence of broader cultural themes and sensibilities on the configuration of penalty.¹⁹ Here, attention is drawn towards particular sensibilities (experienced by the individual but feeding into collective frameworks of ideas) which shape and limit the scope and operation of penal practice, and in particular, to the character and scope of *changing* sensibilities. Relatedly, the idea that penalty has a generative or determinative effect in cultural life, shaping some core ideas about punishment, justice and morality, prompts interest in the ways in which penal practices and institutions communicate these ideas and give meaning to them in particular contexts. In this framework, the various discourses and criminological knowledge employed by key agents in penal practice, and the conceptions of crime and criminality on which they draw, are recognised as some of the means by which penalty communicates these cultural messages.²⁰

The understanding of these (and other) cultural dimensions and effects of penalty now has the status of conventional wisdom in the field of the sociology of punishment (Garland, 2006:420). The two strands of research identified above are concerned with the relationship between new penal strategies and cultural sensibilities, and with the use to which these knowledges and sensibilities are put by actors in the communication of cultural ideas about social order. These two strands inform a broad range of enquiry encompassing *inter alia* studies of penal transformation and governmental crime control in conditions of late modernity (Garland, 2001a), mass incarceration (Garland, 2001b; Simon, 2001; Gottschalk, 2006; Western, 2006), changing representations of crime and the criminal and associated cyclical movements of criminological thought (Melossi, 2008), the changing governance of crime and political responses (Loader and Sparks, 2004), and the hegemony of crime control discourse and practices in political governance (Simon, 2007). The ‘new penology’ thesis, although appearing to signal some contradictory trends, is similarly culturally grounded, tracing the genesis and development of actuarial discourses and techniques directed towards risk management and control of offenders (Feely and Simon, 1992).²¹

Reflecting the cultural turn in the sociology of punishment, these accounts all make central to their analyses the responses of various actors and their audiences to

changing conditions, with varying emphases on explanations of change at a structural level. In particular, they draw attention to the ways in which the values and dispositions of a range of political, penal and social actors have undergone significant alteration as a result of those broader changes in social and economic life, and which in turn have contributed to the re-shaping of penal practice in a populist and punitive direction.²² Although no single explanatory process is suggested by these accounts, the interrelated shifts in penal culture are attributed, in part, to the waning influence of rehabilitative and individualised approaches to punishment, and are commonly thought to have brought about radical changes in the working practices and assumptions of penal actors.

These broad analyses of penal transformation connect to wider debates (about the political governance of crime, risk and surveillance societies, and social order and control), but they also provide important insights about criminal justice and penal policy developments which appear to be grounded in some of these new cultural understandings about crime and punishment. Some of these themes are issues with which this thesis is directly concerned and will be explored in later chapters. However, the primary interest here in the ‘cultural turn’ in the sociology of punishment is the corresponding place of ‘culture’ in sentencing scholarship, and the advantage to be gained from more fully exploring cultural dimensions of the judicial role in sentencing.

Sentencing scholarship

There are a number of broad insights about the judiciary and its role in penalty which flow from the conceptions of culture in the sociology of punishment outlined above, and which carry some implications for the ways in which the judicial role is researched. Firstly, a cultural approach to the judiciary entails an understanding of an institution grounded in cultural values which shape the decision-making of its individual actors as well as its institutional practices; and as a complex institution whose policies and practices are likely to be the outcome of tension, conflict and compromise. Secondly, it follows from this approach that judges embody and express particular cultural sensibilities and dispositions; that judicial practices have

important cultural meanings and effects beyond any crime control effects which they may also produce; and that these practices have the potential to shape and influence the values and dispositions of others in their immediate audiences and beyond. In this way, judges' role in the transmission of penal culture becomes evident, as does the cultural embeddedness of their practices and dispositions.

By drawing more explicitly on these foundational understandings from the sociology of punishment it is possible to highlight some broad questions about the place of the judiciary in penal culture which appear relatively unexplored. For example, extending a cultural approach to the judicial role in punishment heightens the significance of the observation that judicial sentence is not only an instrumental procedure which activates the punishment process; it also communicates ideas about 'authority, personhood and community' and by its routine invocation is constitutive of those forms of social and cultural relations. In this communicative system of signs and symbols, sentencing is thus 'a signifying practice of some importance' (Garland, 1990: 256) in which judicial decisions and statements have a particular quality intimately bound up with their legitimacy. In this way, sentencing performs a pivotal role in the criminal justice process, representing the point at which the aims and purposes of punishment are given public expression, and providing a link between the rhetoric of punishment and a site for assessment of its legitimacy (Henham, 2012:77). Sentencing decisions and accompanying judicial remarks can therefore be regarded as belonging to a special class of 'acts of naming': they are 'model acts of categorization' by public officials authorized to declare the 'truth' about people or things:

These performative utterances, substantive – as opposed to procedural – decisions publicly formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized.

(Bourdieu, 1987: 838)

There are limits, therefore, to this 'quasi-magical' power, and the judicial power of naming – and punishing - has legitimacy and credibility only insofar as there is some correspondence with existing structures in society: corresponding not only to

material divisions of power but also to culturally understood and shared ways of thinking and feeling about the particular social world of which they are a part.²³ Little is known, however, about the ways in which judges mediate their much proclaimed autonomy with the need to achieve universal recognition for their judgements and decisions: the everyday task of reconciling judicial independence with the public interest.

The judiciary

As outlined above, the sociology of punishment provides a foundation for a cultural approach to sentencing and to the role of the judge in penalty. In some important respects, however, the ‘cultural turn’ in the sociology of punishment has generated surprisingly little inquiry which concerns itself directly with cultural dimensions of judicial work in penal practice. Moreover, the concept of culture which is implied in much scholarship emphasises homogeneity and settled practices in the field. By contrast, the ‘cache of the cultural’ is more evident in law and society scholarship, where cultural analysis forms a central part of the landscape (Sarat and Simon, 2003) and a less static concept of culture is employed. The greater contingency and promise of this approach is captured by Mezey (2003:39) who observes that the best way of thinking about ‘culture’ in law and society scholarship is ‘a set of shared signifying practices that are always in the making and always up for grabs’.

Distinctions in use

Before evaluating the particular use to which the concept of culture is put in sentencing research, it is useful to note some of the distinctions in common use. In Garland’s overview, the concept of culture can be used, firstly, to identify and isolate cultural factors in punishment practices and institutions: in other words, to distinguish certain influences in penalty (such as ‘ideas, or symbols, or values, or meanings, or sentiments’) from other forces operating in the penal sphere (such as political, societal or economic), and to show that these cultural dimensions have a causal role in shaping penalty (Garland, 2006:422). This use of the concept of culture is reflected in criminological literature which talks about ‘sentencing culture’

(see for example Cavadino and Dignan, 2002; Wandall, 2008), ‘civic culture’ (McAra, 2005) and at the most general level, ‘penal culture’.

In its second common usage, the concept of culture is employed to identify distinct groups, communities, nations or other entities in the penal world, each of which is understood to embody or represent a cohesive entity: a ‘more-or-less bounded, more-or-less unified, set of customs, habits, values and beliefs’ (Garland, 2006:423). This is the sense in which it is possible in criminology to talk about a ‘sub-culture’ of delinquent gangs (Cohen, 1955) or of ‘police culture’ (Reiner, 1999).

Each of these uses carries different conceptual difficulties, and the distinctions cannot always be so clearly drawn in practice. Garland (2006:425) cites the use of the concept of ‘subculture’ in criminology as an example of the conflation of the two ideas – where it is used not only to identify the cultural features of a group (such as their distinctive style or attitudes) but also to distinguish such a group from other subcultures or groups. A similar conflation occurs in relation to ‘sentencing culture’ where it is used, usually impliedly, to indicate both a set of characteristic values and dispositions understood to be widely shared among members of the judiciary and to distinguish this set of values attributed to a specific group of penal actors (i.e. judicial values), from others in the penal realm. In this way, some of the problems associated with each of the different usages of ‘culture’ – namely, the difficulty of isolating ‘cultural’ aspects from other dimensions of social life, and the tendency to overstate consensus and homogeneity among members of the specific group – can appear in sentencing scholarship to be quite entangled.

Section 3 Culture and Sentencing research

Sentencing is a practice which animates scholars, practitioners, politicians and the public alike, reflecting a broad range of motivations and interests beyond its instrumental purposes. In recent decades, the politicisation of crime and punishment has secured for sentencing its position as a site for political contest and media focus, reflecting the inherently political questions surrounding crime and punishment (Loader and Sparks, 2010) and an understanding of the contested place of sentencing practice and policy in public life, and of its cultural importance – its communicative

and legitimating role – now informs much sentencing research. Indeed, it is now rare to encounter a sentencing or criminal justice textbook, even one oriented towards sentencing law, which does not place sentencing in some cultural context (see for example Cavadino and Dignan, 2002; Zedner, 2004; Easton and Piper, 2005; Ashworth, 2010; Croall *et al*, 2010). In an important sense, therefore, culture is the new nexus of sentencing and law.

To the extent that ‘culture’ in the first definition and usage outlined above refers to the ‘ontological stuff’ of penalty i.e. ‘meaning, perception, feeling, sentiment, value, belief and the various forms of their expression’ (Garland, 2006:427), much of sentencing scholarship can be understood as having always been oriented towards these cultural dimensions of the penal world. In this section I trace some of the ways in which the concept of culture is employed in sentencing research. Interest in the ‘cultural’ dimensions of sentencing tends to be expressed in a fragmentary manner, but in ways which allow useful insight about the benefits of developing a more fully cultural approach to the subject.

The insight that culture has never been very far removed from the study of judicial decision-making suggests a broader horizon for sentencing research than is sometimes envisaged today, and has an estimable lineage. The ancient school of jurisprudence, for example, has always been concerned with what we would understand today as cultural variables in relation to judicial behaviour and norm enforcement (Grossman and Sarat, 1971). Enquiry into the fundamental human quality of good judgement, the universal basis for sound governance, continues to be a shared concern of political theorists, philosophers, jurists and social scientists (Thiele, 2006).²⁴

Thiele (2006:5) describes practical judgement as ‘an aptitude for assessing, evaluating, and choosing in the absences of certainties or principles that dictate or generate right answers’. This presupposes the existence of some degree of discretion if it is to be considered a cognitive and evaluative, rather than mechanical, exercise. Discretion, however, is the Trojan horse of sentencing, providing scope for judicial bias (or ‘extra-legal influences’) and introducing the possibility of disparity and inconsistency. It also brings into play a host of liberal debates about the rule of law,

the tension between formal and substantive notions of justice, and about judicial impartiality and independence. Scholarly work is therefore directed towards the identification of those judicial values or biases which are assumed to play a determinative or shaping role in sentencing decisions. This is the search for the ‘holy grail’ of sentencing – a rational explanation of judicial decision-making and the ability to predict and control outcomes – and it continues to motivate much research, particularly in the US where the availability of large data sets generated by the work of sentencing commissions over the last two decades has fuelled the proliferation of regression-based studies (Ulmer, 2012). The primary focus of this work is directed largely towards quantitative measuring of case process outcomes with increasingly refined variables; in particular, towards identifying patterns of sentencing behaviour, testing and proving the nature and extent of disparity, and thereafter modelling systems such as guidelines or grids designed to ‘structure’ or limit discretion.²⁵ In the US, even areas of research which are influenced by symbolic interactionism and labelling theory, which understand sentencing decisions as joint social acts produced by actors’ definitions and interpretations, and whose research is guided inductively from interviews with court actors, are geared towards the modelling of sentencing behaviour and outcomes.²⁶

A shared interest in judicial values and dispositions is also evident in research which draws on philosophies of punishment to explore the normative basis of sentencing. This work is perhaps inspired less by suspicion of discretion and more by the understanding that *all* judgement is inherently normative and that the exercise of punishment by the state requires moral justification. In this way, research explores the philosophical or normative basis of sentencing and is interested in those judicial frameworks of thought which are believed to play a determinative role in sentencing decisions - and normatively, in those that it is believed *should* guide decision-making. The fact that judicial rationales for sentencing tend to display a certain ‘pick ‘n mix’ quality (when set against a template of philosophies of punishment) is thought to indicate lack of rationality and coherence and the operation of post-hoc rationalisation (de Keijser, 2000; Hutton, 2006). Some critics suggest this proceeds on the basis of a misapprehension about the connections between penal policy and practice, and about the purpose of sentencing justifications (Duff and Garland, 1994;

Ashworth, 1995; Tata, 2000). This form of critique is sometimes enjoined by distrust of intuition, along with assumptions of disparity, and at this juncture the interests of political actors, policy-makers and scholars tend to coalesce in legislative moves to structure discretion.²⁷

As important as these two strands of research are for the proper control of judicial discretion, for the identification of unwarranted inconsistency, and for the development (and re-appraisal) of a normative framework for punishment practices, the interest in judicial values appears narrowly conceived, and allows only a thin explanation of judicial decision-making and its place in penal culture. Some hint of these limitations comes from this this writer in the form of a plea for mixed research techniques:

We also need to collect more detailed ethnographies of the courts, and of people's experiences in court, prison, and on the streets. We can then think about what the ethnographies tell us as we analyse our quantitative data, and vice versa, to better develop and assess theoretical paradigms capable of reflecting the complexities of people's lives and the multiple factors that influence criminal justice decision-making.

(Zatz, 2000: 529)

As Ulmer notes, these calls for ethnographic studies of court processes rightly assume that 'behind quantifiable sentencing outcomes lie interpretive decision processes involving people who interact with each other, and interact with their local and larger social contexts' (2012: 33). In making his own strong case for a 'major renewal of court community ethnography', he explains the inherent limitations of the measurement and modelling approach to sentencing:

Recall that almost all the theoretical frameworks applied to sentencing, such as focal concerns, uncertainty avoidance/causal attribution, rational choice, and racial threat ideas directly or indirectly rest on depictions of individual social psychological processes. *None of these processes can be directly observed with sentencing or even earlier case processing outcome data.* Even if we had real-time data on charging, conviction, and sentencing outcomes, and detailed case and defendant attributes, this still would not directly tell us what was going on in courtroom workgroup members' heads, or the content of their interactions with each other. As a field of inquiry, our collective research agendas need to better recognize this fact.

(Ulmer, 2012:34-35; emphasis in original)

Leaving aside for the moment the idea that it is possible for any research technique to directly tell ‘what was going on’ in the head of any courtroom member, it is of note that Ulmer’s ethnographic horizons are broad: he seeks better understanding of ways in which court actors process sentencing information, how they interpret and implement sentencing policies, and ‘whether and how these are shaped by local and larger cultural contexts’ (2012:33). The extent to which this inquiry is aimed simply at advancing the positivist study of causal mechanisms of sentencing decisions (by supplementing and adding some contextual detail), or has its own interpretive value, is unclear. However, Ulmer’s own research into the dynamics of ‘court cultures’ suggests he has an interconnected agenda in mind (Ulmer, 1997).

A more sceptical account of judicial decision-making and the discourses which accompany might raise doubts about any further pursuit of the ‘Holy Grail’ of sentencing. Hutton (2006) for example, noting that there are no ‘systematic guiding principles’ and few rules governing sentencing practice in Scotland, characterises the practice as ‘general, individualized, ad hoc, case-by-case’ decision making, displaying ‘naked[ly] expressions of value preference’ (ibid, 169; 172). Judicial explanations of sentencing decisions, in this context, represent *post facto* ‘construction of plausible accounts’:

Their sentencing decisions cannot be explained because there is literally no language to explain it other than the language they use in their judgements.

(Hutton, 2006: 171)

In place of the search for a ‘real’ account of the practice of sentencing, Hutton proposes that sentencing should be conceived as a social rather than legal practice, and based on intuition and a range of socially constructed values and assumptions. We should therefore ‘let go of the idea that we can ‘know’ how sentencing decisions are made or that there is a consistent systematic policy waiting to be uncovered by painstaking systematic research’ (2006:168). He advocates the use of a wider range of research techniques (which includes listening to judicial explanations of sentencing) but with a pragmatic focus:

‘we should start from what we want to do about and with sentencing (for example make it more rational, more accountable, or more transparent) and ask what we need to find out to allow us to achieve this goal’.

(Hutton, 2006:168)

As Hutton (2006: 168) suggests, this is perhaps a debate about methodology in social science, since his commitment to a cultural and interpretive understanding of sentencing is elsewhere evident. However, these different understandings about the nature of judicial decision-making and ways of researching it can also be read as indicative analyses of the place of ‘culture’.

Values and ‘culture’

Ulmer’s call for a revival of the ‘classic court ethnographies’ of past decades appears to be prompted by the marked decline in the US of the use of qualitative methods to research judicial decision-making (2012: 33) and is insightful for what it suggests about shifting degrees of interest in those cultural contexts of sentencing.²⁸ Over the same period of time in the UK and elsewhere, sentencing research appears not to have been marked by the same preference for quantitative over qualitative methods of researching as in the US, though the extent to which interviews with judges formed the basis of that approach was significantly less than some sentencing researchers would have liked (Ashworth, 2003; Warner, 2006).²⁹

However, despite this overarching interest in some broad cultural dimensions of sentencing, and commitment to an interpretive approach (among others) to its inquiry, the place and meaning of judicial ‘values’ or of ‘culture’ in this body of research remains unclear. For example, scholarly interest in judicial values and frameworks of meaning suggests an interest in sentencing or judicial ‘culture’ in the first sense identified by Garland (2005) – as a set of ideas (judicial values) which has an influence in penalty. It may also be taken to reflect interest in the generative dimension of punishment and in the communicative role of judges; the ways in which these values influence judicial decision-making. However, in several important respects, a singular understanding of the place of culture is suggested by existing accounts.

The influence of culture on judicial values

There is much insightful work in the field which explores centrally important issues concerning sentencing practice (for recent examples in the UK, see Millie *et al*, 2003; Hutton, 2006; Tombs and Jagger, 2006; McNeill *et al*, 2009). More broadly, other studies aspects of judicial work such as ways in which judges seek to maintain ownership of discretion (Ashworth, 1995; Tata, 2000; Hutton, 2006); of judicial resistance to sentencing research (Ashworth, 1995, 2003; Baldwin, 2000; Hughes, 2000); of strategic judicial behaviour in relation to sentencing reform or innovation (Ashworth, 1995; Hutton, 1995; Tata, 2000; Tata and Hutton, 2003; Cavadino and Dignan, 2002); and discussions about judicial diversity (Griffiths, 1997; Hale, 2005; Malleson, 2006; Rackley, 2007).

In the sentencing field at large, though, interest in judicial values and their influence proceeds mostly one way, and is directed towards the ways in which these ideas may impinge directly on the sentencing process, such as in judicial bias leading to disparity or inconsistency, or the extent to which they may suggest greater judicial punitiveness. Less common is inquiry about the effect and influence of culture on judges by virtue of background, training or experience; of local or cultural contexts; or of any judicial ‘hinterland’ beyond that expressed in perspectives about penal issues. One consequence is that there is little sense of the judge as a historically or socially situated actor, and little insight about the individual judge as a penal and moral agent. In this way, judicial ‘structures of affect’ are narrowly conceived.

Liebling (2001: 47) observes the lack of ‘appreciative’ research or sympathy towards the powerful in criminology. There is, she notes, little interest in:

... [the]nature of agency, power and constraint, the complexity of the hierarchy, and the grasp that individual players at all levels have of their own room to make choices, hold different views, to challenge others and to make sense of their own position.

‘Judicial culture’ as homogeneity

Certain assumptions can be made about the hegemonic mix of values the judiciary is likely to represent for as long as it remains an institution composed largely of people

who are ‘white and privileged and male and lawyers’ (Scheppelle, 1989:2084). In this respect, Griffith’s challenge to the political neutrality of the judiciary is likely still to exert a powerful hold on the imagination of the sentencing scholar.³⁰ The following extracts exemplify this outlook:

A central thesis of this book is that judges in the United Kingdom cannot be politically neutral because they are placed in positions where they are required to make political choices which are sometimes presented to them, and sometimes presented by them, as determinations of where the public interest lies; that their interpretations of what is in the public interest...is determined by the kind of people they are and the position they hold in our society; that this position is a part of established authority and so is necessarily conservative, not liberal.

(Griffith, 1997; 336)

When people like the members of the judiciary, broadly homogenous in character, are faced with such situations, they act in broadly similar ways. [...] behind these actions lies a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions.

(Griffith, 1997: 7)

Although Griffith does not use the terms ‘culture’ or ‘habitus’, some sense of that all-embracing use of ‘culture’ can be discerned in his characterisation of the judiciary’s ‘unifying mind: this identifies *both* a set of cultural ideas believed to be widely shared by the judiciary as a result of class and education, and uses this homogenous identity to distinguish the judiciary from other groups of actors. Conflating the two ideas in this way, Griffith employs a strong sense of a homogenous ‘judicial culture’.³¹

In similar fashion, and more topically in their comparative approach to penal systems, Cavadino and Dignan (2002) use the concept of ‘culture’ not only to denote a set of collective penal sentiments (defined as ‘socially determined feelings, emotions and attitudes’) attributed to groupings such as individual nations or judges, but also, in relation to judges, to signify a totalizing sense of ‘culture’. Here, the term ‘penal culture among sentencers’ is used interchangeably with ‘sentencing culture’, and a byword for assumed greater judicial punitiveness.

The judiciary and occupational culture

These examples of ways in which the concept of culture is used to signify a set of undifferentiated judicial attitudes throw into sharp relief the lack of research directed towards the judiciary as an occupational group; of the range of motivations, interests and attitudes which constitute their institutional life; of changes in disposition or outlook; or inquiry into the nature of their working relationships with each other – some sense of the dynamics and internal life of the organisation and of judging as an occupational role.

The concept of ‘judicial culture’ lies in the shadow of the broad school of judicial (as distinct from sentencing) scholarship.³² Scholarship which addresses questions of judicial appointment and training can be read as impliedly incorporating some element of judicial culture in this occupational sense, as can the longer established field of legal scholarship oriented towards political and constitutional dimensions of judicial work.³³ In sentencing research, however, there is scarcely any even implied orientation towards this sphere of activity.

This is surprising on two counts. At a general level, the cultural study of penal institutions might be expected to seek insight about how members of those institutions see their role in penalty and the social world in which they act. Relatedly, it is a surprising oversight given the strong research agenda suggested by recent analyses of transformation in penal sensibilities and culture. Some sense of the centrality of this question is gained from Garland’s (2001: 4) outline of this development, notable for its broad sweep and for the rare sighting of judges:

Within the brief time it takes to progress from basic training to mid-career, a whole generation of practitioners – probation officers, prison officials, prosecutors, judges, police officers, and criminological researchers - have looked on while their professional field was turned upside down. Hierarchies shifted precariously; settled routines were pulled apart; objectives and priorities were reformulated; standard working practices were altered; and professional expertise was subjected to challenge and viewed with increasing scepticism. The rapid emergence of new ways of thinking and acting on crime, and the concomitant discrediting of older assumptions and professional orientations, ensured that many penal practitioners and academics lived through the 1980s and 1990s with a chronic sense of crisis, and professional anomie.

This unsettling of the various professional fields in which criminal justice practitioners operated – albeit one in which at least some of these ‘deposed experts and displaced discourses’ continue to exert some influence (Garland, 2005: 168) – has generated much scholarly interest and some ethnographic study into the occupational penal cultures identified above, but little in relation to judges (or prosecutors).³⁴ Analyses of transformational shifts (and continuities) in penal values also often proceed without examination of the judicial values which play a part in those developments.

It is useful here to compare the trajectory of judicial occupational research with that of the other institutions forming the hegemonic superstructure in Hall *et al*'s *Policing The Crisis* (Hall *et al*, 1978). Grounded in a Gramscian analysis of the relationship between the institutions of the ‘state apparatus’ (here, the judiciary, police and media), this study provides an analysis of the creation of a moral panic by the amplification processes of judges, newspapers and police officers – an ideological circuit which named and defined the problem, and reinforced the others’ pronouncements. Although primarily concerned with the cultural politics of race in Britain in the 1970s, this study provides a classical analysis of the hegemonic role of the judiciary as an institution and in the sentencing process. In particular, it draws attention to the relatively closed and anonymous nature of what Hall *et al* call the ‘internal organisation of the judicial world’ – the habitus by any other name – as well as the rituals and conventions which help to shield it from public scrutiny, the judicial concepts (‘fictions’) of political neutrality and impartiality, the power of judicial homilies, the rituals and conventions which help shield it from public scrutiny, the presentation of consensus, and the important signifying function of sentencing remarks and other judicial pronouncements.

The trajectory of research interest in respect of the three institutions of the state in this study (judiciary, police and media) in the decades since its publication merits closer attention. In *Policing The Crisis* the authors suggested that in relation to the judiciary it was important to study:

...those processes peculiar to the *internal* organisation of the judicial ‘world’...individual differences of attitude and viewpoint between different judges,

and the informal processes by which common judicial perspectives come to be formed, and by which the judiciary orientates itself, in a general way, within the field of force provided by public opinion and official, political or administrative opinion....

(Hall *et al*, 1978: 33)

It can be observed that even the limited research agenda outlined here in respect of the judiciary awaits full achievement. Notably, cultural aspects of *policing* have been extensively researched, with the resulting insight that police culture is not monolithic: that occupational cultures such as these are shaped but not determined by the structural pressures of their environment; and that knowledge of the norms and values that inform their conduct allows scope for changing aspects of culture that may be considered problematic or resistant to change (Reiner, 1999).³⁵ In comparison, research about analogous dimensions of judicial culture seems still to be in its infancy, especially in relation to the judicial habitus.

Section 4 Judicial culture

There are insightful studies which address other aspects of the judicial role. For example, some conceive judging as ‘craftwork’ (Tata, 2007); understand the judge as part of the court community in which formal and informal rules, relationships, politics and constraints operate (Ulmer, 1997; Wandall, 2008); identifies the judge as performing a ‘social service’ function (Malleon: 1997) and the judicial role as involving an aspect of ‘emotional labour’ (Anleu and Mack: 2005); examines the judiciary as part of an institutionally located power network (Hutton, 2013); and in the context of changes in penal practice (McNeill *et al*, 2009). Studies which explore ‘court culture’ capture some of the important dynamics of judicial life, employing a strong sense of ‘culture’ to explore the informal norms and understandings of courtroom actors, and courtroom interaction and communications between penal actors (Ulmer, 1997; Wandall, 2005). The focus of many of these studies is directed towards processes *external* to the judicial habitus: to its relationships with other agencies and institutions, and in the collaborative processes of criminal justice.

It is suggested here that there is value in developing a more focused understanding of *judicial culture* as a field of inquiry. As a way of exploring this field, the

ethnographic study of lives and careers, routine practices and daily activities has the potential to provide greater insight about some of the social meanings and implications of the judicial role, and the lived experience of that role. This employs the concept of culture in both senses outlined by Garland (2006): to denote a range of values, meanings and dispositions of members of the occupational group, and also to distinguish ‘judicial’ culture from others in the penal realm – such as that of police officers, social workers, policy makers or politicians. Like the studies cited above, this approach is towards a sociological explanation of the judicial role in penal culture, and is in alignment with McNeill *et al* (2009) who call for the development of a more fully cultural penology drawing on ethnographies of penality.

Researching judicial culture

The attempt to research these dimensions of judicial culture encounters some of the ‘unavoidable imprecision’ and challenges posed by the exploration of a system or process in penality which operates through symbols, signs and rhetoric, namely:

...the difficulties of accurate measurement, the lack of reliable data, and the impossibility of isolating penal variables from other attitude-forming forces...

(Garland, 1990: 250)

As distinct from other more tangible or more easily identifiable aspects such as those relating to the appointment of judges or even to more measurable aspects of judicial behaviour in criminal justice such as patterns of sentencing, focusing on sensibilities and dispositions is, as Nelken observes, to engage at the extreme end of cultural enquiry with the ‘more nebulous aspects of ideas, values, aspirations and mentalities’ (2010: 49). For Geertz (1983: 6) this problem is as much about the challenge of the interpretive approach – what he calls the ‘practical difficulties in seeing things as others see them’ – as about the figurative nature of social theory:

To turn from trying to explain social phenomena by weaving them into grand textures of cause and effect to trying to explain them by placing them in local frames of awareness is to exchange a set of well-charted difficulties for a set of largely uncharted ones.

In the chapter to follow I address some of the ‘practical difficulties’ in adopting an interpretive approach to judicial culture, but I first outline some elements and orientations of a cultural approach to judicial lives and work.

An interpretive approach to judicial culture

All interpretive approaches have an essentially anthropological orientation to their participants. Geertz (1983: 22) explains it this way:

Interpretive explanation – and it is a form of explanation, not just exalted glossography – trains its attention on what institutions, actions images, utterances, events, customs, all the usual objects of social-scientific interest, mean to those whose institutions, actions, customs, and so on they are.

There are several implications of this understanding for the study of judges and their role in criminal justice. Firstly, although judges in their sentencing role can be regarded as *penal* and *moral* rather than *legal* agents, there is some value in being attentive to their own frameworks of meaning and how they orient themselves in legal and penal space. By virtue of legal education, training and experience, most judges (who by virtue of the appointment process are all senior members of the profession) are inclined to present themselves as lawyers as well as judges, and do not always distinguish their penal role from the civil dimension of their work. For judges, therefore, sentencing is a *legal as* well as a social practice. Moreover, although judges’ talk displays much of the ‘situational, adaptive, ‘fuzzy-logic’ of practice’ (Bourdieu and Wacquant, 1992: 226), it also tends to draw heavily on the legal doctrines which circumscribe and define their judicial role. To the extent that it is possible to distinguish between different orientations, there is value in engaging with the idea of *legal* as well as *penal* sensibilities when considering the normative claims made by judges for the legitimacy of punishment and its various practices, and also to accounts of their role in punishment, to the various categories of crime and the criminal they deploy and to the strategies they adopt to maintain them.

A more fully developed cultural approach to judges’ sensibilities, therefore, would place at the centre of enquiry the broader frameworks or structures of meanings which Geertz, writing about legal sensibilities, calls *epistemes*:

Our gaze fastens on meanings, on the ways in which the Balinese (or whoever) make sense of what they do – practically, morally, expressively.... juridically – by setting it within larger frames of signification, and how they keep those larger frames in place, or try to, by organizing what they do in terms of them.

(Geertz, 1983: 180)

The term *judicial sensibilities* therefore captures the way in which judges orientate themselves to legal as well as penal frameworks and categories of thought, and the distinct manner in which these dispositions are sometimes articulated:

Such sensibilities differ not only in the degree to which they are determinate; in the power they exercise, vis-à-vis other modes of thought and feeling, over the processes of social life.....in their particular style and content. They differ, and markedly, in the means they use – the symbols they deploy, the stories they tell, the distinctions they draw, the visions they project – to present events in judiciable form.

(Geertz, 1983: 175)

There is significant correspondence between some of the claims for a ‘cultural turn’ in the sociology of punishment and those in law and society scholarship: legal thought, for example, is constitutive of social reality in much the same way as penal discourse. There is also shared recognition of the need for historical and genealogical enquiry as ways of tracing patterns of thought, and for understanding the contingency of contemporary ideas – that law is not a neutral or objective set of ideas, though there is interest in the ways these claims are mediated (as Kahn notes, ‘judges cannot speak of a flat earth for too long after everyone else in the society understands the earth to be round’ (2003: 157)). The common proposition here is representation: law, as with all cultural forms, is ‘part of a distinctive manner of imagining the real’ (Geertz, 1983: 173).

Notwithstanding these commonalities, there is value in acknowledging the ‘determinate sense of justice’ which Geertz considers to be characteristic of legal sensibility usefully introduces the concept of the ‘legal imagination’, and which carries insight about ways of exploring it. As Kahn (2003) observes, judges (as lawyers) engage in a continual process of ‘reification and objectification’ of the doctrines and categories of legal analysis. Recognising the danger that the subject will be ‘swallowed up’ by law and its imperial claims, a cultural approach to law

places itself on the line separating ‘internal’ and ‘external’ accounts of law. This requires the researcher to engage with the internal, self-referential discourse while at the same time creating some critical distance and space for self-reflexivity (2003: 177). Lacey (2007) makes a similar point when she says there is value in taking legal doctrines seriously - as distinct objects of criminal justice knowledge and for what they can tell us about broader social and political issues. In this approach to legal discourse there is potential for gaining a better understanding of the tenacity of judicial doctrines such as independence and impartiality and the part they play in institutional responses to sentencing reform.

Judicial sensibilities: the scope of enquiry

The research agenda suggested by a cultural approach to judicial practice is broad and encompasses the kind of enquiry which is commonly the focus of qualitative sentencing research, namely the exploration of judicial attitudes and perspectives on a range of penal matters which might be expected to inform and shape the practice of sentencing. Drawing on the foundational elements of the sociology of punishment outlined above, there is potential for an even broader framework of enquiry. For example, recognising judges as ‘bearers’ of penal culture directs attention to the influence of their background, training and education on the development of their legal or penal sensibilities, and thus as a ‘key determinant of penal practice’ (Garland, 1990: 210). ‘Sensibilities’ can be construed in both their intellectual and emotional dimensions, extending beyond the articulation of perspectives on penal issues to include questions concerning the role of emotions in judging, and facilitating the exploration of subtle changes in the development of penal ‘manners’. It can also be attentive to the character and scope of changing judicial sensibilities, and also to the knowledges on which they draw and the discourses they use to articulate their accounts.

Local knowledge

Like sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge.

(Geertz, 1983: 167)

One of the consequences of the lack of qualitative research in relation to the judiciary is that there are gaps in the explanatory capacity of existing literature to document and provide insight about the changing political and social conditions of judging. In particular, we lack much sense of the judge as a socially or politically situated actor or as one with any emotional hinterland. One of the aims of this project, therefore, is to explore the Scottish dimension of criminal justice history, and the local and biographical contexts of these narrative accounts aid the exploration of matters relating to the distinct penal trajectory of this small jurisdiction. There is some debate about the place of 'local' and 'global' analyses in criminology, and the extent to which studies in local settings and of particular institutions or practices can throw light on broad structural patterns and developments, or whether they add merely local detail - and a converse debate as to whether those general analyses adequately capture local contexts of thought and action (Girling *et al*, 1999; Garland, 2001; Loader and Sparks, 2004; Garland, 2005; Garland, 2006).

Geertz (1983: 233), in his study of law in comparative perspective, points a way through this general debate:

We need, in the end, something rather more than local knowledge. We need a way of turning its varieties into commentaries one upon another, the one lighting what the other darkens.

This suggests the need for some dialectical movement between different contexts, and between the general and the particular, in order to fully realise the insights gained. The cultural approach to judicial life adopted in this project is therefore aimed not only at producing 'ideas of some local depth' but exploring them in ways which can also direct us towards 'some of the defining characteristics, however various and ill-ordered, of what it is we want to grasp' (Geertz, 1983:187).

Conclusion

Towards cultural explanation of the judicial role in criminal justice

In this chapter I have considered some of the common conceptions and representations of judging in criminological scholarship, and the place of culture in sentencing scholarship. I concluded that in contrast to research about most other

penal actors and their occupational culture, judicial scholarship tends to employ a conception of *judicial culture* as monolithic, unchanging and with little capacity for change. This is a significantly under-developed area of research and I identified several foundational elements of the sociology of punishment which hold potential for the development of a more fully cultural approach to the role of the judge in penal practice. These features would recognise the judiciary, like all penal institutions, as a complex organisation grounded in cultural values which shape the actions of its members and whose habitus and practices are the outcome of tension, conflict and compromise.

I then outlined the key features of *judicial culture* as a distinct field of penal inquiry. A more fully cultural approach would recognise not only those characteristics which suggest homogeneity and settled practices, but would also be alert to changes in judicial sensibilities and to the wider range of motivations, interests and attitudes which are likely to constitute the judicial habitus. As with other occupational penal cultures, the study of judicial culture would be interested in the *unsettling* of professional fields that has occurred alongside recent transformational shifts (and continuities) in penal practice. To this extent, the cultural study of the judiciary is an account 'rather entranced with the diversity of things' (Geertz, 1983: 232).

The full ambit of this research agenda is beyond the scope of a single research project, but the aim of the more limited enquiry into judicial culture here is twofold: firstly, to provide contextual and historical detail of judicial lives in Scottish criminal justice history and secondly, to provide insight about the changing sensibilities of a group of penal actors whose connection with broader social and political commitments or developments is often obscured by the ideological imperatives of their role. In the chapter to follow, I set out the empirical framework of the narrative study of judicial life and provide an overview of the narrative research approach.

¹ In England this was partly due to the very restrictive understanding of the public role of the judge expressed in the Kilmuir Rules, as well as the resistance of successive Lord Chancellors to social science research into sentencing processes. See Ashworth (1995; 2003); Baldwin (2000); Hughes (2000) for discussion but also Pierce (2002) for a different perspective in Australia.

² See Hughes (2000) for an account of that period, and Pierce (2002) for insight about the more recent Australian context.

³ Parry (2010) notes tentative signs of ‘strategic’ academic interest in legal biography with the recent establishment of a ‘Legal Biography Project’ at the London School of Economics and of a ‘Women’s Legal History Biography Project’ at Stanford University Law School.

⁴ American judicial biography is a substantial genre which contains elements of this first writing tradition but more generally leans closer to the second orientation. Reflecting the role of the US judiciary in upholding the constitution, studies in this field tend to take the form of specialised intellectual histories of Supreme Court judges, evaluating their individual (and occasionally collegiate) contribution to the development of law. This form has a definite ‘interiority’ and inward focus, the outside world being viewed through the framework of the subject (Girard, 2003).

⁵ Girard (2003) makes no separate reference to Scottish biography in his account of contemporary legal biography, nor does he cite any Scottish studies. Contributory factors in the decline of legal biography more generally include scholarly revolt against the heroic Victorian style of judicial biography, employed to convey greatness and famous for its sentimental idiom (Parry, 2010: 212). There may be little demand now for these ‘edifying role models’, and there are possibly few judges considered by legal scholars to have led sufficiently interesting lives or whose contributions to the development of law are deemed particularly significant (Girard, 2003).

⁶ See Osborne (1997) on Lord Braxfield; Bell (2005) on Lord Cockburn; Michie (1997) on Sir Archibald Allison.

⁷ See for example, Smith (2011); Brand (1995). The autobiography of Sheriff Irvine Smith (2011) represents an account of his early childhood and family life, his life-long interests in music and after-dinner speaking, his career at the Scottish Bar and finally his life as a Sheriff. It appears to be intended for a popular rather than scholarly or exclusively legal audience.

⁸ Girard (2003) cites works which explore the lives and careers of judges in Australia, New Zealand and Canada and provide insight about their imperial and colonial history; and English studies which contribute to our understanding of political and social dimensions of the Stuart age.

⁹ In this account, judging entails the process of ‘cognitive framing’ through which categories of thought and perception are filtered; there can be no unmediated perception of thought and the process of judging is necessarily influenced by social categories. I return to Tamanaha’s model of judging in later chapters.

¹⁰ These studies can be located as part of broader developments in law and society scholarship. See Berman (2003) for an overview of US studies.

¹¹ This was the moment of EP Thompson’s famous conversion to the rule of law.

¹² The frustration of the sentencing scholar is palpable. Decades of scholarship searching for the holy grail of sentencing – a rational and causal explanation of judicial behaviour – seem mostly to confirm (1) that judges are complex actors whose motivations and thought processes do not lend themselves to causal or scientific analyses aimed at predicting behaviour and (2) that they are human actors who are inevitably influenced, in varying degrees, by personal and social factors and by political and public pressures. US studies suggest that politics have much less influence than expected (Tamanaha, 2010).

¹³ See Garland (2006) for an overview of the range and scope of cultural analyses in the field.

¹⁴ The symbolic and cultural dimensions of the judicial role receive greater attention in the largely US body of scholarship known as legal studies/cultural studies/critical legal studies (see for example Kennedy (1997); Kahn (2000); Sarat and Simon (2003)). Reflecting the particular constitutional position of the judiciary in the US, and certain cultural and political commitments, this body of work

focuses principally on the civil (adjudicatory and appellate) functions of the judiciary with scant reference to their functions in criminal law.

¹⁵ The first dimension of this constitutive interplay between punishment and culture – the notion that culture shapes the form of punishment practices – seems readily apparent, even ‘hopelessly self-evident’ (Garland, 1990: 249), though the task of tracing and analysing the sources, influences and multiple variables of this causal process presents considerable challenges. It is the second generative aspect of this two-way process – the extent to which penal practices and discourses shape the pre-dominant culture – that is given such novel and illuminating force in his earlier work (1990) yet has generated most debate.

¹⁶ On this understanding, cultural sensibilities, however socially constructed, are experienced at the individual level but feed into culturally shared patterns of thought.

¹⁷ In his earlier articulation of a sociological approach to the study of punishment, and especially when urging its cultural significance, Garland cautioned against singular interpretations of penalty, insisting that the logic of the argument should lead to ‘multiple causality, multiple effects, and multiple meaning’ (1990:280) in the interpretation of penal policy and practice. His later ‘Culture of Control’ thesis has generated extensive debate about the extent to which the penal practices in question are settled, and about the role of on-going conflict and tension in the field (see O’Malley, 2000; Matravers, 2005; Loader and Sparks, 2004; Garland, 2005).

¹⁸ In the post-war era, these humanist approaches increasingly took the form of biographical and person-centred enquiries. The affinity of an interpretive approach to penal culture with narrative research is discussed in the following chapter.

¹⁹ This understanding of the cultural embeddedness of crime control strategies, criminal justice and political responses to questions of social order also forms the basis of much recent comparative criminological study (Pakes, 2004; Nelken, 2010; Melossi, Sozzo and Sparks, 2011).

²⁰ In the sociology of punishment, these are understood as even broader categories than the ‘shadows lurking behind the case’ on which Foucault believed a case was truly judged and punished: the ‘passions, instincts, anomalies, infirmities, maladjustments, effects of environment or heredity’ (1977: 17). In this broader conception, penalty communicates messages about fundamental moral and political values: ‘power, authority, legitimacy, normality, morality, personhood, social relations’ (Garland, 1990: 152). As Melossi observes, the various penal processes and techniques of assessment, classification and rhetoric produce a kind of ‘gazette of morality’ (2008:6).

²¹ Garland argues that the ‘old’ and ‘new’ penologies represent ‘two *adjacent* positions in a common field of instrumental penalty’ (1997: 203, emphasis in original). See also Zedner (2002) and van Swaaningen for discussion of the co-existence of these trends (1997).

²² In relation to penal sensibilities, this suggests a shift in ‘analytic gear’ from a Durkheimian and Eliasian understanding of the expressive function of punishment (and its boundary affirming role), to one placing greater emphasis on the emotional aspect of criminal justice processes and strategies (Hudson, 2005:54). This tendency towards the greater ‘emotionalization’ of law is manifested *inter alia* by expressions of vengeance, disgust and shame in penal discourse and practice (see Sarat (1997), Karstedt (2002) and De Haan and Loader (2002). For comparisons of the ways in which different political cultures shape national sensibilities about punishment see Downes (1988); Newburn and Jones (2005), Pratt (2007) and Green (2008).

²³ Bourdieu expresses it thus: ‘Symbolic acts of naming achieve their power of creative utterance to the extent, and only to the extent, that they propose principles of vision and division objectively adapted to the pre-existing divisions of which they are the products.’ (1987: 839)

²⁴ Abstracting the sentencing function of judges from judicial decision-making generally is a pragmatic division of labour in an otherwise unwieldy area of research, but re-locating it briefly within its broader context allows reflection on the common interest in judicial decision-making as representing cultural frameworks of meaning.

²⁵ This is a vast body of research, and no attempt is made here to provide a comprehensive account of the field. See Ulmer (2012) for a useful overview of developments in the US field.

‘Judge characteristics’ do not constitute the sole focus of this research, and attempts to predict and model sentencing patterns extend not only to racial and ethnic variables, victim characteristics and other court processes but to socio-political factors such as local religious culture (Fearn, 2005); neighbourhood disadvantage (Wooldredge and Thistlethwaite, 2004); crime rates (Ulmer *et al.*, 2007; Weidner *et al.*, 2004); crime rates and political climate (Helms, 2009).

²⁶ See for example the ‘focal concerns perspective’ research which directs its attention to the ‘substantive rationalities’ of criminal justice decision-making. Recent work narrows the areas of focus to blameworthiness, protection of the community, and practical constraints (Steffensmeier, Kramer and Streifel, 1993; Savelsberg, 1992; Steffensmeier, Ulmer and Kramer, 1998; Kramer and Ulmer, 2009).

²⁷ In its 2006 Report, recommending a system of guidelines, the Sentencing Council proceeded on the basis that there was ‘plentiful anecdotal evidence’ of inconsistency, though noting that research to establish this was ‘virtually non-existent’ (Scottish Government (2006)). Recent US studies found only modest inter-judge variations, largely explained by case and defendant characteristics (Johnson, 2006; Anderson and Spohn, 2010). There has been little research into disparities in Scottish sentencing. The most recent was carried out by Tata and Hutton (1998); the main finding was broad consistency.

²⁸ Judicial scholarship, as opposed to the narrower field of sentencing research, is represented by a very large body of inter-disciplinary literature, in which law, psychology, sociology, anthropology and economics are the most prominent disciplines.

²⁹ See endnotes (4) and (5) above. It is commonplace for legal and socio-legal scholars to note that there is insufficient research on the judiciary and the judicial process, and to call for further empirical work, particularly studies involving interviews with judges (Ashworth : 2003, Kibble: 2008, Warner: 2006). Legal scholarship has generated extensive doctrinal work on dominant legal concepts such as judicial independence, rule of law and separation of powers in relation to constitutional and administrative law but with little insight about their relevance to criminal law and practice.

³⁰ Griffith’s book has a broader application beyond the overtly political aspects he cites in relation to civil and constitutional law. His definition of ‘political’ includes ‘cases which touch important moral and social issues’ (7) and in the preface to later editions he notes the increasingly contested place of sentencing in judicial life.

³¹ In similar vein, a more recent account of the judiciary characterised it as ‘the best defended bastion of class privilege, restrictive practices and white, male domination.’ (Wilson and Ashton, 2001). Many of these issues are relevant to sentencing, raising questions about judicial impartiality, diversity and unrepresentativeness, but are often less than fully explored in the sentencing context, despite the increasing availability of data and the emergence of a body of scholarship addressing these issues (see for example Thomas, 2005; Judiciary of England and Wales, 2010; Boyd *et al.*, 2010).

³² There is occasional reference to ‘judicial culture’ in legal scholarship where it is used to explain specific legal doctrines such as *certiorari* (Lax, 2003) or in relation to specific spheres of judicial activity such as therapeutic jurisprudence (Popovic, 2003); mediation (van Epps, 2001); or European jurisprudence (Ashworth and Player, 2005).

³³ See endnote (19) above.

³⁴ Though see Fielding, 2011. In relation to probation officers, see Robinson, 1999; McNeill, 2000; Clear, 2005; Matthews and Hubbard, 2007: for prison officers see Crawley, 2002; Crewe, 2006; Liebling, 2011; for police officers see Chan, 1996; Reiner, 2010; and for criminological researchers see Loader, 2006; Loader and Sparks, 2010.

³⁵ The enduring legacy and significance of *Policing the Crisis* is reprised in a series of essays in *Crime, Media and Culture* (2008; 4) and although writers note in passing the ideological hegemony and significance of the judiciary in Hall’s study, the eclipse of the judiciary in their contemporary

focus is quite striking. Garland, for example, notes that *Policing the Crisis* remains an exemplar in its 'range, ambition and predictive insights about Britain's drift to a law and order society', but in his commentary focuses on the activities of actors in the media, the police, the government and the public without any reference to the judiciary. In the same issue see also Clark and Jefferson.

Chapter 3 The Narrative Project

Introduction

In the preceding chapter I considered the ‘cultural turn’ in the sociology of punishment and the elusive place of culture in sentencing research. Although much work in the sentencing field impliedly addresses cultural dimensions of judicial work, the concept of *judicial culture* has value in designating a discrete field of inquiry encompassing not only the ‘ontological stuff’ of values, meanings and perception but also the daily routines, institutional practices and occupational dynamics of judicial work.¹

Conventionally, sentencing research employs structured or semi-structured interview methods to speak to judges and enquire about their work. This is an approach often pragmatically aimed at gaining judicial perspectives – statements of position - on specific issues of penal policy and practice. However, the cultural agenda outlined above suggested the value of a research approach capable of orientation towards the exploration of sensibilities and dispositions as well as perspectives, and more likely to generate contextual accounts of judicial life and practice.

Narrative research is an interpretive approach concerned with the personal stories or narratives which people use to communicate meaning and knowledge in the social world, and is aimed at eliciting reflective accounts of personal experience. Although there are many forms of narrative analysis, they share an interest in the close reading of the contexts in which narratives are (co)produced, as well as attentiveness to the particular frameworks of meaning employed by individuals in the telling of those stories. The particular value of this approach for the study of judicial culture is the focus on ‘human subjectivity and creativity, on the way in which individuals respond to constraints and experiences’ (Plummer, 2001:3).

In order to explore some dimensions of judicial culture and habitus, I conducted a series of biographical narrative interviews with a group of retired Scottish Sheriffs and judges. The initial parts of the interviews were orientated towards the participants’ judicial lives and careers, and in most cases broadened into more

general discussions about their experience on the bench and about sentencing practice. In subsequent chapters I use narrative research methods to interpret the accounts given and to re-engage with some contemporary debates in the field.

Some of the research participants were known to me through my former career in law. This career involved four years as a Reporter to the Children's Panel and a much lengthier period as a prosecutor in the Crown Office and Procurator Fiscal Service. During this period of time I had formed long working relationships and friendships with a number of Sheriffs and was still in contact with several. Other judges were introduced to me through mutual acquaintances, and a smaller number responded to an invitation to participate. These shared associations raise important questions about their effect on the research relationship and the interpretation of accounts, and are considered in this chapter.

This chapter is in three parts. Section I provides detail of the empirical framework of the project, about the scope and format of interviews, and discusses the interpretation and analysis of accounts given in interview. Section 2 provides an overview of the narrative research approach, a working definition of 'narrative' for this study, and discussion of the functions which narratives may serve for individuals and for institutions. Section 3 outlines an interpretive position for judicial narratives based on the hermeneutics of faith and suspicion.

Section I The empirical framework

In qualitative research, issues about understanding and interpreting accounts given in interview and about anonymity, confidentiality and ethics are part of the tensions and dynamics in the structure of any research relationship, but additional questions also emerge from the particular interaction between the researcher and participants. Following Bourdieu (1999), I consider these to be simultaneously practical and theoretical problems, and approach the discussion in that spirit: to make clear both the 'intentions' and the 'procedural principles' of the research project as they evolved.

The genesis of the 'Judicial Narratives' project

This study of the lives and careers of judges evolved from some earlier professional interest in the public performance of the judicial role and the private resolution of its various challenges, both of which I had observed at first hand in legal practice. Several assignments in the course of a Master's degree presented the opportunity to interview judges, and I took up the suggestion of an elderly retired sheriff with whom I was still in contact that I should 'talk to the old judges' (including himself). This proposal usefully circumvented what would otherwise have been a lengthy, and not necessarily successful, process of applying to the judicial authorities for permission to interview serving members of the judiciary. Moreover, the age and career stage of the judges in question – judge and sheriffs who were in practice and on the criminal bench in the second half of the twentieth century - usefully foregrounded the role of the judiciary in this period of Scottish criminal justice history. This was a dimension of penological history which seemed to lack much documentation in the criminological literature.

My experience of interviewing the first two retired sheriffs proved instructive in several unexpected ways and was to frame the development of the much larger project which forms the basis of this thesis. Firstly, I was struck by the readiness of these individuals to participate, and their engagement with the topic. This appeared to be connected to their recently retired status in so far as they seemed to welcome the opportunity to reflect on their judicial lives and careers. Secondly, although I had not purposefully adopted a narrative approach to interviewing in these early interviews, my connection with the sheriffs and knowledge of their careers created an interview setting which seemed naturally to gravitate towards explorations of criminal justice history and practice grounded in their personal accounts of their careers. This embryonic interviewing approach led to a more purposeful interview process which drew explicitly on narrative research.

Relatedly, my early interviews alerted me to some pitfalls in interviewing these retired practitioners. In these first interviews I had steered conversation to the topic of 'penal populism' and invited the sheriffs to talk about their own experiences of

this era. Although each had attempted to respond in these terms, my clumsy interviewing approach provided the insight that having theorized the topic prior to interview in terms which made sense to me and my study, I had made the mistake of giving the participants the concept and asking them to talk to it, rather than allowing them to narrate it in their own terms.²

Research participants: the judges

Although gaining access to judges for the purpose of research is often challenging, the selection of participants for this research project was achieved without difficulty. The first group of participants consisted of two retired judges who I knew from legal practice, and to this number were added three others who were suggested by one of the first group. This small participant group was significantly expanded when I attended the annual conference of the Scottish Association for the Study of Offending in 2009, and met a former senior colleague from the Crown Office, now a Sheriff. On hearing about my PhD research project and my plans to enlist other retired sheriffs and judges, he introduced me to several retired High Court judges attending the conference. He also offered, in his capacity as office-bearer for an association representing a significant proportion of Sheriffs, to ‘put out the call’ for more volunteer research participants. Over the next few weeks this produced a steady stream of emails from volunteers responding to his request for participants for my research project.

Within a short period of time this series of introductions, in classic ‘snowballing’ fashion, placed me in the fortuitous position of having more volunteers for my research than I would need or be able to accommodate.³ Some selection had to be made in order to limit the group to a manageable geographical location and size, but the problems often associated with ‘snowball samples’ – that they are self-selecting and biased and do not allow researchers to make generalizable claims (Griffiths *et al*, 1993) - did not present a challenge here because of the individual life history and case study nature of the project. Moreover, the demographic profile of this group of retired judges meant that only a very small number of female judges formed part of the group, and in any case had been approached separately by me. In this context, the

self-selection of a group of male judges presented no significant problem, there being few other relevant criteria for inclusion.

However, with this embarrassment of research riches came some sense of heightened personal accountability or investment in my research relationship with the participants. It was evident, in both the face-to face introductions with judges at Peebles and through the email responses of the volunteer sheriffs, that this way of recruiting participants relied heavily on two factors: firstly, the personal recommendation of a senior legal figure who had worked with me over a long period of time – a personal vouchsafe; and secondly, on my perceived status as a legal insider. Additionally, I knew several of the participants well. Taken together, these factors might suggest a raised level of trust and potentially some conflict with my role as an independent researcher. I address this issue more fully below in the context of discussion about the relational dynamics of interviews, and in substantive discussions about the interviews in later chapters.

The final group consisted of 12 participants, the majority of whom were retired sheriffs and a small number who were retired High Court judges. The female members of the group were in a small minority.⁴ The age range of participants was 65 to 86 years.

Anonymity, confidentiality and identifiability

In my initial correspondence with each judge, and before any interviews took place, I explained that the details of their involvement in the research project would be kept confidential and that I would anonymise their details in any publications. I discussed the more difficult issue of their identifiability, the possibility of which could not be discounted since they were members of a tight-knit legal community in a small jurisdiction. The most likely way in which this would occur was being identified through biographical details or in the narration of specific events in particular locations that could be tied to them as individuals.

I explained that there were some steps I could take to minimise this possibility. For example, in the case of the female participants, a group which was particularly susceptible to inadvertent identification because of their very small number, it was

possible to render their accounts in the masculine pronoun. This strategy would not be effective where their accounts related specifically to their experience of being female judges, but having raised this issue prior to interviews, some care was taken with details which could identify them. On occasion, both male and female judges requested after interview that I withhold certain details which could identify them or their families. Although some participants declared they had no need of anonymity, I decided to anonymise all accounts for the sake of overall coherence; also, in view of the small size of the overall group, to avoid having an even smaller and thus more identifiable sub-group.

Disconcertingly, I discovered from the start that participants sometimes relinquished their *own* anonymity by sharing information about their participation in the project with others. I became aware in the first two interviews I conducted that each participant had somehow ascertained the identity of the other, and was using the knowledge to make coded references to their very different judicial styles and sentencing approaches.⁵ As the project expanded to its current size, this was a problem which bedevilled the study without any real resolution.

To an extent, the use of ‘snowballing’ as a means of gaining access to participants was an obvious source of identity ‘leakage’, even though I was careful not to disclose to the originator whether any ‘referred’ individuals had subsequently taken part in the project. Some participants were openly curious about the identity of the larger group, and (unsuccessfully) engaged in some gentle prodding and mischievous attempts to ascertain their identities. Nonetheless, it quickly became apparent that the existence of various post-retirement networks and friendship groups had facilitated the sharing of a certain amount of information about my research project.⁶ Some were quite direct about this; for example, informing me that my research had been the subject of conversation at the funeral of one of their colleagues; another telling me that the subject had ‘come up’ at a retirement dinner for a sheriff.⁷

Despite my discomfort at some of the implications of this self-disclosure – the narrowing of the group by the identification of some certainly increased the chances of accidental disclosure of identity of others in the event of publication – I had to accept that it was the right of any participant to voluntarily concede their own

anonymity, and as the project developed it was, in any event, a matter over which I had little control. Moreover, this sharing of information was perhaps an inevitable consequence of doing research with a small community whose informal networks remained intact post-retirement. In future research I would consider the merits of addressing the issue more directly with each participant before interviews began, in the interests of the larger group.

Informed consent

As well as discussing these issues about anonymity, I provided each judge with an outline of the scope of the research; in general terms, that I was interested in judicial accounts of Scottish criminal justice history in the late twentieth century period and that I wanted to explore this by way of open-ended interviews, drawing on personal accounts of judicial careers and experiences. I also indicated that I was interested to explore some of the personal demands and challenges of judicial life. As far as the likely time commitment was concerned, I suggested that I would need to interview each participant twice, with intervals of one or two weeks between meetings, and that each interview would last several hours. I proposed to record all interviews for the purposes of transcription. After discussion (usually by email) with each participant about these and other issues arising, I asked them if they were content to proceed on these terms; all consented. In light of these discussions, it did not seem necessary or appropriate to formally record their agreement in a written document.

However, the researcher's satisfaction at having secured consent to relatively explicit terms of engagement such as these can only ever be partial if the contingent nature of ethnographic or interpretive research is properly acknowledged. Josselson (2007:545) explains the predicament in this way:

The nature of the relationship that develops in narrative studies is emergent and cannot be predicted at the outset, and here lie some of the murkiest and most subtle of ethical matters, realities that cannot be made explicit. People can give informed consent to participate in the *research* project, but they cannot give prior consent to participate in an open-ended *relationship* that is yet to be established. (emphasis in the original).

By its very nature, this is probably an unresolvable ethical dilemma, and is difficult to articulate or capture in any kind of consent prior to interview, whether or not in written form. Elsewhere, Josselson (2004:20) notes the difficulties which narrative researchers have in explaining to participants that they (the researchers) have the final ‘interpretive authority’. In particular, there is unlikely to be any resolution of the problem of participants feeling offended or invaded by interpretations beyond their own narrations or insights. Thus, while anonymity may protect confidentiality – though not necessarily in a small community – it cannot protect individual participants from any ‘narcissistic injury’ which may flow from the researcher’s analysis of their accounts.

The specific dynamics of the particular research relationship will also play a part in this ethical dilemma, particularly the extent to which the relationship is based (or perceived to be based) on trust. For the researcher, Bourdieu (1999: 1) makes the telling observation: ‘no contract carries as many unspoken conditions as one based on trust’. I return to this question later in discussion about the interpretation of narrative accounts.

Judicial narratives: a shared enterprise

On the morning of my first interview I received a telephone call from my interviewee wanting to know if I was listening to a news item on Radio 4 about the size of the prison population. ‘Turn it on’, he urged: ‘this is what I want to talk to you about’. Another participant emailed in advance of our meeting to ask if I could direct him to a website with information about levels of drug offences. Several others turned up to interviews with hand-written notes to which they would sometimes refer, sometimes to introduce new topics or to follow on from previous interviews.

While possibly indicating the controlling tendencies of powerful actors, even in retirement, this sense of insistence in relation to certain topics and debates was observed frequently enough to suggest some eagerness, post-retirement, to engage in public debate about penal matters. Although I had outlined my research project with each participant, the open-ended nature of the narrative approach resulted in many purposeful digressions on their part, and several accounts are peppered with

directional comments to me, such as ‘Now, this is *really* important’ or ‘What I’d like to say is....’ or ‘This is the most important thing I can tell you...’. The form of this engagement suggested not so much individuals eager to take part in an exercise mistakenly perceived by them to be a ‘vanity project’ (many seemed less self-assured when it came to situating their own experiences more centrally and did so with some initial diffidence) but rather, some eagerness at ‘getting things off their chest’.

Interview framing and scope

I conducted thirty interviews in total, having interviewed each participant at least twice and some three times. Conducting a series of interviews with each participant, with intervals of several weeks in between, allowed time for reflection on what had already been discussed, and provided space for review or development of these conversations or to identify new areas of discussion. For the purposes of recall, I was certainly at an advantage in having the recorded interview to listen to before our second meeting, but it was quite common, at the start of the second interview, for the participant to initiate the conversation by following up or clarifying some matter which had been discussed at our first meeting.

The duration of interviews was variable and ranged from one hour to three, depending on the circumstances. Although there was a range of issues and ideas I wished to explore with each participant, all interviews were unstructured in the sense that I had no interview schedule and was prepared to let the conversation diverge from its initial orientation. I took no notes, but recorded all interviews. Several participants recorded the interviews themselves: one openly, at least two covertly. This somewhat militated against my general concern about the implied relationship of trust but did not entirely displace it.

Narrative interviews

If traditional interview formats tend to *suppress* rather than generate stories (Hollway and Jefferson, 2000) some thought requires to be given in advance to the particular interview setting and context which might more easily generate narratives.

According to Riessman (2008: 23) this requires significant change in interview practices and for researchers to give up some control:

The model of a 'facilitating' interviewer who asks questions, and a vessel-like respondent' who gives answers, is replaced by two active *participants* who jointly construct narrative and meaning.

Although most of the 'rules' of everyday conversation apply – taking turns, making points of significance, and 'entrance and exit' transition talk – generating narrative requires longer turn-taking if brief question and answer sessions are to be avoided. However, in so far as the interviews could be considered joint endeavours, or the accounts co-constructions, it was sometimes apparent that this enterprise was hindered by the more structured techniques of forensic inquiry and examination which the participants and I were familiar with, and to which the conversation sometimes defaulted. Undoubtedly, I had the advantage of gaining greater proficiency in unstructured interviewing skills over the course of the research project, but it was also apparent that some participants were uncomfortable with an unstructured interview format.

The first interview with each participant was aimed at exploring the biographical context of the judge's life and career, and I invited them first to tell me something about their life and legal career up to the point when they became a judge. I encouraged them to frame this in their own terms by explaining that I was interested in all the experiences or events which were important to them. Once that area had been fully explored, I steered the conversation to their judicial careers and invited them to tell me why they had sought appointment. From there, and depending on the flow of conversation over the course of both interviews, I would attempt to explore with each participant a range of topics relating to sentencing practice, and wherever possible, in the context of their own experience.⁸ This format often produced useful and interesting stories and digressions. However, as will be observed in the substantive discussions about the interviews, a small number of judges sought to control the manner or extent of their narrative engagement; on occasion, therefore, a more semi-structured format of question and answer was used to explore those or other topics.

Relational dynamics: judge and prosecutor

Although I had introduced myself to the participants (i.e. those I did not already know) as a researcher, and attempted to maintain a research relationship with them on that basis, our former occupational roles exerted some presence in the interviews. At the very least, as Andrews (2007:33) observes, the ‘tell-ability’ of stories is highly influenced by the level of familiarity between speaker and listener, and the researcher’s biography plays a part in this process.

The working relationships between judges and prosecutors are not only (or always) structural or hierarchical, and when they occur over long periods of working life are inevitably shaped by institutional, organisational and personal contexts. These contexts mitigate the extent to which the more rigid and hierarchical performance of court roles is mirrored beyond the courtroom.⁹ Other inter-professional hierarchies and positions – such as those relating to the separate solicitor and advocate branches of the profession and the corresponding rights of audience in different levels of court – affect spheres of influence and engagement in and out of court. Some hierarchical rivalries and tensions are therefore inevitable, reflecting the messy historical development, ‘practical interdependence’ and ‘muddled interactions of human agency’ which characterise systems and processes of criminal justice (Zedner, 2004; 20).

In a general sense, the research dynamics of these interviews support the view that judges are ‘alert to status’ and have a preference for being interviewed by individuals of similar status who are knowledgeable about legal work (Fielding, 2011). Additionally, some specific dynamics of the judge/prosecutor relationship could be observed in interviews where participants defaulted to subtle hierarchies and roles. One judge, for example, paused for clarification from me as he would have in court from the prosecutor - ‘Remind me please what the penalty is’ - before resuming his stream of thought. The manner of questioning by others was more in the manner of a joint enterprise. ‘Do we have Victim Impact Statements?’ asked one sheriff, while another wondered ‘What is the maximum fine level now?’ In other interviews, several participants (themselves advocates) alluded to what they perceived to be the

higher calling and greater independence of the advocate compared to a solicitor, and one later expressed the hope that no offence had been caused. In other interviews, several participants who were also former prosecutors made coded reference to individuals or events we both knew. Occasionally, this was to the detriment of the issues being explored since I discovered only later, on listening to the tape-recorded interviews, that I had failed to fully tease out the meaning of some comment for the benefit of readers unfamiliar with the context.

The narrative research relationship: 'positioning'

These and other dynamics of my research relationship with the participants were closely interwoven with each stage of the process, from the earliest point of making contact with possible participants, through to interviews and even beyond the project itself.¹⁰ These specific dynamics brought to the foreground several issues which neither the qualitative methods literature, nor interview-based sentencing research, squarely address.

Bourdieu (1999: 607) denounces methodological writings on interview techniques on the grounds that they misguidedly seek to introduce signs of external scientific rigour into the social sciences - and in any case, do not add much to the stock of knowledge which most researchers have about the 'infinitely subtle strategies that most social agents deploy in the ordinary conduct of their lives'. Narrative research offers no specific guidance for interviews, yet almost all texts on qualitative research methods, most narrative research writing and even much of Bourdieu's own work acknowledges the relevance of 'context' and 'positioning' in interviews. Most interpretive approaches also extend this focus to transcription, analysis and interpretation of interviews.

This is a debate about what levels of distance or engagement are suggested by the research relationship, and it follows that the nature of the conclusions reached – or the prescriptions given – depends on the epistemological position of the writer. Following the classical view that value-neutrality should be the social scientist's goal, conventional methodological texts approach the question of positioning or standpoint by way of the mechanical metaphor borrowed from the natural sciences,

whereby the researcher consciously positions herself outside the field in order to provide an objective account (Riessman, 2008). This stance represents the ‘positivist dream of an epistemological state of perfect innocence’ (Bourdieu, 1999:608).

Interpretive approaches challenge the pursuit of neutrality and share a number of assumptions about certain pre-existing, structural disparities between researcher and researched, employing hierarchical models of power and the language of symmetry (Kvale, 2006). Factors contributing to this asymmetry – most usually in the form of the researcher’s dominance - include the researcher’s competence in the particular field, their possession of greater cultural capital (Bourdieu, 1999), and the power which comes from instigating, framing and commanding the terms of engagement in the research relationship (Mishler, 1996; Bourdieu, 1999; Kvale, 2006).

The ‘elite’ model

The ‘elite’ interviewing model, on which much qualitative sentencing research in the US is based, reverses this assumption of dominance and warns of the ‘unequal power relations that lie in wait for researchers (Rice, 2010).¹¹ Here, the operative theory is that the powerful ‘elite’ participant has dominance by virtue of being in possession of specialized knowledge which the researcher seeks to elicit, and the literature contains a range of techniques and strategies to manage the challenges of ‘studying up’.¹² By contrast, most sentencing research in the UK and parts of Europe tends not to draw explicitly on any approach in relation to interviewing judges, and discussion of method often consists of brief descriptions of sample size, location and interview format.¹³ To some extent, the imprint of the elite model and its focus on ‘the influential, prominent and well-informed’ can be traced in studies of the UK judiciary, though many of these studies avoid the more problematic features of the elite model.¹⁴

Relationship ‘structures’

Other ways of capturing some of the relational dynamics of an interview include categorisation according to the characteristics of the researcher and their relationship to the organisation in question (Merton, 1972). Thus in the context of police

research, Reiner (2000) employs the categories *inside insiders*; *outside insiders*; *outside insiders*; and *outside outsiders*. Using this framework, my own position most closely resembles the *outside insider*, used to denote individuals who conduct research on an organisation after leaving employment in that institution and whose ‘inside’ knowledge and experience thereby presents them with unique advantages, but also some problems, compared to ‘complete outsiders’. However, this categorisation captures only some of the nuances of my position *vis a vis* the judiciary: the *insider* part of the attribution, for example, would apply at the level of shared legal background and experience in criminal justice practice, as well as common occupational history with judges who were formerly prosecutors. However, the attribution does not apply at the level of membership of the judiciary as an institution; there, I would be considered an outsider, though not perhaps a *complete outsider*.

Plato contrasted two different ways of looking at the world: that of the philosophers who ‘talk at their leisure in peace’, and that of the ‘rhetors’ speaking in the courts who ‘are always in a hurry, for the water flowing through the water-clock urges them on’. Bourdieu (1977) draws on this distinction to illustrate the distance between the scholar/philosopher and the practical agent/rhetor in the field, which is manifest in the research encounter – particularly in the ‘outsider-orientated discourse’ of the practitioner. As indicated above, it was sometimes possible in interviews to observe at play some of what Bourdieu (1999: 608) calls the ‘objective structures’ which constrain social interaction – in this case, professional hierarchies, though other factors may be differing amounts of social or cultural capital held by researcher and researched - and which are captured by Reiner’s model. However, beyond these structures and typologies, both Bourdieu (1999) and Reiner (2000) emphasise the importance of reflexivity on the part of the researcher about possible biases and influences in the research relationship.¹⁵

Reflexivity in the research relationship

Along with other interpretive approaches such as ethnomethodology and ethnography, and strands of feminist research, narrative research displaces some of

the assumptions about objectivity, distance, power and positioning in conventional qualitative and 'elite' literature by reflecting on some broader 'relational dynamics' (Hollway and Jefferson, 2007: 85) of the research relationship. These approaches introduce questions about involvement, subjectivity and reflexivity, and replace some simple hierarchies of position and static conceptions of power with an acknowledgement of the different ways in which researcher and participant are multiply positioned. Much feminist work, in particular, is concerned with ethical positioning and responsibility in the research relationship (Oakley, 1981; Maynard and Purvis, 1994; Platt, 1981). Narrative research positions the researcher as *part of* the field and unlike 'objectifying and aggregating' forms of research, understands the relationship as a relational undertaking (Josselson, 2007). Relatedly, the narrative account is regarded as co-produced:

... we are never the sole authors of our own narratives; in every conversation a positioning takes place [...] which is accepted, rejected, or improved upon by the partners in the conversation.

(Czarniawska, 2004:5)

Biography in the shadow

Josselson (2007:11) observes that personal familiarity or knowledge of experiences or situations may place the researcher in a privileged or advantaged position when it comes to interpreting accounts.¹⁶ She suggests questions such as these are prompted: 'What are the shared social locations and assumptions? Where are the points of discordance or strangeness?'

In *The Weight of the World* (1999), Bourdieu advocates the formation of research relationships purposefully built around certain 'homologies of position' between the researcher and the participant. The aim is to reduce as far as possible the *symbolic violence* which is caused to any research relationship by virtue of its cultural asymmetry. In order to minimise these 'intrusion effects' and aiming to bring the relationship as close as possible to its 'ideal limit', he suggests that 'social proximity and familiarity' between the participant and the researcher provide two of the conditions of this form of 'non-violent communication'. These can offer the basis of

‘real affinities’ in the relationship and minimise the risk of the participant being ‘objectified’ in the final account – or at least, indicate to the participant that the researcher, by virtue of these affinities, is also being objectified (1999:610).

In the interviews forming the basis of Bourdieu’s study (1999), the researchers were encouraged to choose participants to whom they were ‘socially very close’ i.e. sharing almost all the characteristics capable of understanding and explaining their respondents’ ‘practices and representations’. Examples of these ‘optimal conditions’ include a young physicist interviewing another young physicist, or an unemployed person interviewing another unemployed person (1999:611). Bourdieu considered that these situations of close familiarity allowed the researchers to ask questions which emerged from their own dispositions, ‘objectively attuned to those of the respondent’.¹⁷

Bourdieu’s approach privileges research relationships constructed around very close ‘homologies of position’ and to this extent my own insider/outsider status *vis a vis* the judiciary could be regarded as ambiguous, and the implications for the research relationship unclear. It may be, however, that this ambiguity introduces a useful amount of ‘distance’, facilitating Geertz’ (1983) aim of rendering familiar the unfamiliar and vice versa. In this context, knowing *less* about the judiciary than a ‘complete insider’ may serve a useful purpose:

Researchers must become sufficiently acquainted with the social and cultural world of their participants to be able to engage appropriately in interaction with them. This means knowing enough about their mores and expectations so as not to appear rude, insensitive, or intrusive - but knowing little enough to be able to inquire deeply about those aspects of the world of the participant one wishes to learn about. (Josselson, 2007:547)

Section 2 Narrative Research

One of the interpretive goals of the cultural approach to the judiciary adopted here is to gain greater understanding of how judges make sense of what they do, and the larger ‘frames of signification’ they use to communicate this: ‘the symbols they deploy, the stories they tell, the distinctions they draw, the visions they project’ (Geertz, 1983:175). An important focus of this research project is therefore the

‘stories’ which judges tell about judicial life and practice, as well as the ‘visions’ they project. Narrative research is concerned with the personal stories or narratives which people use to communicate meaning and knowledge in the social world, and is aimed at eliciting reflective accounts of personal experience.

The narrative turn

Contemporary narrative research is the product of a number of parallel and sometimes overlapping developments: post-war humanist approaches to the study of social life; the ‘reflexive turn’ in the social sciences; and post-structuralist, postmodern, psychoanalytic and deconstructionist movements (Andrews *et al*, 2008; Denzin, 1989).¹⁸ Despite these divergent theoretical antecedents, there is a shared normative inclination towards the narratives of ‘the ordinary, the marginalized and the muted’ (Langellier, 2001, quoted in Riessman, 2008:17). Relatedly, there is belief in the emancipatory potential of narratives as ‘modes of resistance to existing structures of power’ (Andrews, 2008:4).¹⁹ Reflecting some of these ambitions, narrative research is advocated by some as an anti-positivist and humanist approach to the study of human behaviour and culture (Plummer, 2001; Bruner 1991), and by others less categorically as an alternative to structured or semi-structured interview formats, and hence a useful addition to the available repertoire of methodological approaches in the human sciences (Riessman, 2012).

As a result of the ‘narrative turn’ in social sciences, it is now a broad understanding in the human sciences that people order and make sense of their lives through narrative (Bruner, 1990, 2004; Freeman, 1993). Josselson explains it this way:

Hopes, desires, memories, fantasies, intentions, representations of others, and time are all interwoven, through narrative, into a fabric that people experience – and can tell – as a life history. Stories are the linguistic form in which the connectedness of human experience as lived can be expressed. (2004:2)

On this understanding, narrative is closely bound up with questions about self, identity and the search for meaning: ‘the implicit meaning of life is made explicit in stories’ (Widdershoven, 1993:2). One of the distinctive contributions of psychology

is to tie narrative even more closely to self and identity through the assumption that people not only express their lives through narrative, but create that identity through a continuous autobiographical process much like creating a story (Josselson, 2004). In this way, biographical ‘facts’ are not so much ‘told’ as *created*, since new and later events and experiences are liable to change understandings about past events. This framework captures the idea of social life as an enacted narrative; an ongoing and open-ended process which ends only with life itself (Bruner, 1990).

However, although narrative may be a ‘natural’ or instinctive form of expression, the telling of those stories should be understood as a process which is culturally and socially mediated. All narrative scholars observe that the stories people tell, and the stories which researchers hear, are influenced by cultural norms (Denzin, 1989; Riessman, 2008). For Riessman (2008: 183) this process is invariably ‘situated and strategic, taking place in institutional and cultural contexts with circulating discourses and regulatory practices, always crafted with audience in mind’. Consequently, narrative texts do not speak for themselves and cannot be regarded as ‘windows into the soul’. Scholarship in the field is thus directed towards the interpretation of narrative texts, and is a dialectic process, moving from text to meaning, and offering a re-telling or reconstruction of meaning.

The concept of narrative

Narrative is recognised as an instinctive and ancient form of cultural and self-representation, and most reviews of narrative research acknowledge the universality of the narrative form in cultural sites such as myth, history, tragedy, drama, comedy, painting, cinema, and conversation, and the pervasiveness of narrative in ‘every age, in every place, in every society’ (Barthes, cited in Sontag, 1982: 252).²⁰ However, the increasing popularity of narrative research methods has led to some scholarly unease about the boundaries surrounding the concept of narrative. Riessman (2008: 5), for example, observes the ‘tyranny’ of narrative in contemporary life in which the concept is reduced to a metaphor: everyone, it seems, has a ‘story’ which speaks for itself and needs little interpretation. Political actors and media commentators, alert to the salience of everyday ‘narratives’ in public life, strategically employ the concept

to advocate an ideological position of their own (Riessman, 2012). Also notable is the striking diversity of uses of narrative in popular culture, though Andrews *et al* (2008) point to some positive applications and interpretations.²¹ In the field of social science research, the extension of the concept of narrative to forms such as lists, objects and some visual material can also be controversial (Craib, 2004).

Most narrative researchers respond to this lack of specification by drawing their own boundaries around some narrative meanings-in-use, and by providing working definitions of the concept in particular research settings and contexts. This clarity is important because the definition of narrative which is employed will lead to certain other methodological and interpretive assumptions about the narrative texts in question. In this section I therefore outline a working definition of the concept of narrative for this thesis, and consider some implications for the interpretation and analysis of judicial accounts. Riessman (2012) observes that the methodological assumptions and analytical strategies adopted by narrative researchers tend to follow disciplinary backgrounds. However, the limited range of narrative research in criminology and criminal justice scholarship makes any such pathways or frameworks less obvious for this project. The approach followed here is therefore adapted for the study of judicial narratives and framed within some of the parameters and debates relating to their work in penal practice.

Definition of 'narrative'

For narrative scholars, 'all talk and text is not narrative' (Riessman, 2008:5). The first generally accepted criterion of narrative is contingency: text which contains contingent sequences, linking ideas and events. Another related criterion is the ordering of the narrative sequence into some meaningful pattern or structure, most usually temporally and spatially though sometimes thematically or episodically (Andrews *et al*, 2008; Riessman, 2012). These features distinguish narratives from other texts which are merely descriptive or theoretical, such as reports, statements or simple question and answer exchanges (Riessman, 2008).

Further, some narrative researchers draw a distinction between *story* and *narrative*. In this context, *narrative* represents the overarching, general class of discourse encompassing a variety of forms containing the key elements outlined above; and *story* represents one of those types of discourse in a specific sociolinguistic sense – passages of text held together with some minimal level of ‘plot’ i.e. an element of disruption to the normal or expected pattern of events followed by resolution (Czarniawska, 2004; Riessman, 2008, 2012). To illustrate the contingent element of a ‘story’, Czarniawska cites Harvey Sacks’ famous use of emplotment sequences. In this example, the first part - ‘The baby cried. The mommy picked it up’ - requires completion by a third sentence - ‘The baby stopped crying’ - in order to qualify as a story (2004: 19).

While acknowledging these distinctions between narrative and story, many narrative scholars use the concepts interchangeably (see for example Frank, 2000; 2002; Riessman, 2008). However, Frank cautions that people do not tell narratives: they tell stories. In this way, although narrative analysis can uncover interesting structures and meanings of which the storyteller was largely unaware, there is a danger that in doing so, narrative analysis may overlook the central importance of the story to the teller (Frank, 2000:354).

Beyond these preliminary understandings, the concept of narrative is used in diverse ways. These range from the linguistic analysis of an isolated unit of discourse, such as a single response to one question, to the interpretation of whole life stories gathered from a variety of textual forms. Narrative projects based on interviews come within the middle range of this continuum, involving ‘long sections of talk - extended accounts of lives in context that develop over the course of single or multiple research interviews’ (Riessman, 2008:6).

Working definition of ‘narrative’ and ‘story’

Within this general theoretical framework it is possible to identify three principal types of narrative dialogue which emerged from the interviews conducted with judges in this project; these different forms point towards some working definitions

for the discussion to follow. The first type of dialogue, representing the greater part of most interviews, can be considered *narratives* or *narrative accounts* in the general sense referred to above: long sections of talk about lives and careers, linking ideas and concepts about the subjects under discussion.

These extended responses sometimes generated a second additional type of dialogue in the form of *stories* as outlined above, namely contingent accounts illustrating the point the narrator seeks to make, usually rich in detail and context. On occasion these stories occurred unexpectedly or seemingly as a digression from the main topic under discussion – sometimes only later on review emerging as more central to the discussion. As Riessman (2008:24) observes, the attempt to generate extended narrative accounts in interview requires the researcher to cede control over some of the direction of the interview – ‘following participants down *their* trails’ - and introduces a degree of uncertainty into the process.

Reflecting this unpredictable element, I identified a third type of dialogue in several interviews. These were responses which appeared to be purposefully abbreviated and truncated by the participants, rendering the exchange more akin to a formal question and answer discussion. Here, the impression was sometimes gained that the participant was closing down narrative engagement and substituting a more formal interview relationship. I discuss the contexts of one of these ‘avoiding accounts’ (Czarniawska, 2004: 54) in Chapter 7.²²

These three styles of narrative engagement – narratives, stories, and ‘avoiding accounts’ – form the interpretive framework of this project. The different forms are not always clearly distinguishable in the judicial accounts, though participants themselves sometimes indicate the boundaries with ‘entrance’ and ‘exit’ talk (Jefferson, 1979), especially in relation to stories. Although some overlap or blurring of the categories is therefore inevitable, attempting to identify the various types of narrative discourse is relevant in relation to interpretations which may flow from the content. They may also be significant because of the different purposes being served by participants’ discrete sections of narrative talk.

The functions of narrative

The different purposes that narrative can serve merit further discussion here. In the early phase of social science narrative research, the primary focus of narrative interpretation and analysis was on narrative as text and on the content of narratives as straightforwardly descriptive.²³ By contrast, the focus of much of the ‘second wave’ of analysis is ‘narrative-in-context’, particularly in relation to the discursive achievements of narrative (Phoenix, 2008). This broader focus on narrative as the object of inquiry allows exploration of some of the performative dimensions of narrative and the uses to which narratives are put.

As Riessman (2008:8) observes, a narrative form of dialogue is employed by people because it achieves certain effects which other forms of communication do not: narratives are ‘strategic, functional, and purposeful’. However, this strategic use of narrative may not be a *conscious* act:

This is not to claim that the intentionality of narratives is always conscious and deliberate; the ends that are being achieved may be utterly obscure to those whose narratives they are. Rather, the claim is simply that narratives, as sense-making tools, inevitably do things – for people, for social institutions, for culture, and more.

(Freeman, 2002:9)

Riessman (2008) usefully identifies some of the key functions of narratives. The primary purpose which narratives serve is the building and on-going construction of identities: ‘Identities are narratives, stories people tell themselves and others about who they are (and who they are not)’ (Yuval-Davis, 2006:201). The next and more familiar function of narrative is its role in remembering the past, where individuals use narrative to unearth and re-evaluate memories and personal experiences. This partly autobiographical narrative function is now understood as a dynamic process in which people revisit and reconstruct past experiences in line with present identities and commitments. The stories which are generated in this way must also be considered deeply contextual since storytelling occurs ‘at a historical moment with its circulating discourses and power relations’ (Riessman, 2008: 8). Thus, narratives

will also tend to reflect cultural conventions about forms of storytelling and their intended audiences.

These first two functions – identity building and remembering - suggest some extra significance may be attached to narratives told in retirement. In broad terms, people are predisposed to tell stories at particular biographical and historical moments (Polanyi, 1983; Sandelowski, 1991), and in ways which help to create order and contain emotion (Riessman, 2008).²⁴ However, when Bruner (2004:692) observes that the meaning-making function of narratives helps us to structure experience and organise memory, he also draws attention to the constructed nature of life histories which means that the personal account of one's life is always 'an interpretive feat':

When somebody tells you his life ... it is always a cognitive achievement rather than a through-the-clear-crystal recital of something unequivocally given.

People also use stories to *argue and persuade*, summoning the necessary rhetorical skills to do so. The positioning of the narrator themselves in these stories is of interest to the researcher; shifting positions even more so. Relatedly, narratives seek to *engage* an audience through 'imaginative identification' with their experience (Riessman, 2008: 9). On occasion, narratives can also be used to *entertain* or even to *mislead*. Finally, as Riessman (2008:8) observes, narratives can do '*political work*', challenging discrimination, injustice and oppression and mobilising others to action.²⁵ Elements of these different narrative functions can be recognised in some of the judicial accounts studied here, and where they seem relevant will form part of the interpretation of the accounts in later chapters.

Institutional narratives

This discussion of the functions which narratives serve can usefully be extended to the judiciary, and here some distinction can be drawn between individuals and groups, although some overlap is inevitable (Riessman, 2008). The political dimension of narratives may have more meaning and application for groups, for example, and the biographical aspect has more obvious resonance with individuals.

However, the judiciary – as an institution - can usefully be regarded as a site of narrative production in relation to both its individual members and collectively as an institution. In this way, the judge is both an individual biographical subject as well as a constituent member of the judicial community with a range of institutional commitments.

This dual research focus on the judge as penal actor provides scope for insight about judicial culture in a number of connected ways. The first of these relates to institutional narratives. Andrews *et al* (2008: 12) note that the Latin derivation of narrative is *knowing* rather than telling, highlighting the potential of narrative research to play a part in the mapping of forms of local knowledge – and thus to connect with societal narratives in ways which allow some broader understandings to be gained. Schutz (quoted in Czarniawska, 2004:4) observes that in order to understand human conduct we need first to understand intentions, and then to comprehend the settings in which those intentions were intelligible. Nelken (2010:7) makes a convincing case for understanding this in the context of criminal justice:

The social actors we are studying will not have all the answers to our problems (or their own). But whatever our objectives ... we will not get far if we do not all that is possible to make sure we have a fair grasp of what they think they are doing (as well as what they are actually achieving) and try to find out why it makes sense to them – to the extent it actually does so.

Czarniawska (2004:5) notes that every field of practice has, at any given time, a succession of stories in circulation. One way of gaining greater understanding about actors' intentions, therefore, is to explore the 'repertoire of legitimate stories' of a particular society, group or institution. The significance of organisational or group narratives lies in the functions they serve for that group, such as identity building and maintenance, or reinforcement of institutional values; and hence for the insight they provide about the values and working practices of that body. Research participants may offer these 'legitimate stories' and circulating discourses to researchers in certain strategic ways: to the newcomer or outsider by way of introduction to (or explanation of) the life of the organisation, or to members of the same group in order to reinforce a shared history. In the case of retired practitioners, as with the judges

here, the repertoire of stories offered in interview may represent collective judicial memory.

Czarniawska takes issue with the suggestion that reliance on these familiar constructs signifies lack of meaningful insight into the participant's subjective views. On the contrary, she argues, it is a necessary pre-condition:

‘Meaningful insights into subjective views’ can only be expressed by ‘familiar narrative constructs’ (although this expression may take the form of deviating from or subverting these constructs), otherwise they could not be understood or even recognized as such. (2004: 50)

The difference between ‘meaningful personal insights’ and ‘familiar constructs’ is likely to be determined by the researcher's principal focus in the organisational narratives. If the primary interest is in the organisation itself, the very familiarity of narratives is important:

Organizational stories delimit a dominant, or a legitimate, range of such compositions in a given time and place, and thus it is their familiarity, their repetitiveness, that is of interest to a student of organizing.

(Czarniawska, 2004:51)

By contrast, Czarniawska suggests, individual life histories consist of ‘unique compositions of materials’ made accessible through the common store of stories, and this uniqueness holds greater interest for the researcher of personal narratives (2004: 50).

It is noteworthy that the possibility of the researcher having a dual interest in the interview participant – as both the bearer of those unique individual life histories *and* as a member of the larger group – is not directly within Czarniawska's contemplation. Although Bruner makes the same distinction between personal and cultural narratives, he makes a useful connection between the way life histories are produced and the circulating master narratives:

The tool kit of any culture is replete not only with a stock of canonical narratives (heroes, Marthas, tricksters, etc.), but with combinable formal constituents from which its members can construct their own life narratives: canonical stances and circumstances, as it were.

(Bruner, 2004: 694)

On this understanding, an individual's life history will be composed of several different forms of narratives. In the case of judges, some of these will be institutional stories drawing on the familiar discourses circulating in that particular cultural environment. Moreover, since by virtue of their legal education and experience the judges interviewed in this study tended to present themselves as lawyers first, then as judges, and only finally as sentencers, the important identity-building and maintenance function of narratives suggests a strong but complex relationship between individual judicial biographies and the master narratives of their institution. It also prompts some acknowledgement that other master narratives may shape judicial outlook.

Canonical or 'master narratives' and the judiciary

According to Czarniawska, the cultural metaphors and representations embedded in organisation folklore are 'powerful carriers of social memory' providing important insight about dimensions of social life often hidden from view (2004:6).²⁶ These hidden dimensions include the drama of organisational power and resistance; institutional nostalgia; and access to the 'emotional life' of the organisation (Gabriel, 2000; Czarniawska, 2004). This approach suggests narratives can offer significant insight about the judiciary, whose institutional arrangements mean that these and other dimensions of its members' working lives are relatively unseen and unknown.

The mythological character of many organisational and institutional narratives is commonly observed (see for example Gabriel, 1991, 2000; Munro and Huber, 2012), and this also has implications for judicial culture. The formalist or positivist account of the judicial role, outlined in Chapter 3, relies heavily on the core legal concept of judicial independence, and the strong 'Olympian' version of this concept has important implications for sentencing practice and for penal reform. Judicial

independence can therefore be regarded as having the status of a *master narrative*, and one which serves important legitimacy functions for the judiciary.

The various categories and doctrines which form the basis of conventional legal and judicial narratives form a central part of the biographical accounts of judicial lives narrated in this project, and appear to be significant in the ways they make sense of and articulate their experience. For this reason, close attention to the master narratives used in their discourse may provide greater understanding about judicial life. The centrality of the master narrative of judicial independence to accounts of practice, and some of the implications for judicial culture will be discussed in Chapter 7.²⁷

To an extent, this reading of organisational narratives relies on assumptions about shared judicial narratives, and could also suggest a static interpretation of the role of institutional narratives: involving merely their re-telling to a given audience. However, in this study I consider interviews as sites not only for the *distribution* of canonical narratives that circulate in a given area of practice, but also as ‘micro-sites’ for the production of new narratives – or at the very least, for the emergence of new understandings about those canonical narratives (Czarniawska, 2004:51).

Judicial narratives: as method, object and product of inquiry

As Garland (2006) observes, practical convenience leads many analysts of penal culture to resources such as the extended discursive texts of its actors, or to the ceremonial and symbolic routines of practice.²⁸ For the narrative researcher, however, the discursive text carries more than methodological convenience: not only is it the *method* of inquiry, it is the *product* of inquiry as well as the *object* of analysis - *how* stories are produced (Ewick and Silbey, 1995). These are inter-related categories but of these three ways in which narratives enter scholarly analysis, I first consider the narrative interview as a *method* of inquiry into judicial culture.

Judicial narratives as a method of inquiry

Most qualitative research relating to judges takes the form of the conventional structured or semi-structured interview. This methodological approach, caricatured by Johnson (1989) as the art of ‘soaking and poking’ the judiciary, is pragmatically geared towards the gaining of judicial perspectives – often statements of position - on specific issues affecting penal policy and practice.

Bourdieu (1977: 37) observes that the interview can be one of the weakest forms of research methods because the interviewee is prone to providing the researcher with an ‘official’ account of practice: a version of what *should* happen rather than what *does* happen. This observation may account for the incidental finding of one sentencing researcher that many of the judges in her study made ‘almost identical comments’ (MacKenzie, 2005:11).²⁹ Moreover, as Hollway and Jefferson (2000) note, question and answer exchanges tend to produce ‘reports’ rather than ‘stories’; indeed, these interview formats tend to *suppress* stories.

Judicial narratives, whether in the context of extended talk or in storied form, are rarely to be found in criminological, narrative, or interdisciplinary scholarship, and it may be that the exploration of judicial sensibilities invokes and disrupts some unacknowledged tensions in each of these fields.³⁰ The absence of the judge as a subject of narrative scholarship can be understood in view of the humanist emphasis of that approach and the emancipatory and sometimes therapeutic orientation towards giving a ‘voice’ to marginalised, disempowered or otherwise silenced individuals or groups. This is an occupational category into which judges (most obviously) do not fit.³¹ Notwithstanding the occasional observation of narrative scholars that the narratives of the powerful and the powerless deserve equally close attention (Atkinson and Delamont, 2006), the lives of judges and of other powerful actors have not commanded much attention from researchers in this field.

In criminology, notwithstanding the early flowering of the Chicago School and the ‘life history’ method it espoused (for example, see Shaw, 1930; Sutherland, 1937), the union of life histories and criminology has been relatively unproductive, prompting Maruna’s (1997) observation that this method had been ‘all but

abandoned' by criminology. Congruent with criminology's natural affinity with the underdog or other excluded groups, it is notable that the few recent criminological forays into narrative research have focused solely on the lives of offenders (Maruna, 1997; Presser, 2009).³²

To an extent, the absence of ethnographic judicial research in contemporary criminology may be a reflection of the general scarcity of qualitative research relating to judges in this field, and of researchers' historic difficulties in gaining access to judges. However, it is also possible that research embodying Matza's (1964) concept of 'appreciative research' presents a challenge to established ways of thinking about researching judicial work, particularly in its lived, experiential aspect. Maguire (2000: 127) notes that a key feature of the 'appreciative' method is:

'... (at least temporarily) to suspend judgement and observe and listen [to offenders] – in a sense, to allow them to 'tell their own story'.

In the same vein, it is unlikely that when Cavadino and Dignan (2007: 28) comment that the orthodox account of the penal crisis is 'positivistic' and ignores the place of 'subjective human experience, perception, reflection and meaningful human action', they were advocating the exploration of the sentencers' subjectivity.³³ However, this may be an oversight, and bringing judicial narratives within an interpretive or appreciative framework may produce some of the insight which narrative research envisages:

Most often, perhaps, we frame our research in terms of narrative because we believe that by doing so we are able to see different and sometimes contradictory layers of meaning, to bring them into useful dialogue with each other, and to understand more about individual and social change. By focusing on narrative, we are able to investigate not just how stories are structured and the ways in which they work, but also who produces them and by what means; the mechanisms by which they are consumed; and how narratives are silenced.

Andrews (2008: 1-2)

Judicial narratives as the object of analysis

Narrative research is marked by methodological diversity, and offers no prescriptive guidance but a 'family' of interpretive approaches (Riessman, 1993) to guide

analysis of narrative texts. The common feature of this ‘methodological repertoire’ (Riessman, 2012: 369) is that all narratives resist ‘automatic readings’, making it necessary to draw on different approaches and interpretive stances as appropriate for the particular study. All narrative accounts require close reading but researchers attend to different aspects of the text – such as language, form, context, and audience – in highly variable ways according to the subject of study.

Riessman (2008) identifies four principal approaches to narrative analysis: thematic, structural, dialogic/performance, and visual. The boundaries between these approaches are not always clear and many writers urge transgressing those borders. In this study I adopt thematic analysis as the principal method of interpretation, the focus being largely on the content of interviews – on the ‘told’ rather than aspects of the ‘telling’ (Riessman, 2008:54). Typically, in this approach, less attention is paid to the ‘local context’ of narrative production, such as how the story unfolded or the researcher’s role in generating it, and it is uncommon to explore language, form or interaction. Although I make empirical and theoretical connections across individual cases in relation to common themes, I keep ‘stories’ intact where possible to preserve the integrity and coherence of the account.

Judges and the narrative quest

Law and the narrative form, it is often observed, are inseparably linked, and many observe the central role of narratives in law. Amsterdam and Bruner (2002: 2), for example, observe that narratives, along with categories and rhetoric, are three ‘commonplace processes of legal thought and practice without which lawyers, judges, and students of the law could not possibly do.’ Cover (1983:4) points to the way narratives give meaning to law:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.

Moreover, the various forms of official narratives which emanate from judges, such as written opinions and legal judgements, are quite commonly the object of analysis in legal scholarship, as a specific type of judicial discourse and legal argumentation. Judicial work is therefore a densely narrated field of activity, and the narrative or

storied form of judgements is a familiar legal construct. In this way, narratives are the means by which lawyers and the courts ‘get the world to go along with them’ (Bruner, 1992:182).

Although judicial narratives have a discrete meaning in this study - as personal accounts of judicial life and experience – their essentially normative character represents the same search for the ‘golden thread of normativity’ and of rights and responsibilities found in all stories:

The difference between how the world is and how it is supposed to be is almost invariably accounted for narratively, by telling a story about how it came about that the expectable failed to occur. Stories are so compelling and useful a way of representing deviations from expectancy in the world that cultures typically include a good stock of them in their tool kit of ready made.

(Bruner, 1992:176)

In this way, the value of judicial narratives lies beyond the historical and contextual insight they provide about judicial lives; they also form part of our cultural tool kit.

The narrative quest for the ‘good society’

However, the place of narrative in contemporary life is contentious in an era marked by rejection of metanarratives (Czarniawska, 2004). In particular, the question is raised as to whether it is possible to build shared meanings or concepts through and across narrative accounts without resort to the grand narratives of modernity aimed at legitimation (such as universal reason, progress and emancipation). Rorty’s pragmatic response is that the ‘first-order’ or ‘little’ narrative account survives this challenge, as does any other narrative form marked by its readiness to listen to alternative accounts – and that the individual’s quest for a ‘good life’ is by extension also the search for a good society (1992:60). According to Czarniawska (2004), this narrative quest for the ‘good life’ is a continuing and unpredictable enterprise but that the sense of purpose in lived narratives allows meaningful explorations and explanations of lives and goals. The explanations which may emerge from this endeavour are of a different order from those which emanate from more positivist attempts to generate measurable results and achieve predictability. In particular, the

desired effect of a narrative approach is to continue, rather than conclude, the conversation:

The old metanarratives sinned in their ambition to end a conversation by trying to predict its outcome. If a canon is already known, there is nothing left to talk about.

(Czarniawska (2004: 13)

The narrative quest for the ‘good life’ is inescapably social and normative in character. In much the same manner as biography and oral history, narrative research is case-centred, and exploration of the individual’s narrative quest, locating it in a particular time and place, can illuminate connections between biography, history and society (Mills, 1959). Making connections in this way, narratives are ‘deeply social’ (Riessman, 2012: 369).

There is a very contemporary relevance to this which Brown (1992: 144) makes clear in his suggestion that there is a disconnection between private and public discourse in western society which narrative goes some way to address:

Narrative requires a political economy and collective economy in which a sense of lived connection between personal character and public conduct prevails.

Frank (2002) makes a related point when he observes that neo-liberalism actively conceals or denies this linkage between personal troubles and public issues. There is consensus in both accounts that narrative research is directed at the (re)construction and enrichment of a public moral discourse around Tolstoy’s question of how to live, and that personal stories and life histories are an important way in which people respond to that question.

The judicial role and the normative quest

The central place of the narrative quest in social life has a particular relevance for studying judges, a group of powerful penal actors who play a key role in the building and maintenance of what Cover (1983) calls our nomos – the normative universe. As Geertz (1983: 230) notes, the constructive role of law and adjudication becomes clear here - what really is at stake is not whether property is to transfer, or marriage

to be recognised, according to particular customs or principles, or even how 'fact' is to be decided or laws applied:

... what is at issue, and what these specific disputes in one way or another evoke and symbolize, is the sort of society, what counts and what does not'

For Geertz (1983:234), these issues represent part of a much wider, deeper struggle people have to 'imagine principled lives they can practicably lead'.

However, the part played by judges in this normative quest is contested and has some relevance for the sense we make of their narrative accounts. For Cover, judges are 'people of violence' in two senses. Firstly, they are state officials who, through a 'structure of cooperation' with other actors, are able to 'bring physical force to bear in making their interpretive acts work in the world' (Sarat and Kearns, 1995: 228). Secondly, judges act in a 'jurispathic' manner to unnecessarily circumscribe and repress the normative universe (Cover, 1983). In this way, it is argued, the judge's role in punishment is incompatible with the narrative goal (outlined above) of continuing the conversation:

It puts an end to interpretation and meaning construction: it cuts off conversation. It does not elicit and evolve; it concludes. Violence puts an end to the hermeneutic impulses that generative narrative.

(Sarat and Kearns, 1995: 229)

Sarat and Kearns (1995: 7) observe that several trends in legal scholarship tend to displace the subject of violence from the law: humanist movements which place emphasis on the 'meaning-making, community-building' nature of law and overlook its coercive dimensions; positivist studies of legal institutions and processes which disconnect practices from law's coercive power; and post-modernist theories which overwhelm the question of violence with multiple meanings.

To this list of discourses which obscure some of the material realities of law could be added the formalist account of criminal law and justice, and the philosophies of punishment which accompany it. This is a process of rationalisation and categorisation based on individual moral responsibility, and whose legitimacy is encapsulated in the very idea of criminal justice as opposed to social justice (Norrie,

2002; 341). In Chapters 7 and 8 I explore more fully some of the ways judicial discourse can obscure the ‘social question’ and consequently, the weight to be placed on ‘agent-based visions’ of penalty.

Section 3 Judicial narratives: faith and suspicion

In this chapter, I have outlined some of the benefits of using narrative research to explore the lives and careers of judges. In a broad sense, law and narrative enterprises can be regarded as closely connected through the shared normative quest for the ‘good society’. The narrative character of judicial discourse and rhetoric underscores this connection. Moreover, the status of the participants as retired practitioners lends itself to a biographical narrative approach, with potential for rich historical insight and personal reflection on lives remembered.

However, a number of concepts and normative orientations are held in tension when biographical narrative interviews are used to study the judiciary. The first of these relates to conceptions of the judicial role. Tamanaha (2010) persuasively argues that the polarisation of conceptual models of judging along the lines of the formalist and realist models does not represent the true nature of judging - or even judges’ own understanding of their role – which is closer to a form of balanced realism. However, I have argued (in Chapter 2) that the continuing influence of these models in their polarised forms - the formalist model suggesting *faith* in judgement, the realist model inspiring *suspicion* - can be traced in criminological literature, particularly in relation to the penal crisis and the critique of discretionary sentencing where a strongly hegemonic interpretation of the judicial role tends to be employed, with strong realist underpinnings. To an extent, the tenacity of the polarised conceptual models in criminological and penal scholarship – and particularly the hegemonic model - may be the necessary corollary of any critical understanding of the judicial role in punishment. Tamanaha’s argument, it should be noted, is grounded in the civil (rather than criminal) judicial role and turns largely on questions of legal interpretation and decision-making in that quite different field of practice.³⁴

Although narrative analysis involves the interpretive task of moving from text to meaning, a task which allows for the possibility of interpretations not shared or even

recognised by the participant, this normative orientation nonetheless appears to call for a degree of 'faith' on the part of the researcher towards the participant's stories. This implied commitment may be strengthened where there is a biographical dimension to the research. A normative orientation based on faith alone therefore appears incongruous in its application to a dominant elite such as the judiciary.

The epistemological axis of faith and suspicion forms the basis of Ricoeur's (1970) distinction between two interpretive stances: the hermeneutics of faith and the hermeneutics of suspicion. Josselson (2004) applies Ricoeur's distinction to narrative research to explore the contours of its interpretive field, and considers the possibility of combining these interpretive positions. This framework offers a more subtle dialectic in the reading of judicial accounts in this project, and in order to explore this potential I first outline Josselson's argument, and then assess its value in analysing judicial narratives.

Dualities and oppositions

As Josselson observes, drawing sharp distinctions between concepts is a scholarly device destined to fail: 'all dualities ultimately break down or merge' (2004:4). Nonetheless, she offers Ricoeur's distinction between hermeneutic stances as a way of illuminating the different epistemological positions which may be held by narrative researchers, and of showing that hermeneutics is not a 'unitary pursuit'. Specifically, the distinction between the two interpretive stances allows us to consider the researcher's dilemma about what can be 'read' into a text.

The hermeneutics of restoration (faith)

Ricoeur's first interpretive position is animated by faith. Following a humanist tradition, the narrative researcher here considers that the participant is providing the best account of their experience, freely sharing knowledge, understanding and insights gained. On this basis, and as often implied in the broad field of qualitative research, the research interview provides 'a window on the psychological and social realities of the participant' (Josselson, 2004:5). Interpretation is an integral part of the narrative process on the basis that it always involves 'a telling at some different

level of discourse' (Josselson, 2004(3), and this may involve reading some implied, rather than directly expressed, meanings into the text. However, the interpretive process is ultimately aimed at the faithful restoration of the narrator's intended message in the story or account given:

The imprint of this faith is a care or concern for the object and a wish to describe and not reduce it.

(Ricoeur, 1970: 28)

Josselson observes that this interpretive stance has particular relevance and value when the participant group is a marginalised or 'muted' one, and the research aim is to provide a 'voice' to that group (2004: 6). It is a stance that also has a more general application in other areas of narrative research, especially in anthropological and ethnographic work where it is considered important for the researcher first to immerse themselves in cultural understandings and frameworks of meanings in order to re-present the subjective experiences and life-worlds of the participants in question.

The interpretive process of 'taking people at their word' is therefore the basis for a rich seam of narrative work. Studies which adopt this interpretive stance often display the following features: close attention to the relationship between researcher and participant, as facilitating a productive and authentic research encounter; emphasis on the co-construction and production of narrative texts; and some awareness of the potential for self-revelation and new understandings from both parties (Josselson, 2004).

Reflexivity is central to the hermeneutic stance of restoration and faith, the researcher being considered a constitutive part of the interpretive process (Josselson, 2004:11). Rejecting any naïve belief in the ability of the researcher to cast off or isolate their assumptions and biases – what Bourdieu (1999:608) calls 'the positivist dream of an epistemological state of perfect innocence' - these inclinations are instead understood as culturally shaped positions which should be acknowledged and explored by the researcher as part of the relational dynamics of the interview, and forming part of its subsequent interpretation.

Particularly useful here is the concept of the ‘biography in the shadow’ which is considered integral to narrative research (Behar, quoted in Josselson, 2004: 11). This approach suggests questions such as: ‘What are the shared social locations and assumptions? Where are the points of discordance or strangeness?’ These questions acknowledge that it is relevant – certainly to the participant and also to the narrative reader – whether or not the researcher is a member of the same group he or she is researching, and thus to their capacity to understand. It is also relevant to the researcher’s ability to render faithfully the participant’s intended meanings.

The hermeneutics of demystification (suspicion)

For Ricoeur, all language is inherently ambivalent and capable of many meanings. Drawing on the three ‘masters of suspicion’ – Marx, Nietzsche and Freud – Ricoeur outlines a second hermeneutic stance aimed at the demystification of meaning through the recognition and interpretation of a form of false consciousness on the part of the narrator. In contrast to an interpretive stance based on faith, accounts of experience or feelings are not assumed to be transparent, and the researcher will be alert to strategies of self-deception such as denial, evasion or hesitation. More simply, this could amount to acknowledgement of the presence of untold stories, ‘negative spaces’ or silence. The researcher’s attention may be drawn to:

... the omissions, disjunctions, inconsistencies and contradictions in an account. It is what is latent, hidden in an account that is of interest rather than the manifest narrative of the teller.

(Josselson, 2004:15)

This interpretive stance can be regarded as inspired more by scepticism than suspicion, and by awareness that personal accounts can be ‘multivocal’ and layered in meanings. Analysis may be directed at illuminating connections between these voices, beyond any made or suggested by the narrator. In this case, the researcher’s own voice will be more clearly distinguished from the narrator’s than in an interpretive stance based on faith, and necessarily acknowledges that the researcher has different interests from the narrator. It follows from this approach that the researcher will be conscious of how the narrator positions him or herself

linguistically, and this may suggest a performative dimension to the narrative interview.

In contrast to an interpretive stance based on faith, narratives are not regarded as co-constructions of meaning; as Josselson observes, this renders the participant more like the research 'subject' of some qualitative approaches (2004:20). Indeed, Ochberg (1996:97) advocates listening to narratives

... as though they are attempts at persuasion, the rhetoric structured to present a certain view of events rather than another, less palatable one.

Josselson (2004) observes that the aim of this interpretive stance (based on suspicion) is to offer a *different* reading, rather than to re-present the narrator's own. Inevitably, this reading 'between the lines' may go beyond the narrator's own intentions, and carries a greater interpretive burden on the researcher. The responsibility flows from the 'claim to privilege' the researcher is making when proposing meanings beyond those stated by the narrator. Here, the focus shifts from the voice of the narrator to that of the researcher, who must persuade the reader of the validity of the different reading. This can only be achieved, Josselson believes, by carefully documenting the interpretive process from 'observation (text) to narrative explanation at a theoretical level', including some reflection on why participants may not be aware of the particular 'hidden' dimensions the researcher seeks to highlight (2004: 19).

An interpretive stance based on demystification or suspicion is a less favoured position in narrative research, according to Josselson. In some cases, this may be because the researcher is uncomfortable assuming the right to re-interpret the intentions of the narrator. The lack of many recognised alternative interpretive frameworks may also play a part. The term 'suspicion' itself may even be unfortunate, since the main interest in this stance is not necessarily in contesting or refuting the narrator's beliefs – these may be sincerely held - but in 'those aspects of self-understanding or meaning-making that operate outside of the participant's awareness' (Josselson, 2004:15). Josselson is keen to rescue the hermeneutics of suspicion from any unduly sinister or shadowy construction and observes that this

interpretation of the stated or ostensible meanings of other people is no more than what we all do when negotiating our daily lives and fellow human beings (2004:18). Moreover, it can be observed that Marx, Nietzsche and Freud each confronted false consciousness with a view to achieving some better or ‘truer’ level of understanding rather than resorting to a form of nihilism.

Combining ‘faith’ and ‘suspicion’

The careful delineation of these discrete interpretive stances serves, somewhat paradoxically, to highlight the *fluidity* of interpretation. As Gadamer notes, there is no single ‘valid’ interpretation of a narrative text, and it is possible to have different readings of the same text over time (Gadamer, cited in Josselson, 2004).³⁵ Moreover, although some intellectual disciplines tend to view the hidden as more ‘true’, there is no good reason to assume that a latent or disguised meaning in a text is more authentic or ‘true’ than one more seemingly transparent.³⁶ This fluidity persuades Ricoeur that the two hermeneutic positions stand in an interesting dialectic to each other:

Symbols both disguise and reveal. While they conceal the aims of our instincts, they disclose the process of self-consciousness. Disguise, reveal; conceal, show; these two functions are no longer external to one another; they express the two sides of a single symbolic function.

(Ricoeur, 1970: 497)

The tension between the two interpretive stances thus has the potential to produce new knowledge and insight. The hermeneutics of suspicion can be regarded as grounded in the ‘archaeology of the person’ – their hidden motivations - and can provide insight about ways in which the past has been structured. An interpretive position based on the hermeneutics of faith, on the other hand, may be oriented towards the ‘teleology of life’ – in hopes and beliefs – and can point to visions for the future. The resolution of these different temporal orientations may allow greater understanding of the ‘ever-shifting present’ (Josselson, 2004:21).

Ricoeur (1970) believed that the interpretation of narrative accounts could be motivated by *both* an inclination to listen and an inclination to suspect. However,

notwithstanding the potential that may lie in adopting a combined interpretive position, Josselson believes that most researchers have an instinctive and normative inclination towards one or other interpretive stance. The adoption of one over the other is therefore likely to be determined by the researcher's motivation for examining the narrative text. A researcher who is motivated to 'giving a voice' to their participant group is less likely to be searching for evidence of hidden meanings; a researcher who is already interested in unearthing hidden or less visible structures of thought is likely to consider the participant's account as part of the 'puzzle' to be solved (Josselson, 2004:22). A combined epistemological stance is therefore possible, but according to Josselson, 'relatively rare and certainly very difficult' (2004:22).

Judicial narratives and the hermeneutics of faith and suspicion

A combined interpretive approach has significant potential for the analysis of judicial narratives. To the extent that the interpretive stance adopted by a researcher in a given field is largely determined by the nature of the researcher's interest in that subject, the present study of judicial lives and careers is motivated by interest in two distinct areas: firstly, a biographical dimension particularly in relation to experiences of judging; secondly, the meaning-making processes of judicial work in criminal justice. Following Josselson's analysis of Ricoeur's hermeneutics, it is possible to highlight some of the different interpretive issues raised by these two discrete fields of inquiry for this study.

Faith and restoration

Without employing any conception of judges as a marginalised group, the partial orientation towards biographical interviews in this project can still be acknowledged as being in some way motivated by the opportunity to hear judicial 'voices' which are relatively unheard.³⁷ Even without any 'empowerment' agenda, this biographical focus entails the building of a research relationship which facilitates the telling of personal stories. The biographical dimension of narrative research thus places the researcher in an intimate and personal relationship with the participant. The research relationship is therefore necessarily built on an implied contract of care:

... the researcher endeavors to obtain “data” from a deeply human, genuine, empathic, and respectful relationship to the participant about significant and meaningful aspects of the participant’s life ... The greater the degree of rapport and trust, the greater the degree of self-revealing and, with this, the greater degree of trust that the researcher will treat the material thus obtained with respect and compassion.

(Josselson, 2007:539)

Moreover, there are many features of a narrative approach which incline the researcher towards an interpretive stance based on faith. These include the close attention paid to the relationship between researcher and participant, as facilitating a productive and authentic research encounter; emphasis on the co-construction and production of narrative texts; and awareness of the potential for new understandings from both parties about previously held positions.

However, it is not necessary to proceed directly to a position grounded in ‘suspicion’ of judicial narratives to recognise that an individual’s biographical account is a ‘privileged but troubled narrative’ (Bruner, 2004:693). For Bruner, this is because the life story is inherently reflexive rather than ‘factual’:

... a life as led is inseparable from a life as told – or more bluntly, a life is not ‘how it was’ but how it is interpreted and reinterpreted, told and retold.

(Bruner, 2004:708)

For Hollway and Jefferson (2000), the narrative account always reflects the dynamics of the ‘interview pair’ and they situate both researcher and participant as ‘anxious, defended subjects’ (2000: 45). Ethnomethodology regards the question of accountability as central to understanding social action and this may hold some relevance for interpreting judicial narratives. Others insist that autobiographical accounts should not be privileged as any special kind of representation or carrying any greater claim to authenticity (Atkinson, 1997).³⁸

A combined approach

The duality of the judicial role points towards the value of an interpretive approach to judicial narratives which draws on elements of both faith and suspicion. The

judicial role has more dimensions than a simple hegemonic interpretation based on class interests would imply (particularly in relation to its role as guardian of constitutional and human rights), but the position of the judiciary as an elite social group has some obvious relevance to the ‘parameters of their moral thinking’ (Norrie, 2000: 178). Suspicion, however, is not the only interpretive stance indicated, and faith or empathy may also have some place in generating meaningful understandings about aspects of the judicial world which are occluded or shielded by the researcher’s own predispositions. Liebling (2001: 476) questions the way in which a ‘creed of sensitivity’ is extended only to the offender and not to the ‘powerful’:

Why is sympathy reserved for the offender and denied to those who (sometimes in good faith) work in criminal justice, with their own lives, stories, pains, motives and understandings ...?

‘Truth’ in narrative accounts

The analysis of narrative accounts inevitably raises questions about the reliability and ‘truth’ of accounts, and about the extent to which it is possible to generalise or draw conclusions beyond the particularities of the individual case history. Maguire (2000) points to the easiest answer, which is that the objective of this type of research is to gain greater understanding and insight, and that other forms of research can be used if the aim is to test the frequency of some phenomenon. To this could be added Mishler’s (1996) observation that individual case studies have been used in psychological and natural sciences to make significant theoretical advances, and are thus no less ‘scientific’ than variable-based approaches. The particularities and contexts of case-centred narrative studies can therefore also generate categories and concepts (Riessman, 2008).

However, Maguire (2000) also points to the much less straightforward question about the reliability and ‘truth’ of life history accounts.³⁹ In social sciences, philosophical ideas about the meaning of ‘truth’ are more pragmatically recast as questions about reliability, validity and trustworthiness, but it remains a ‘vexing question’ for narrative research (Riessman, 2008: 182). Riessman observes the growing body of qualitative literature on validity with its associated ‘paradigm

warfare' with unease, believing the language of fixed criteria and standards to be unsuited for narrative research which is characterised by fluid boundaries and categories:

...there is no canon, clear set of rules or list of established procedures and abstract criteria for validation that fit all projects.

(Riessman, 2008: 200)

Moreover, Riessman observes, since all narrative research projects are situated in specific ways, questions of trustworthiness should be considered evaluated within those contexts. Considered this way, there are two levels of validity: the validity of the participant's narrative account, and the validity of the researcher's analysis.

For certain 'realist' epistemologies such as history, factual truth is important, and consistency between narrative accounts and other sources of evidence may therefore be important: this is the 'truth as correspondence' approach. Bruner (1991: 13), however, observes that verification has 'limited applicability where human intentional states are concerned', such as in psychological sciences. Here, the 'correspondence' of events recounted in a personal narrative with other forms of 'evidence' has less significance.

Most narrative scholars agree that a narrative is 'not simply a factual report of events, but instead one articulation told from a point of view that seeks to persuade others to see the events in a similar way' (Riessman, 2008: 187). In this way, 'verifying the facts' may be less important than 'understanding their meanings for individuals and groups' (2008:187).⁴⁰ In relation to judicial narratives, the correspondence theory of truth has no obvious utility and I made no attempts to 'verify' the judges' narrative accounts. To an extent, my own working knowledge of some of the participants allows some internal consistency to be applied. More apt perhaps is Riessman's observation that persuasion is the most useful way to demonstrate trustworthiness: 'good narrative research persuades readers' and analytical interpretations should be 'plausible, reasonable, and convincing' (2008:191). In more practical terms, she also suggests that researchers ground their claims for validity by using detailed transcripts

or excerpts, being attentive to the narrative form and language, to the contexts of (co) production, and being reflexive about positioning.⁴¹ Czarniawska's conclusion looks beyond techniques:

I do not think that there exists anything that must, should, or ought to be 'done' to narratives. Every reading is an interpretation, and every interpretation is an association: tying the text to other texts, other voices, other times and places. Much more important than a specific interpretative or analytical technique is the result: an interesting recontextualization.

Czarniawska (2004: 135)

The researcher's interpretive authority

With its emphasis on multiple voices, meanings and interpretations, there is a danger that narrative analysis, as with elements of postmodernism, could overwhelm the reader with the multiplicity of meanings and interpretations which could be derived from a single text. This highlights the limitations of a social constructivist interpretive orientation at one end of the epistemological spectrum, which conceives the world 'as a collection of subjectively spun stories' (Czarniawska, 2004: 5). Bottoms (2000) points to the dangers of epistemological relativism in criminology and suggests that it is always possible, and often important, to argue that one interpretation of a subjective account is 'truer' than another. As far as critiques of criminal justice are concerned, Norrie (2000:234) puts it more trenchantly: 'the only worthwhile distinction is between better and worse understandings of criminal justice.'

In the discussion above on informed consent, I drew attention to the ethical dilemma concerning the 'interpretive authority' of the researcher. This quandary was highlighted to me in an acute way in relation to one of my first participants, whom I knew well and continued to visit when he had failing health. On one of these visits, he inquired about this project and confided that he had only agreed to participate because he trusted me to 'tell the truth'. I regretted not asking what he meant: tell the truth about what? I had no doubt he trusted me to accurately transcribe and quote any part of what he said, but was left to wonder if I had missed, or misinterpreted, some

hidden ‘meaning’ in his interviews. Or worse, had he so misconstrued the nature of the project that he understood my role as faithful scribe?

In general terms, the tension arises because the interpretive problem for the researcher of life histories is not so much (or only) how to impart a faithful representation of their participant’s memories and experiences, but how to construct this discourse more generally or ‘scientifically’ and in a way that allows social explanation (Bourdieu (1999: 611). Josselson explains the dilemma more fully:

The task of the narrative researcher is to relate the meanings of an individual’s story to larger, theoretically significant categories in social science, a task distinct from the individuals’ specific interest in their own personal story (Smythe & Murray, 2000). While the task of the researcher in the data-gathering phase is to clarify and explore the *personal* meanings of the participant’s experience, the task in the report phase is to analyze the conceptual implications of these meanings to the academy. Thus, at the level of the report, the researcher and the participant are at cross-purposes, and I think that even those who construe their work as “giving voice” and imagine the participants to be fully collaborative with them in the research endeavor are in part deluding themselves. The researchers are interested in the research questions (and their careers). The participants are interested in themselves. Thus, there is a division between the personal narrative told by the participant and the “typal” narrative, a narrative that exemplifies something of theoretical interest, created by the researcher.

(Josselson, 2007: 549)

Narrative research relies on some understanding of the relational dynamics of a narrative interview, as articulated here by Czarniawska (2004: 5):

.....we are never the sole authors of our own narratives; in every conversation a positioning takes place [.....] which is accepted, rejected, or improved upon by the partners in the conversation.

However, it may be disingenuous for narrative researchers to describe narratives as co-constructed since this ‘does not imply that we have similar aims as participants or that we are somehow working together to produce the research results’ (Josselson, 2011:39). The researcher’s interpretive authority is necessarily compromised by awareness of the potential gap in expectations between researcher and researched.

Reflexivity and ethics in a combined interpretive stance

Josselson outlines several approaches which she considers central to the achievement of the goal of moving between the two interpretive stances – ‘giving voice’ as well as deciphering. Firstly, there should be reflection on the ways in which the ‘narrative strategies’ of both the researcher and the participant are influenced by their cultural and historical positions, as well as by questions of identity and community. Secondly, the researcher should consider his or her ‘hermeneutic allegiances’ – what hierarchy of faith or suspicion will prevail in particular contexts? Neither stance has epistemological superiority over the other, she believes, and interpreting from both positions is possible, but the researcher’s shifting positions should be made clear. The contextual position on ‘faith’ and ‘suspicion’ which Josselson adopts here suggests there may be no ‘ethical moat’ (Ricoeur 2000:38) between the two analytical stances, but a distinction which is circumstantial and contingent.

When interpreting the narrative accounts, I was also mindful of Geertz’s (1983: 16) warning of the need to ‘steer between overinterpretation and underinterpretation, reading more into things than reason permits and less into them than it demands’ . For Geertz, achieving some sense of what people are ‘really like’ (he uses this term ironically) or actually trying to say, requires the ability to ‘construe their modes of expression ... their ‘symbol systems’: this is more like ‘grasping a proverb, catching an illusion, seeing a joke....’ than achieving communion (1983: 70).⁴²

It is also important to minimize any totalizing impulse in relation to the interpretation of narrative accounts, at the personal as well as the social level. Geertz (1983: 187) explains this further in relation to any broad understandings about society or culture that may be gleaned from personal narratives:

I am not engaged in a deductive enterprise in which a whole structure of thought and practice is seen to flow, according to some implicit logic or other, from a few general ideas, sometimes called postulates, but in a hermeneutic one – one in which such ideas are used as a more or less handy way into understanding the social institutions and cultural formations that surround them and give them meaning. They are orienting notions, not foundational ones. Their usefulness does not rest on the presumption of a highly integrated system of behavior and belief.

In relation to the personal account, Czarniawska (2004: 61) observes that however well-meaning or intentioned the researcher is, the act of rendering an interpretation of someone else's story is always 'a political act of totalizing'. In the final analysis, therefore, interpretive responsibility lies squarely with the researcher:

The burden of authorship cannot be evaded, however heavy it may have grown; there is no possibility of displacing it onto 'method', 'language', or ... 'the people themselves' redescribed ... as co-authors.

(Geertz, 1988: 140)

Ricoeur and the 'rule of sincerity'

There is one further dimension of Ricoeur's hermeneutics which is not mentioned in Josselson's account but which offers an additional perspective on the balance to be achieved between 'faith' and 'suspicion' when interpreting judicial narratives. In the context of discussion about the recognition of the 'other' as the subject of rights, Ricoeur insists that mutual recognition of the rules of practical discourse - the necessary framework for interpersonal relations - makes sincerity and authentic dialogue possible. This requires confidence in the 'rule of sincerity':

'I expect that each will *mean what he or she says*'

(Ricoeur, 2000:6, emphasis in the original).

While not supplanting the interpretive stance based on measures of faith and suspicion when it comes to the analysis of judicial narratives, Ricoeur's understanding of personal authenticity provides an ethical basis for the conduct of the research *relationship* itself. The 'rule of sincerity' also places public discourse on a foundation of trust and is a useful additional framework for the discussion of judicial authority and public legitimacy. In particular, it is directly connected to the construction of public moral discourse which is central to narrative research (Czarniawska, 2004).

Conclusion

In this chapter I provided, firstly, details of the empirical framework of the project and addressed questions about ethics, the framing and scope of interviews, the relational dynamics between researcher and participants, and about reflexivity. In the second section I provided an overview of narrative research and drew attention to aspects of this approach which hold significant potential for research about judicial life and work. In particular, the identity-building and remembering functions of narratives suggest potential for insight about ‘master narratives’ such as judicial independence and about changing judicial sensibilities. In the final section I considered the interpretive axis of faith and suspicion which may be the necessary corollary of a critical understanding of the judicial role in punishment. After outlining these features, I proposed an interpretive stance which entails moving between the interpretive poles of faith and suspicion while also observing Ricoeur’s ethical ‘rule of sincerity’ (2000:6).

This narrative study of judicial life and work in penal practice raises important questions about social action, individual agency and the discourse of powerful actors. These issues are not fully addressed in narrative research literature, and in the chapter to follow I consider the usefulness of Bourdieu’s conceptual framework of *habitus*, *field* and *practice* for exploring the personal accounts of judicial actors and for providing insight about penal change and its requisite conditions.

¹ This approach directs greater attention to the signifying and communicative aspects of the sentencing role and situates the judge as a socially and historically situated actor. The values and dispositions of judges are of interest here not only for their immediate instrumental significance (in relation to policy and practice) but also for the insight they can provide about changing sensibilities and motivations in the penal domain.

² This insight was gained during a seminar I attended in Paris, 2009 led by Ruth Josselson. She described this error as ‘putting *your* template on *their* life’.

³ The ‘snowball method’ of recruiting research participants, also known as chain referral sampling, works by identifying respondents who are prepared to refer the researcher onto others. It is considered a useful process for sampling social or professional networks, building new contacts and accessing

hard to reach populations such as the deprived, the socially marginalised and elites (Biernacki & Waldorf, 1981).

⁴ The details of the exact composition of such a small group are withheld to minimise the possibility of identification.

⁵ These details had to be omitted in any extracts given here because of the easy identification which would follow.

⁶ These networks also prompted a number of queries from other retired sheriffs asking if they could be included in the project.

⁷ Two small insights were gained from these conversations. Although a number of participants were happy to share the fact of their involvement in the project, they were, apparently, 'quite coy' about sharing any details of their own personal reflections. Another, referring to the retirement dinner, observed that I had 'got them talking about all this interesting stuff' – presumably, the less personal 'stuff'.

⁸ If the conversation did not naturally stray into these areas, I tried to ask each participant a range of questions such as: 'Do you think your own background influenced the kind of judge you became - and in what way? What were the most important developments in criminal justice during your legal and judicial career?'

⁹ Although the dramaturgical model is perhaps overworked when it comes to observations of courtroom practice, it does capture the sense of performance of a role which is a part of that occupational reality. To an extent, also, some fluidity of roles is inevitable given the system of appointment to the bench in Scotland whereby judges and sheriffs are appointed from the ranks of practitioners.

¹⁰ Several participants remain in touch, and in one case, the spouse of a participant who died several years after our first interviews.

¹¹ Most US qualitative studies of judicial work take place within the political science tradition of judicial behavioural studies.

¹² Advice about interviewing 'elites' includes guidance on gaining access to members of elite groups, preparation and communication, interview formats, dress code, interview etiquette, and strategies geared towards the successful 'extraction' of data (Dexter, 1970; Richards, 1996; Odendahl and Shaw; Harvey, 2010). Researchers are warned that the time of elites is limited and therefore valuable; that elites do not suffer fools gladly; to guard against being too deferential; and that while a little flattery may be wise, sycophancy is not (Richards, 1996). Some of this guidance is explicitly drawn upon in several studies of the judiciary (see for example Baum, 2006; Johnson, 1989; Pierce, 2002).

¹³ This is often to be found in a footnote or Appendix (see for example Tombs, 2006; Millie *et al*, 2003; Wandall, 2008).

¹⁴ Traces of the 'elite' model can be seen in assessments of the ways in which judiciaries valorise their independence (Malleon, 1997, 1999, 2002; Stevens, 1988, 1999, 2002); of ways in which they seek to maintain ownership of discretion (Ashworth, 1995; Tata, 2000; Hutton, 2006); in accounts of judicial resistance to sentencing research (Ashworth, 1995, 2003; Baldwin, 2000; Hughes, 2000); and of strategic judicial behaviour in relation to sentencing reform or innovation (Ashworth, 1995; Hutton, 1995; Tata, 2000; Tata and Hutton, 2003; Cavadino and Dignan, 2002); and in discussions about judicial diversity (Griffiths, 1997; Hale, 2005; Malleon, 2006; Rackley, 2007).

The 'elite' model is problematic where it does not specify the context of the attribution of 'elite' status, where it overlooks other actors who may exercise influence in a given field (Woods, 1998), or fails to recognise the relational aspects of power in the research relationship (Smith, 2006). A number of studies such as Tata (2000); Tata and Hutton (2003); McNeill *et al* (2009) directly address these issues.

¹⁵ Although I am attempting here to identify some of the advantages and disadvantages (for the research relationship) of my former role in criminal justice practice, it is relevant to note that I located

myself, however naively, in the *outside outsider* category (academic) rather than the *outside insider* category described above. In particular, I felt I was able to recognise, but not necessarily identify with, certain cultural values being expressed in interviews.

¹⁶ It may also, she suggests, lead to problems of over-identification with the participant, and requires a careful delineation between the two ‘voices’ in the research relationship (Josselson, 2004).

¹⁷ Although Bourdieu’s concept of *habitus* is not explicitly employed in *The Weight of the World*, it is clear that he envisages here its controlling and shared framework.

¹⁸ Theoretical differences between these approaches are reflected in different strands of research; the humanist approach providing a new focus on individual case studies, biographies and life histories, and the postmodern approach proceeding on an understanding of ‘multiple, disunified subjectivities’ and on the constructed nature of accounts (Andrews, 2008).

¹⁹ Andrews (2007) introduces an important note of caution about these emancipatory claims, raising questions about who benefits from the work, about reception by different audiences, and the position of the narrator over time. For some narrative scholars, the narrative interview itself may hold some transformational potential (Mishler, 1986).

²⁰ However, it is important to note that many authors who attempt to tame some of this complexity by organising the fuzzy boundaries of narrative research into scholarly categories, chapters and exemplars nonetheless urge narrative researchers to ‘innovate and transgress the borders’ created by these endeavours to tame it (Riessman, 2008:18, 73; also Andrews, 2008: 4).

²¹ These positive uses include its use in promoting empathy with others in difficult circumstances, for example, or to gain better understanding of the connection between personal problems and social issues.

²² In one example, it was possible to track the participant’s growing unease with a particular subject area (the social context of sentencing) over the course of several interviews, and to observe the strategies employed by that participant to avoid, and then finally confront the issue. I discuss this in Chapter 7.

²³ A tendency to celebrate lengthy autobiographical accounts was characteristic of this period (Squire, 2008, Riessman, 2012).

²⁴ Recent studies in occupational therapy literature (Jonsson *et al*, 2000; Jonsson & Andersson, 1999; Kendall, 1996; Rudman, Cook, & Polatajko, 1997) suggest that retirement should be regarded as a complex, unfolding process rather than a single transition to a new status.

²⁵ In its most celebrated role, narrative research is instrumental in ‘giving a voice’ to respondents, underscoring its normative inclination towards the narratives of the marginalized and oppressed. For examples, see Roberts (2002); Ewick and Silbey (1995); Delgado (1989).

²⁶ Czarniawska (2004:46) defines organisational folklore as ‘cultural practices and artefacts that are symbolic, spontaneous, and repetitive’.

²⁷ Czarniawska cautions that it is not enough merely to note the existence and use of canonical or master narratives in a given field of practice. She suggests that a broader agenda would ask: ‘...what are the consequences of [scientific] rhetoric and what are the consequences of storytelling – for those who tell the stories and those who study them?’ (2004:41)

²⁸ In the case of judges, there is strong symbolic force in the public performance of the judicial role, yet this domain generates surprisingly little ethnographic research (see Carlen, 1976 and Rock, 1993 for rare examples). Nor do we know much about the private, back-stage, everyday routines of judicial life.

²⁹ The judges in this Australian research project on ‘judicial methodology’ in sentencing were each asked the same open-ended questions such as how they approached the task of sentencing, the influences upon them, the role of discretion, and the part played in sentencing by public opinion and the media. The researcher’s observation about their ‘almost identical’ responses was made seemingly in passing and without further comment.

³⁰ Bourdieu's inclusion of a magistrate in his accounts of social suffering in *Weight of the World* (1999) is a striking exception to this trend. Although not conceived of by Bourdieu as narrative research, these accounts nonetheless take the form of personal life stories.

³¹ Judges' own institutionally-imposed marginal role in public life scarcely qualifies them here.

³² Presser's (2009) work is notable for its attempt to build a 'narrative criminology' that has only the offender as its subject.

³³ This comment is made in light of Cavadino and Dignan's account of the judicial role in the penal crisis in the same volume, which represents a strong hegemonic interpretation.

³⁴ Although judicial work in Scotland comprises a mix of both areas of law – and hence judges' own conceptions of their role may represent a hybrid form – any analysis of the judicial role in punishment needs to draw distinctions of this sort.

³⁵ See Andrews (2007) for an account of re-visiting old narrative transcripts and finding new layers of meaning and understanding.

³⁶ Josselson re-tells the assumed apocryphal tale of Freud's observation to an audience while puffing his cigar: 'Although we all know that this is a phallic symbol, let us remember that it is also a cigar.' (2004:21)

³⁷ Indeed, as some legal biographers argue, the political and rhetorical power of judges in the common law world makes ignoring their biographical accounts seem unwise (Burnside, 2009; Girard, 2003).

³⁸ Notwithstanding the caveats included here regarding biographical accounts, it is evident that for interpretive purposes no strict demarcation can be drawn between those parts of the judges' accounts I describe here as 'biographical' and those which are conceptual or relating to experience of criminal justice practice.

³⁹ In relation to offenders, Maguire (2000) recommends seeking independent corroboration of at least some of what was said, along with personal judgement and tests of 'internal consistency'. See Presser (2009) for further discussion of 'truth' in relation to offenders' narrative accounts.

⁴⁰ Czarniawska (2004) observes that it is always possible for a researcher to 'check the production certificate' by methods such as comparing stories or checking written documents.

⁴¹ There is an extensive debate in narrative research between those seeking to make narratives 'epistemically respectable' and those who rely on criteria of 'aesthetic quality' (O'Dea, 1994: 161).

⁴² In *The Weight of The World* (1999) Bourdieu reaches the striking conclusion that the personal history can be 'a sort of *spiritual exercise* that, through *forgetfulness of self*, aims at a true *conversion of the way we look at* other people in the ordinary circumstances of life'. The 'welcoming disposition' which is required to achieve this state of communion is, he suggests, 'a sort of intellectual love' (1999:614, emphasis in the original). Earlier in the same text he speaks of his attempts to create a research relationship built on 'active and methodological listening', and 'a total availability to the person being questioned, submission to the singularity of a particular life history' (1999: 609).

Chapter 4 The reflexive judge and the judicial habitus

Introduction

My aim in this chapter is to extend the narrative project, thus far described, in ways that might usefully generate knowledge about judicial lives and practice, of their relations with the social world of crime and punishment, and about some of the dynamics and potential of the judicial role. Engaging with the narrative accounts of judges raises some issues central to criminal justice and punishment which were touched upon but not fully addressed in Chapter 2 (in relation to judicial culture) and Chapter 3 (in relation to narrative research).

The first of these issues is that any study of social action needs to attend, in some manner, to the specific sensibilities of individual agents; these provide insight about the cultural values in which the practices of the institution in question are grounded. This narrative study directs that attention to the experience, motivations and role conceptions of judges and to the everyday routines of sentencing practice. These are essentially questions about human dispositions - their origin, structures and practical significance - and about the nature (its form, function and meaning) of the discourse about penal practice by powerful actors.¹ In turn, these matters raise questions about the authenticity (and suspicion) of the 'personal' account; and about the place of the individual judge in relation to the wider space of culture and society and to some broader structures such as the judicial community and the penal field.

Secondly, notwithstanding explanations of judicial conduct suggesting 'virtuoso' practice and agency, narrative accounts raise questions about the extent to which the judicial role is circumscribed by some objective realities of social life (such as presented in the economic, political or bureaucratic spheres) or by social structures such as class, gender and race.

Finally, there are questions about the nature of judicial practice and what Bourdieu (1972:77) calls the 'unconscious principles of the ethos of practice' which operate to determine and limit the parameters of individual conduct and aspirations, and of

collective action. These questions about individual agency and personal choice in judging, and about change and its requisite conditions, are all directed towards ways of better apprehending, understanding and explaining the role of judges in the penal world. Social theory helps facilitate this task by allowing these questions to be framed in ways that allow the particularities of the penal environment to be seen more clearly (Garland and Sparks, 2000).²

In Section 1, I consider Bourdieu's conceptual framework of *habitus, practice and field* and his *theory of practice* for the insight they offer about these and other dynamics of judicial life and practice when exploring judges' narrative accounts in subsequent chapters of this thesis. In particular, and notwithstanding the sustained critique that Bourdieu's concept of *habitus* necessarily implies a static and determined model of the social world, I consider the capacity of these concepts to capture some of the possibilities and processes of change as well as continuity, and of differentiation as well as homogeneity, in the judicial field of practice. As Wacquant (2007) observes, much of Bourdieu's sociology represents a critique of inherited and taken-for-granted categories of thought. This articulates well with the ambition of this project to explore and question dimensions of judicial life and work about which there seems much received wisdom. The explanatory potential of *habitus* is usefully expressed by Reay (2004:437) in this way:³

Habitus is a way of looking at data which renders the 'taken-for-granted problematic. It suggests a whole range of questions not necessarily addressed in empirical research; How well adapted is the individual to the context they find themselves in? How does personal history shape their responses to the contemporary setting? What subjective vocations do they bring to the present and how are they manifested?

In Section 2, I consider the question of *reflexivity*, the need for reflection on the conditions and dimensions of the researcher's position in the social and intellectual fields she occupies. I extend this discussion about reflexivity to the penal agent and their capacity to reflect on the conditions of their own practice and dispositions, and the position they occupy in the penal field. In Section 3, I consider how to move

from subjective accounts, descriptions and observations of practice gained through research, to a sociological view of how those practices are generated.

Section 1 Habitus

Habitus as theory and method

Bourdieu emphasised that the concepts of *habitus*, *practice* and *field* emerged out of continuing ‘confrontations’ with the range of empirical realities he studied, and were not intended as a set of stand-alone theoretical constructions or as a substitute for research. Indeed, he suggested they were better conceived as a *method*:

The main thing is that they are not to be conceptualised so much as ideas, on that level, but as a method. The core of my work lies in the method and a way of thinking. To be more precise, my method is a manner of asking questions rather than just ideas. This, I think, is a critical point.

(Bourdieu, 1985, quoted in Mahar, 1990)

As Reay (2004:439) notes, Bourdieu is using the term ‘method’ here in a broad sense to emphasise his point that this framework of ideas was imagined as a ‘conceptual tool to be used in empirical research rather than an idea to be debated in texts’, and as ‘a way of understanding the world’. Bourdieu’s own conceptual work, as Reay shows, moves in a dialectical loop between theory, empirical work and reformulation of theory, using ideas as ‘open concepts designed to guide empirical work’ (Bourdieu, 1990b:107). This lends *habitus*, as *theory*, a certain mutable and indeterminate quality, with the attendant danger that it can become ‘whatever the data reveal[s]’ (Reay (2004:438); but this uncertainty seems less perilous when considered in the context of Bourdieu’s intended use of *habitus* as a ‘program of perception and of action’ and as a ‘modus operandi’ which guides and structures research practice (Wacquant, 1989:50).⁴

Whether conceptualised as theory or method, Bourdieu did not want to limit the explanatory capacity of his ideas to the empirical context in which they were formed; his writings indicate that he envisioned a cross-cultural/ historical use for them;

while simultaneously, and without any necessary contradiction, insisting that to achieve this level of generalisation it was necessary to locate it within an empirical context:

My entire scientific enterprise is indeed based on the belief that the deepest logic of the social world can be grasped only if one plunges into the particularity of an empirical reality, historically located and dated, but with the objective of constructing it as a 'special case of what is possible'.

(Bourdieu, 1998:2)

It is in this spirit that I consider the concepts of *practice* (and discourse about practice) and *habitus, field and capital*: as a way of exploring some of the practical and theoretical problems that emerge in this research, but with a view to making broader and more general connections with the social world of penality from the empirical specificity of this project. In subsequent chapters of this thesis I draw on these concepts as Bourdieu intended - as methodological tools - putting them to use in exploring, interpreting and explaining narrative accounts.⁵

In order to effect the first part of the dialectical loop between theory and empirical work it is necessary first to set out in this chapter the scope and logic of those concepts and then to examine the use to which this conceptual framework has been put by Bourdieu himself and by others in relation to judges and judicial work. The concepts of *habitus, field and capital* have some obvious affinity with inquiry into the habits, values and practices of an occupational group such as the judiciary, but there have been surprisingly few attempts to employ them in this way. Bourdieu's own example (1987) is therefore instructive and I consider the extent to which a sometimes overly reductive or deterministic application or interpretation of this conceptual framework limits the potential of that approach.

Greater engagement with Bourdieu's views on *practice* and on *reflexive sociology*, on the other hand, may hold potential for enlarging the scope of inquiry and to consider processes of adaptation, change and potential rather than stasis and reproduction. The ways in which Bourdieu's approach usefully articulates with this study of judicial dispositions and culture will be outlined and I draw on some of

Bourdieu's last expositions and exemplars of his ideas in *The Weight of the World* (1999) for this purpose. I suggest that where deployed as theory *and* method, and alongside some of Bourdieu's insights about the nature of practice (and discourse about practice), the concepts of habitus and practice allow potential for greater understanding about some broader dimensions of judicial lives and practice through narrative accounts – and point towards some limitations in that enterprise, too.

To reflect on these matters requires engagement with the concept of reflexivity beyond the structural and spatial dimensions of positionality, and the relational dynamics discussed in Chapter 2. In the context of a narrative approach to interviewing, I discussed reflexivity in two distinct senses. Firstly, insofar as the narrative accounts which emerged were the individual responses of retired practitioners to an invitation to reflect on their judicial careers, reflexivity was an ontological aspect of the research process for the judges themselves. Moreover, for the *researcher* it was a methodological stance which may provide greater 'ethnographic authority' (Pillow, 2003). The strength of this stance as methodology lies in its potential to question and unsettle some orthodoxies of research, such as the authority of objectivity and the politics of representation and of power relations; but its weakness lies in the limited attention paid to the conditions of research production itself – the 'habits of thought of the intellectual field' – and the temptation it offers for some degree of 'vanity reflexivity' (Kenway and McLeod, 2004).

Bourdieu's *reflexive sociology* suggests a different return on this question; away from (simply) the researcher in her 'biographical idiosyncrasy' (1989:35) and towards the sociological field itself, and the space in that field of one's point of view.⁶ According to this understanding of reflexivity, it is only by interrogating the position which the researcher adopts in the field towards the object of study and to the inherited dispositions and categories of the sociological field which she occupies (those 'classifications, hierarchies, problematics etc. that always, in spite of ourselves, orient our thought' (Bourdieu, 2000:9)) that the 'unthought categories of thought which delimit the unthinkable and predetermine the thought' can be systematically uncovered and explored (Bourdieu and Wacquant, 1992:40). In most

of his work Bourdieu reserves to scholars alone the capacity, or inclination, to objectify and reflect on the conditions of their intellectual position, and on the ‘unthought’ categories of the field. A preliminary attempt will be made in this chapter to draw attention to some of the ways in which academic thought towards judicial discourse is currently orientated; this task will be continued throughout subsequent chapters.

This chapter therefore continues the discussion towards the end of Chapter 2 which was concerned, *inter alia*, with the question of what weight should be given to the subjective narrative accounts of judicial actors about the field of penal practice, and what relations of distance or engagement this suggested for the researcher at each stage of the project. Here I extend that discussion by drawing on social theory to aid the key sociological task identified by Bourdieu (echoing C. Wright Mills and his linking of personal troubles to public issues): how to take stories about ‘the apparently most subjective tensions of the social world and their contradictions’ and show how they frequently ‘articulate the deepest structures of the social world and their contradictions’ (Bourdieu, 1999: 511).

Judicial narratives: personalism and agency

In Chapter 2, I addressed some of the methodological challenges posed by this biographical narrative study of the judiciary; questions of the authenticity, truth and validity of personal accounts, common to phenomenologically-inspired methods of social inquiry. In order to escape some of the individual relativism that is entailed in the use of first person accounts, narrative scholars reflect on the situated and strategic nature of these accounts: that they are given (and received *and* co-constructed) in cultural, social and institutional contexts. Some of these relational dynamics were explored in Chapter 2, and an interpretive position based on the hermeneutics of faith (restoration) and suspicion (demystification) was outlined as a partial response to some of these dimensions of the research. And in order to address aspects of the validity question relating to the interpretations produced I adopted the interpretive framework suggested by Reissman (2008:118) which addresses questions of

trustworthiness and coherence. These methodological interventions are important for the integrity of the narrative research project and allow some of the strengths of the narrative approach to be more apparent: that it produces rich and insightful accounts of the experience of judging and sentencing, embedded in the lives of individuals, suggesting links between the past and the present.

It is integral to narrative research that it facilitates the external expression of some individual, internal representations of events and experience (Andrews, 2008); and within the diverse range of ways in which narrative research is conceptualised and exemplified, its potential to connect biography and society through individual life histories is also evident (Riessman, 2008). However, even with narrative researchers concerned with the social and cultural implications of narratives, it is unclear what conception of action or agency is being employed as far as the individual agent is concerned. As Andrews (2008:7) notes, this is one of narrative research's 'theoretical incommensurabilities' which some narrative researchers attempt to resolve by 'strategic essentialism' i.e. the 'assumption of agentive subjects where politically expedient'. Narrative research is nonetheless an approach which takes individuals' understandings about their own conduct, reason and agency as some basis for social life, though not necessarily adopting wholesale the phenomenological notion that social reality is 'but the sum total of the innumerable acts of interpretation whereby people jointly construct meaningful lines of (inter)action' (Wacquant, 2008:267).

For Bourdieu (2000:132) the 'personalism' of the subjective account, with its belief in the 'uniqueness of the person', is a 'condensed form of all the theoretical postures – mentalism, spiritualism, individualism, etc. - of the most common spontaneous philosophy'. There are some echoes of this in the criticism of narrativity and contemporary storytelling. This is the claim that our culture of reflection, and the seeking after identity and 'authenticity', promotes an 'interview society' in which everyone has a 'story' to tell; but which soon descends into a 'rather facile relativism' in which everyone has their own values and about which it is difficult to argue (Bloom, quoted in Frank, 2002; see also Atkinson, 1997). For Bauman (2000a) this relativist individualism makes both the idea and the pursuit of 'common

interests, and most notably *negotiated* common interests' increasingly difficult. All this presents a problem for the 'liberalism of neutrality' and its reluctance to affirm the values of some over others – the idea that 'some forms of life are indeed *higher* than others' (Taylor, 1991:17, original emphasis).

The charge that our contemporary taste for narratives produces stories that lack reference to 'things that matter' could not easily be levelled at the judges' accounts found in this study, pre-occupied as they are with some of the very questions Bauman poses. Moreover, the act of judging – especially sentencing – necessarily represents a purposeful act of affirmation and signification of a particular set of 'higher' values. It is, *ex facie*, a highly agentic function in which judgement triggers and sets in chain a process of state-legitimized violence:

Legal interpretive acts signal and occasion the imposition of violence upon others. A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.

(Cover, 1986: 1601)

For Cover, this understanding of the coercive function of the judiciary, and of the cultural practices which support it, requires an attitude of suspicion towards those judicial actors who deal in 'pain and death', and leads him to a strong rejection of any 'humanistic interpretation' of the judicial role, or of its subjective representation:

...any account which seeks to downplay the violence or elevate the interpretive character or meaning of the event within a community of shared values will tend to ignore the prisoner or defendant and focus upon the judge and the judicial interpretive act. Beginning with broad interpretive categories such as "blame" or "punishment," meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence.

(Cover, 1986:1608)

In his indictment of accounts of penal practice which trade in metaphors of community and the communication of shared norms, and which operate to deflect attention from its real and material effects, Cover directs our attention to the

hegemonic form and function of judicial discourse. In the present study, awareness of this dimension of penalty prompts curiosity about those institutional mechanisms of support for punishment, the cultural practices which sustain and defend them, and the moral and psychological implications for judicial actors who are implicated in them. The subjective accounts of the actors in question are essential to the exploration of these dimensions of penal practice – though not ruling out any ‘humanistic’ interpretation - but the questions of agency, and of the representations of practice contained in those accounts, remain central concerns of this thesis and are explored further in this chapter.

The ‘epistemological pair’: subject and object

For Bourdieu, there are three forms of theoretical knowledge which are commonly brought to bear on the social world; the first is phenomenological, concerned with primary experience and which attends to the recovery or reconstitution of the lived experience. The second is objectivist and directs attention to the objective relations which structure and determine the dispositions of individual practitioners, their practice, and representations of that practice. Bourdieu is in ‘double opposition’ to both characterisations of social action and he expresses what he believes to be the necessary dialectical relationship between the two modes of knowledge in a theory of practice: this is his ‘third-order’ form of knowledge.

The challenge arises from the deep-rooted opposition in social and philosophical theory between objectivist and subjectivist (interpretive) methods of inquiry and the related dialectic of agency and structure: the extent to which the actions of individuals are constrained by objective structures in the world, and the relative importance which should be attached to the mental structures and representations which shape those actions. Much of Bourdieu’s intellectual energy (1977; 1980; 1998; 1990a; 1990b; 2000) was directed towards overcoming these oppositional readings of the social world, a dualism he regarded as theoretically flawed and disabling of rigorous sociological thought. Lane (2000:88) traces the development of Bourdieu’s thought on this subject from his early works on Kabyle anthropology to

his fully developed theory of practice and reflexive sociology, and notes that anthropological scholarship (of the colonial type) presented him with a striking example of the intellectual hazard awaiting the unreflective scholar. This folly derived from overlooking the inevitable distortions that resulted from the distance that separated observer from observed. The same tendency was manifest in the other principal current of thought which informed Bourdieu's views, the opposition of Lévi-Strauss's structural anthropology and Sartre's existential phenomenology. The existentialist folly was to elevate the 'drama' of the individual subject and to attribute to the individual a degree of freedom and agency which was in fact contingent and determined by social forces; the structuralist error was to prematurely proclaim the 'death' of the subject and reduce complex social practices to 'a closed system of structural laws intelligible only to the impartial observer' (Lane, 2000:89). Without reflecting on the 'social, historical and material determinants' of that relationship both schools then unwittingly imported their own relationship with the object, into their analysis of the object, as either:

'the mechanical execution of a model or the pure expression of free choice, this depending upon whether one is thinking more of oneself or of others'.

(Bourdieu, 1972:195)

Oppositional readings of the judicial role

These oppositional readings of the social world have implications for the ways in which the accounts of judicial actors can be understood and explained. Phenomenological or subjectivist accounts of social action tend to view society as the product of the 'decisions, actions, and cognitions of conscious, alert individuals to whom the world is given as immediately familiar and meaningful'; but as Wacquant (1992:9) notes, in so doing they may exaggerate individual agency and underplay the constraints on action of pre-existing social structures and relations. Thus, a *subjectivist* reading of the judicial role would be primarily concerned with the way judicial actors make sense of the penal world and with gaining a practical understanding of that domain. This approach would give greater weight to subjective

accounts of experience and take individual accounts as some basis for explanation of social action. Rejecting overly deterministic conceptions of human action, this perspective attaches greater significance to the possibility of individual agency in the judicial role.

Although for Bourdieu, personalism or subjectivism is the basis of the ‘scientifically disastrous opposition between the individual and society’ (2000:132), *objectivism* falls prey to the ‘Durkheimian collectivist fallacy of reifying social structures’ (Farnell, 2000:408). Here, social phenomena are treated as ‘things’ and what is left out is ‘everything that they owe to the fact that they are objects of cognition – or of miscognition – in social existence’ (Bourdieu, 1987:125). An *objectivist* reading of the judicial role would draw attention to the objective material forces and conditions of social and economic life that together determine and delimit judicial practice and individual agency in the penal field, and which shape the ways in which judges represent that practice; class, gender and race for example. On this structuralist reading of the social world, then, the various representations and accounts of disposition, motivation and action that are offered by judges in interviews could be interpreted as the more or less mechanical and unconscious reactions to the social framework within which they function – some sort of ‘pre-established assemblies, ‘models’ or ‘roles’’ (Bourdieu, 1977:73).

For Bourdieu, the ‘ideological couple’ of subjectivism and objectivism represent two epistemological obstacles in the path of social scientific knowledge (Lane, 2000). Neither account, however, provides a sufficient explanation of social action in itself; these two dimensions of social life – the social and the mental structures – are better understood as related by ‘a twofold relationship of mutual constitution and correspondence’ (Wacquant, 2007). What Bourdieu seeks to achieve is a conceptual synthesis which transcends the ‘antagonism which opposes these two modes of knowledge, while preserving the gains of each of them’ (Bourdieu, 1980:25). Stated briefly here, in *habitus, practice and field* Bourdieu conceptualises a theory of social action in which agents are ‘neither free nor the mere puppets of objective social laws’. Rather, they ‘incorporate a practical sense of what can or cannot be achieved,

based on intuitions gained through past collective experience, into their ‘habitus’” (Lane, 2000:25). Bourdieu’s attempted resolution is therefore a supersession of the ‘ideological couple’ of objectivism and subjectivism so as to attain a ‘third-order’ level of knowledge; a theory of practice capable of properly constituting the social world. Importantly, practical knowledge occupies a pivotal position in this dialectical synthesis of practical and theoretical ways of thinking. This attempt to create an integrated approach, a ‘theory of practice’ which locates the blind spots of each perspective while saving their respective insights, (Lane, 2000) is of much interest here, because the tensions outlined in these dominant themes of social theory are reflected in existing sentencing scholarship and continue to orient some of the ways in which judicial practice and discourse is understood, explored and represented.

Methodological objectivism and third-order knowledge

‘Methodological objectivism, a necessary moment in all research, by the break with primary experience and the construction of objective relations which it accomplishes, demands its own supersession’.

(Bourdieu, 1977:72)

In his sociological critique of the juridical field, and referring to law’s universalizing and legitimizing effects, Bourdieu (1987:843) observes that the power of the law is ‘special’. But importantly, as he cautions elsewhere, the social importance of a subject does not by itself confer any particular significance on the discussion or analysis that accompanies it (1987:843).⁷ What does matter, if that discourse is to have any sociological importance, is the ‘rigor of the construction of the object’ (Wacquant, 1989:51). This is only achievable and made fully evident after a first ‘break’ with subjectivism and through careful empirical evidence. In relation to the judiciary, this ‘necessary moment’ of objectification would call attention to the specific features of the institutional environment of the judiciary, and to the ways in which judicial practices are generated and in which accounts of that practice are produced. The various legal conventions and institutional arrangements which inhibit judges from speaking publicly mean that such accounts are infrequently given or

available in the public domain, but even so, the relative novelty of the phenomenon does not alter the force of Bourdieu's observation about the dangers of reification.

By insisting on the need for a methodological 'break' with primary experience, Bourdieu does not underplay the importance of first-person accounts for gaining insight of social life, and his own writings indicate commitment to what he calls a 'sociology of the perception of the social world, that is, a sociology of the construction of the world-views which themselves contribute to the construction of this world' (1987/1994:130).⁸ However, he believes that sociology cannot rest content with the 'mysteries of subjectivity' or a 'phenomenal vision' of the social world (1977:4), and the objectivist break he proposes is not with phenomenology itself but with the 'pre-notions, ideologies, spontaneous sociology and 'folk theories'' that form part of subjective accounts; those 'tacitly assumed presuppositions [which] give the social world its self-evident, natural character' (1977:3). These 'native accounts', he observes, look only at how the world is subjectively constructed and understood, and give undue emphasis to the capacity of individual actors to act in the realm of practice. However, once this first break with primary experience has been achieved, the limits of the objectivist position itself require to be fully questioned, but without rehabilitating subjectivism or that form of 'naïve humanism' which pits 'lived experience' against objectification (1977:3). For Bourdieu, the contemplative or impartial position usually adopted by the sociologist represents a 'scholastic fallacy', and has a distorting effect on the production and interpretation of 'native' accounts. The source of this bias is a fundamental misunderstanding about the nature of practice itself, viewing it as 'an interpretive puzzle to be resolved, rather than a mesh of practical tasks to be accomplished in real time and space' (Wacquant, 2007:11).

Judicial discourse: 'native' accounts of practice

A key issue arises here about the nature of judicial discourse that is found in narrative accounts (and other forms of interview). How do judges represent their experience of judging, and how is this practical sphere of knowledge interpreted and

represented by researchers? For Bourdieu, discourse about practice embodies the common-sense ('doxa') of practitioners in the field who are 'immersed in universes in which it goes without saying'; this is evident in the 'semi-learned grammars' and the 'unthought categories of thought' of any field of action and on which agents draw in their accounts of practice (2000:12). This aspect of practical knowledge, Bourdieu believes, presents an obstacle in the way of scholars in their attempt to construct the sociological object.

Where that object of study is the sentencing judge, those 'unthought' ways of thinking and being carry extra significance. This is because of two related aspects of the judicial role in punishment which have relevance for how judges speak about it. Firstly, as sociologists of punishment have shown, punishment practices such as sentencing have constitutive and generative effects in the social world, and this understanding directs our attention to the rationalizations and justifications judicial agents provide for those practices, not just for their expressive significance but for the social and cultural commitments they suggest. And secondly, the concepts of judicial independence and neutrality are couched in the universalizing and legitimizing claims of law. Bourdieu's concept of *symbolic violence* thus has some force in its application to judicial discourse – indicating the ability of dominant actors such as judges to conceal the arbitrary and contingent nature of their 'power to name' in the social world, and thereby to achieve the complicity of others in their subjection to these categories and classifications of conduct.

In *Outline of a Theory of Practice*, intended as a 'reflection on scientific practice which will disconcert both those who reflect on the social sciences without practising them and those who practise them without reflecting on them' (1977:vii), Bourdieu illustrates the pitfalls which these 'native' theories and representations of action present for the unreflective questioner. Grounded in his own early anthropological experience and drawing on examples from art history, cartography and linguistics, he draws attention to the theoretical distortions which arise from the researcher's position as an 'outsider' who has no place in the system he is observing. He notes, for example, that linguistic research carried out in the researcher's mother tongue is

quite different from the form it takes in a foreign language (the difference between a listening subject and the speaking subject); and observes the way in which sociologists often compensate for their lack of innate knowledge of a social world by constructing cultural ‘maps’ which they use to orient themselves around this unfamiliar landscape. For Bourdieu, the ‘intellectualist tendency’ to adopt the position of impartial observer introduces a significant source of bias:

So long as he remains unaware of the limits inherent in his point of view on the object, the anthropologist is condemned to adopt unwittingly for his own use the representation of action which is forced on agents or groups when they lack practical mastery of a highly valued competence and have to provide themselves with an explicit and at least semi-formalized substitute for it in the form of a *repertoire of rules*, or what sociologists consider at best, as a ‘rôle’, i.e. a predetermined set of discourses and actions appropriate to a particular ‘stage-part’.

(Bourdieu, 1977:2)

As Bourdieu describes it, this is almost a comedy of errors; a performative event in which the process of research and inquiry induces in each party a series of performances, responses and misunderstanding while each remains ignorant of the true nature and implications of their respective positions. The research dialogue typically proceeds in this way: the agent is prompted, by questions about his practice, to effect a ‘reflexive and quasi-theoretical return’ onto his own practice, drawing attention to his most remarkable ‘moves’. This response, being necessarily an ‘outsider-orientated discourse’, tends to ‘leave unsaid all that goes without saying’ and excludes direct reference to specific cases.⁹ A ‘distance’ has now emerged between agent and researcher which is that between the ‘learned reconstruction of the native world and the native experience of that world’. The process of questioning has produced from the agent a standpoint or perspective – no longer action, not quite science – which consists of a post-hoc rationalization of the ‘unconscious schemes’ of his practice:

Because his actions and works are the product of a *modus operandi* of which he is not the producer and has no conscious mastery, they contain an ‘objective intention’.....which always outruns his conscious intentions. The schemes of thought and expression he has acquired are the basis of the *intentionless invention* of regulated improvisation. Endlessly overtaken by his own words, with which he

maintains a relation of ‘carry and be carried’....the virtuoso finds in the *opus operatum* new triggers and new supports for the *modus operandi* from which they arise, so that his discourse continuously feeds off itself like a train bringing along its own rails..... witticisms surprise their author no less than their audience, and impress as much by their retrospective necessity as by their novelty.

(Bourdieu, 1977:79)

The research relationship thus outlined by Bourdieu has a pedagogical dimension insofar as the agent is attempting to make explicit for the outsider (a non-player) the rules of a game which are largely unconscious and unknown to the player. In trying to create the appearance of mastery of his practice (based on an illusory set of rules) the agent produces a ‘semi-formalized substitute’ for action; this discourse draws on the language of rules, the language of ‘grammar, morality and law’. For Bourdieu, it is quite misleading for the language of rules to be invoked in this way (though the agent does this unwittingly): the true nature of any social practice is that it follows quite different principles. This is the operation of the habitus which generates practices through a set of socialized dispositions; I return to this shortly.

Here it becomes apparent that both agent and researcher are in a state of ignorance. Despite all appearance of purposeful action and intention, the agent is simply displaying ‘the practical mastery which makes possible both an objectively intelligible practice and also an objectively enchanted experience of that practice’ (1977:4). The agent is unaware of the true principles of his practice – that it amounts to *learned ignorance* of these principles. And the sociologist, having adopted the objectivist position of the impartial spectator, but having no innate knowledge of the practice, labours under the same fundamental misapprehension about the true nature of practice, assuming that its generative principle must be a set of ‘independent and coherent axioms’ or rules (1980, *ibid*: 12). This ‘scholastic fallacy’ leads the sociologist to misunderstand, and thereby misrepresent, the social world as ‘an interpretive puzzle to be resolved, rather than a mesh of practical tasks to be accomplished in real space and time’; this distorts the ‘situational, adaptive ‘fuzzy logic’ of practice by confounding it with the abstract logic of intellectual ratiocination’ (Wacquant, 2007:273).¹⁰ For Bourdieu, agents are ‘virtuosos’

(1977:79) rather than individualistic rule followers, and have no need of rules and principles to guide them around their world. They rely instead on a ‘sense of the game’ and practical flexibility. As King (2000:419) observes, this intuitive ‘sense of the game’ refers to ‘a sense of one’s relations with other individuals’; it is an *intersubjective* quality requiring a finely-tuned understanding of the norms and values of other individuals in the group.

These insights on the nature of practice, and Bourdieu’s insistence on reflexivity as a remedy for the bias unwittingly introduced by the sociologist’s position in the field, are of considerable interest and relevance to the study of sentencing as a social practice. In particular, they invite reflection on the way sentencing practice is represented by judges in interview and the extent to which it captures the ‘true’ situational ‘fuzziness’ of practice.

Section 2 Reflexivity

One of the most distinctive aspects of Bourdieu’s work is his insistence on *reflexivity*, the need to continuously reflect on the conditions and dimensions of the researcher’s position in the social and intellectual fields she occupies (Wacquant, 2007). Bourdieu identifies three possible sources of bias in a scholar’s work; firstly, there are personal factors such as gender, ethnicity, and class which may be relevant, and as discussed in Chapter 2, the narrative researcher would be encouraged to reflect on these aspects insofar as they allow insight of the situated character of parties to the research. Second, the sociologist should reflect on the inherited categories of thought and perception in a particular intellectual field and carry out a ‘critical dissection of the concepts, methods and problematics she inherits’ (Wacquant, 2007:273). Finally, reflection by the scholar on their own position in the field is necessary if distortions in the production of accounts are to be avoided. These distortions tend to arise from the ‘intellectualist tendency’ to assume a ‘contemplative or scholastic stance’ (Wacquant, *ibid*: 273) and which lead to misapprehensions about the practical world.

For Bourdieu, this reflexivity is the pre-condition for the supersession of both primary experience and of objectification which will allow the researcher to achieve ‘third-order’ knowledge: this is a ‘higher objectivity’ which conserves and integrates the gains of both practice and theory (1980:17). This involves some return to the common-sense world of practice which is an integral part of the social world, but in a manner which acknowledges that objects of knowledge are ‘*constructed*, and not passively recorded’; the purpose is to ‘sidestep objectivism without relapsing into subjectivism’ (Wacquant, 1989:42).

Judicial reflexivity

I address here some of the implications of Bourdieu’s theory of practice and reflexivity for this study; first judicial reflexivity, secondly reflection on some ‘inherited’ categories of thought in the field, and finally reflection on the researcher’s position in the field. The first dimension that bears further consideration is the capacity of judges, as practical agents, to reflect on the conditions of their own practice and dispositions, and of the position they occupy in the penal field. As I have shown, it is integral to Bourdieu’s theory of practice that in order to achieve a ‘rigorous science of practices’ (1977:4) the sociologist should make a double movement of thought; first, a break with subjectivism and the ‘lived experience’ of agents in order to question and challenge the ‘tacitly assumed presuppositions which give the social world its self-evident, natural character’ (1977:3). For Bourdieu, a lack of reflexivity on the part of the *agent* is one defining element of the practical world. It represents:

‘all that is inscribed in the relationship of *familiarity* with the familiar environment, the unquestioning apprehension of the social world which, by definition, does not reflect on itself and excludes the question of the conditions of its own possibility’.

(Bourdieu, 1977:3)

Put more forcefully, the objective truth of the *doxic* world of the agent is that it represents ‘experience denied explicit knowledge’ of the structures of the social world (1977:3). To neglect this dimension of practice, and discourse about practice,

would be to run the danger of producing some sort of ‘*half-science* which unknowingly accepts categories of perception directly borrowed from the social world’ (Bourdieu, 1996:224). Or worse:

‘.....it can reduce the social world to the representations that agents make of it, the task of social science then consisting in producing ‘accounts of the accounts’ produced by social subjects’.

(Bourdieu, 1987/94:12)

This is certainly an epistemological fate to avoid, and wariness of it forms some basis for the interpretive position based on faith and suspicion which is set out in Chapter 3. The principal aim of Bourdieu’s process of objectification is, in similar vein, to enable the sociologist to question these taken-for-granted categories of thought and to lay bare some of the logic of social processes which are less visible in the subjective accounts, and to the agents themselves. Indeed, for Bourdieu (1977:79), the agent’s understanding of the practical world is at a ‘pre-conscious’ level:

‘It is because subjects do not, strictly speaking, know what they are doing, that what they do has more meaning than they know’.

The essence of practical knowledge, it seems, is ‘blindness to its own truth’ and is reflected in an outlook which ‘excludes any reflexive return’ by the agent (1980:91). Taking seriously the need for reflection on the categories of thought and perception that we inherit from our intellectual field, I consider the possibility that Bourdieu’s understanding of the agent’s incapacity for any serious epistemic reflection— or, to put it another way, that only the sociologist has access to objective truth about the social world - has become one of those ‘unthought’ categories of thought in sentencing research with some important consequences. Some of the influence of this thought will be traced in the discussion of *habitus* to follow, and I will draw on narrative interviews in subsequent chapters to explore this question in relation to a number of emergent themes. I raise here, however, the general question which Bourdieu’s observations raise about the limitations of judicial discourse about sentencing practice.

Tomlin's (2000) typology of socio-legal scholarship provides a useful framework for this discussion. He argues that in the inter-disciplinary school, there are two 'fields of encounter'. The first field is characterized by a 'modality of rule' in which law and legal actors such as judges are perceived to operate autonomously. This perspective takes dominant legal ideologies 'at their own estimation' and tends to produce a form of self-referential legal discourse which restricts its own usefulness to enabling legal scholars to communicate with judges and other legal practitioners. By its nature it inhibits engagement with broader audiences or topics. It is the second 'field of encounter' which produces scholarship concerned with questions about the form and expression of juridical order, typically drawing on analyses situated in politics, society and the economy (and here criminology would be the exemplar field of scholarship). For the present study, Tomlin's typology of fields of encounter and Bourdieu's methodological process of objectification and reflexivity both usefully point to the dialectical relationship to the field that the researcher must adopt: that is, the exploration of the first field, the realm of practice with its self-referential discourse, habits and 'routine categories' of thought, from the perspective of the second, which objectifies and interrogates these categories. And importantly, one of the tasks of criminological scholarship which has as its object of study an institution such as the judiciary is to question the 'conditions of its own possibility' in a way which practitioners may not.

All this may simply suggest a division of labour in the field which more or less corresponds to accepted conventions. Both frameworks nonetheless carry understandings of the nature of judicial discourse, along with some broader implications about the judicial role and how we study it. There is much in Bourdieu's account of agents' discourse about practice that resonates with my experience in this study of the way judges talk about and represent their practice and experience of judging. However, the corralling of judicial thought into a 'pre-conscious' and unreflexive category, from which confines only the researcher can raise consciousness (to a higher level of thought), strikes a discordant note. Certainly, in most narrative accounts in this study there was evidence of the diversity of discourse

and rhetoric which characterises much talk in the penal field – the ‘utilization of different idioms, and its tendency to project contradictory and ambivalent messages’ (Garland, 1990:275) - and Tomlin’s characterisation of ‘self-referential’ discourse captures well the flavour of much discussion about concepts such as judicial independence and impartiality.

To an extent, this reflects the manner in which legal discourse is conventionally constructed; around a reified conception of law as autonomous, and which draws on a set of taken-for-granted concepts and doctrines (such as the rule of law and judicial independence) and binary oppositions such as free will versus determinism, and positivism versus realism. As Norrie (2002: ix) puts it, these legal concepts tend to be ‘troubled and oppositional and generally hunt in pairs’; and by their emphasis on individual responsibility, they also tend to exclude or minimise questions of social justice.¹¹ Bourdieu describes precepts such as these - the ‘semi-learned grammars of practice – sayings, proverbs, gnomic poems, spontaneous ‘theories’ – as ‘secondary explanations’ which merely serve to reinforce existing structures and practices by providing them with rationalizations (1977:20). In the field of practice, and by virtue of their perceived status as prominent spokespeople for these and other notions, the judge’s position may be thought to entail a continuous process of reification and objectification of law and its legal categories (Kahn, 2003). Moreover, the biographical orientation of these narrative accounts also lends itself to self-referential discourse of the type encapsulated by Tomlin.

As Valverde (2006) observes, law and society scholars are often critical of this dimension of judicial speech, noting the seeming contradiction between the judges’ views and their official positions, and decrying the use of both popular and expert knowledge in judicial discourse.¹² Valverde has a useful perspective on this sort of ‘creative mixing and matching’ that is evident in judges’ speech. She argues that legal actors such as judges are required, by their institutional position, to ‘reduce’ to a manageable pile the diverse knowledges which are derived from law and social science. The common-sense notions and legal concepts that emerge are thus mechanisms for ‘excerpting, bracketing, formalizing, and otherwise ‘reducing’

knowledge claims (as cooks reduce sauces)' (2006:593). We can accept that law acts like an 'epistemological meat grinder', Valverde says, without reifying law and not being diverted from the task of exploring 'actually existing' knowledge networks, debates and conflicts where they occur.

Section 3 Habitus, field and capital

The 'conceptual arsenal'

I turn now to a question which arises in the present study: how to move from subjective accounts, descriptions and observations of practice gained through research, to a sociological view of how those practices are generated. This is a question to which Bourdieu's theory of practice is generally directed; and through the conceptual framework of *habitus, field and capital* Bourdieu attempts to effect a synthesis of objectivism and subjectivism (and the related dualism of agency and structure) to address it. This represents an attempt to overcome the obstacles presented by approaches rooted in one to the exclusion of the other. In particular, habitus was intended by Bourdieu to provide a method for analysing both 'the experience of social agents and...the objective structures which make this experience possible' (Reay, 1988; 782).

These concepts have an immediate and apparent usefulness for this narrative study which has subjective and objective dimensions in various degrees of tension. Narrative accounts are necessarily grounded in a subjective and interpretive view of the world, but the judiciary (and the practice of punishment) is an institution which requires some measure of objectivist inquiry about the social structures and forces which determine the conduct of its agents and shape their individual and collective representations. It also requires critical evaluation of the established and taken-for-granted categories of thought and perception which pervade the judicial world. Bourdieu's framework offers the potential of a more integrated sociological explanation which incorporates three elements of social life: the level of structure, the level of disposition, and the level of practice (Nash, 2003:188).

Habitus is a multi-layered concept which along with *field and capital* and his theory of practice constitutes the central organizing principle of Bourdieu's work. Reay (2004) has usefully identified four related dimensions of its use. Firstly, *habitus as embodiment* can be used to explain the ways in which the experience of being in the social world, particularly in a given field, or through family and education, inscribes in the individual a set of durable and transposable dispositions. These largely unconscious attitudes and perceptions - ways of thinking and feeling - are thus shaped by the socioeconomic or structural positions in which people are situated, and which in turn shape and determine our conduct and the representations of that world. For Bourdieu, this understanding avoids the fallacious notion of the 'active subject confronting society as if that society were an object constituted externally' (1990:190).

Secondly, *habitus* can operate at the level of both the individual and of society. Thus, although Bourdieu acknowledges the history of each individual ('just as no two individual histories are identical so no two individual habituses are identical': 1990:460) he also observes that the shared histories of groups of individuals produce a *collective habitus*. Here, shared dispositions are the emergent product of homogeneity of experience in a given field.

Thirdly, *habitus* is a *complex interplay between past influences and present stimuli* (Reay, 2004: 434); it is both structured by past influences and conditions, and in turn structures those dispositions and practices subsequent to it. *Habitus* therefore carries within it the 'genesis of new creative responses' that can transcend its own social conditions (Reay, 2004:435) and can stimulate new and adaptive responses.

Finally, *habitus* implies a concept of *agency* which is at once constraining and transformative. It is constraining because individuals are predisposed to ways of thinking and acting in predictable and regular ways:

The habitus, as a system of dispositions to a certain practice, is an objective basis for regular modes of behaviour, and thus for the regularity of modes of practice, and if practices can be predicted....this is because the effect of the habitus is that agents who are equipped with it will behave in a certain way in certain circumstances.

(Bourdieu, 1990:77)

However, an important dynamic of the habitus is its generative capacity and the ability of actors to remain inventive, to improvise and adapt to new circumstances; yet the range of dispositions and practices possible in any given field are pre-limited by the ‘possibilities and impossibilities, freedoms and necessities, opportunities and prohibitions inscribed in the objective conditions’ (1990: 54). Bourdieu insists that this should invite no mechanistic or deterministic understanding of the operation and logic of practice - this is still marked by ‘vagueness and indeterminacy’ (1990:77).

Used by Bourdieu in a technical sense, a *field* is defined as a network or configuration of relations; a formation of positions held by individuals that are objectively determined by their acquisition of power and capital. The position occupied by an individual, a group or an institution in a particular field is determined by the capital (social, economic and cultural) they have acquired. Importantly, *field* is an agonistic concept, being a ‘space of conflict and competition’ over power and resources; entry to the field is itself a source of struggle and new entrants bring tension and challenge. The limits of the field themselves are ‘always at stake’ (1989:39). A critical property of any field is its autonomy from external influences and its capacity to assert its own ‘criteria of evaluation’ over those of contiguous or encroaching fields (Wacquant, 2007).

It is the interaction of *habitus*, *capital* and *field* through which practices are generated and structured, and which determines the logic and the representation of those practices. For Nash (2003:188) it is ‘almost as simple’ as this: ‘social structures, or social positions, generate socialized dispositions, and socialized dispositions generate practices’. A predisposition towards stability and reproduction is necessarily implied in Bourdieu’s account of the functioning of the habitus; an ‘immediate fit’ between habitus and field, he says, is the ‘most prevalent one’ (Bourdieu, 1989:45). Indeed, the regulation and ordering of practices is often accomplished without the necessity of rules, practices being ‘objectively adapted to their goals without presupposing a conscious aiming at ends or an express mastery of

the operations necessary to attain them'. So much so, practices thus produced can appear to be 'collectively orchestrated without being the product of the orchestrating action of a conductor' (Bourdieu, 1977:72).

Habitus is therefore the pivotal concept, linking the past and the present through dispositions already acquired, but carrying the genesis of change and transformation through dispositional responses to new encounters in the field; necessarily limiting the scope of agents but simultaneously providing scope for rational choice, agency and resistance. As Wacquant (2007) observes, the relationship *between* habitus and field is the key element of the concept, representing the meeting of disposition and position, but refusing to give primacy to either. Through his extensive writings and responses to critique, it seems incontrovertible that this form of soft determinism is what Bourdieu intended (Nash, 2003; Sweetman, 2003). However, the concept of *habitus* has been subject to the sustained criticism that it is reductive and deterministic, and I examine here the implications of this critique for the study of judicial culture.

Sentencing research: the lost or forgotten habitus?

The concept of habitus appears under-employed in judicial scholarship, considering its apparent potential for enriching our understanding of practice. The criticism that there is a tendency for habitus to be sprayed through academic texts like 'intellectual hair-spray', or 'bestowing gravitas without doing any theoretical work' (Reay, 2004:432) does not have any obvious application to the field of sentencing research. However, it is notable that Bourdieu's own influential examination of the juridical world (1987) suggests little of the dynamic relations in this field that can be read into the full scheme of his conceptual work, and may even invite the charge of latent determinism against which Bourdieu argued so forcibly. On the other hand, Bourdieu's later work 'The Weight of the World: Social Suffering in Contemporary Society' (1999), which includes interviews of magistrates among the accounts of those bearing witness to the suffering of others, explores some broader dimensions of social life and provides some telling insight into judicial lives and practice. This later

study goes unremarked in sentencing scholarship. I consider here Bourdieu's examination of the juridical field in these two studies in order to gain greater clarity about those dimensions of Bourdieu's work which offer the greatest guidance for this study.

'The Force of Law: Towards a Sociology of the Juridical Field' (1987) is a study of the *juridical* field which contains, inter alia, a classic account of the hegemonic function of the judiciary in the legal order. Advocating a 'rigorous science of the law' to overcome the dominant jurisprudential debate between formalism (the 'rigidified' doctrine of legal scholars in which law is conceived as an autonomous and closed system) and instrumentalism (in which law is understood as an instrument of domination), Bourdieu calls into service the framework of *habitus*, *field* and *capital* to construct the 'entire social universe' neglected by these accounts: the juridical field. From the outset, the operation of this field is closely circumscribed by Bourdieu:

'[the] specific logic is determined by two factors: on the one hand, by the specific power relations which give it its structure and which order the competitive struggles.....that occur within it; and on the other hand, by the internal logic of juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions'.

(Bourdieu, 1987:816)

As a social space, the juridical field is structured by a set of historical and objective relations between actors and is the site of competition over control of access to legal resources, technical competence, and over the right to 'name' or determine the law through legal interpretation; these are all forms of juridical capital. However, the struggle over power does not preclude the complementary exercise of the respective functions of legal actors; indeed, it serves as the basis of a 'division of the labour of symbolic domination' in which there is complicitous fulfilment of mutual needs by those actors. The 'universalizing claims' of law confer a transcendental appearance on juridical forms of discourse, and contribute to the production of an 'ordered vision of the social whole' (1987:819). Moreover, the social cohesion of juridical actors

serves to heighten the effect of symbolic violence. Further, reflecting the influence of legal realism, Bourdieu notes the ‘extraordinary elasticity’ of legal forms (texts and judgements) which sometimes amounts to complete indeterminacy. This, he believes, enables judges to orient practice towards ‘a sort of casuistry of concrete situations’ in which the law presents itself as ‘ex post facto rationalization of decisions in which it had no part’ (1987:827). In this way, the arbitrary decision of the judge – which ‘owes more to the ethical dispositions of the actors than to the pure norms of the law’ – contributes to the ‘collective work of sublimation’. This is the process whereby the decision is legitimated as the will of the law rather than the expression of the world-view of the judge (1987:828).

There is much in Bourdieu’s explanatory account of the juridical field that enriches and enlarges the study of the judiciary in the penal realm, and which can usefully be employed to frame some dimensions of the penal field and judicial practice. In particular, this account usefully captures and explains the competition for monopoly and the division of juridical (and judicial) labour, the power of ‘naming’ and its relevance to sentencing, the concept of ‘symbolic violence’, the nature of juridical capital, and the indeterminacy of judgement. And importantly, it captures the sense of judges’ broader commitments as part of an interpretive community committed to the legal project of coherence and legitimacy (see Kennedy, 1997; Halliday and Karpik, 1997). There are, however, two striking aspects of Bourdieu’s conceptualisation of the juridical field; firstly, the limited operation of the psychological or dispositional level of the *habitus* and the predominance of *field* and *capital* as the structuring forces of practice. Relatedly, there is very little sense of the agency of individual actors. These issues point to some limitations in the use of these concepts for this study.

As Nash (2003) observes, concepts perform work; and if, as Bourdieu insists they should, actors *can* escape the structural determinist fate, then the work of the habitus – as an embodied set of dispositions - is to provide the grounds for agency and transformation through adaptive responses to new experiences, however limited those may be. But if, as in this account of the juridical field, those pre-existing

cultural and structural features of society seem only to produce homogeneity of disposition among actors in the field, which neatly complements those dispositions of the holders of ‘worldly power in general’, habitus cannot do its work of providing the genesis of agency and change. As Bourdieu observes, the ‘parallelism of habitus’ which is quite evident among legal actors, tends to foster ‘kindred world-views’; it therefore ensures that the choices made by legal actors between competing interests and values are ‘unlikely to disadvantage the dominant forces’ (1987:842). Among the dominant legal actors in the field, he singles out judges whose membership of the dominant class is ‘universally noted’ and whose professional corps is largely united by ‘a universally accepted hierarchy and consensus concerning its role’. Although Bourdieu does insist elsewhere that the concept of habitus implies a *predisposition* towards stability and reproduction, there is, in this overly determined juridical field in which dispositions appear not so much embedded as cemented by social structures, little sense of the mechanisms by which the habitus could facilitate invention or adaptation, never mind resistance; there is no development of his early proposition that the juridical field ‘contains the principle of its own transformation’ (1987:817). In Bourdieu’s account, all action is directed towards competition and struggle over monopolies and the accumulation of capital through legal training and knowledge. The dynamics of the social field – such as processes or mechanisms of collaboration, consensus or disagreement - are nowhere discussed, and judges appear to operate with little reflexivity. Judicial independence, for example, is described as ‘a kind of functional imperative’ which they employ ‘without even willing or realizing it’ (1987:830).¹³

The static and deterministic model of agency employed in ‘The Force of Law’ leads others to minimise its usefulness for gaining insight about social relations in the legal field. As Valverde (2006) observes, Bourdieu’s model appears to have more to say about law as a field of capital accumulation and reproduction than about social relations in the law more broadly, or even about the specific form and mode of the reproduction of legal capital as opposed to any other sort; and it tells us little about the dynamics of the knowledge which constitutes that capital, especially its

generative effect beyond the field. It can be generally observed, however, that some broad concept of habitus, in the sense of a set of values and dispositions which incline judgement in a particular way, underpins much work in sentencing research, albeit mostly impliedly and not necessarily derived from Bourdieu's conceptual framework.¹⁴ So, for example, the (largely US) tradition of judicial behavioural studies, geared towards the prediction of judgements and elimination of disparity, is premised on the idea that there is a rational and causal explanation of sentencing behaviour – derived from personal and political judicial preferences - which can be scientifically observed and measured. This seems impliedly to draw on an understanding of a shared set of dispositions and values. In similar fashion, but directly focused on the political dimension of judicial preferences and the implications for judicial neutrality, Griffith's (1997) study of the English senior judiciary is underscored by explicit assumptions about the homogeneity of judicial dispositions according to class distinctions, and their determinative effect on judgement and neutrality. More generally, habitus is used to explain a certain level of sentencing consistency which arises from the shared social worlds of background, education and training (Hutton, 2003, 2006; Franko Aas, 2004; Beyens and Scheirs, 2010) and to explain the slow adaptation of penal actors to change in the field (McNeill *et al*, 2009).

Perhaps the most complete application of Bourdieu's work to sentencing is that of Hutton (2003; 2006) who adopts the conceptual framework of habitus, field and capital to explore the 'sociological distinctiveness' of sentencing as a form of legal decision-making. In this account, the judicial habitus is constituted by a set of embedded, pre-conscious attitudes; this produces a shared judicial outlook which is 'unthinking and unreflective', and is slow to adapt to new or altered circumstances. The largely patterned nature of sentencing is explained by homogeneity of background and training, along with a distinctive legal and court culture which reinforces these shared values; in fact, judges can conceive of no other way of acting, being 'unaware that their motives, goals and aspirations are not spontaneous or natural'. Sentencing decisions are intuitive rather than rule-bound, and judges'

accounts of their sentencing practice are mere post-hoc rationalizations of the ‘unthinking common sense approach that becomes second nature to experienced judges’ (2006:163).¹⁵ Hutton also draws on the idea of cultural capital to explain judicial resistance to sentencing reform, particularly where it takes the form of attempts to limit discretion, and is understood as an attempt to retain cultural and symbolic power through ownership of legal knowledge in sentencing.

Hutton’s account of the judicial habitus and of sentencing practice is grounded in Bourdieu’s broad conceptual framework and consistent with readings of Bourdieu’s work in which actors appear to have ‘no conscious mastery’ over their practice. In this way, judges are ‘influenced and almost driven by the values and expectations they get from the habitus’, and unable logically to explain their decision-making without resorting to taken-for-granted ideas and values (2006:163). Hutton acknowledges the limitations of Bourdieu’s approach, particularly its deterministic tendency, and notes the contingent nature of the habitus; that it can change but would be slow to do so.

To take Hutton’s broad argument, it seems unassailable to observe that judges acquire habits of thought and ways of acting through socialization processes in practice, and that this tends towards homogeneity of disposition. This is, nonetheless, a static model of judicial action in relation to practice, which focuses on the homogeneity of judges and on the constraining and inhibiting effect of the habitus. There is little sense, for example, of any tension between the sanctioned ways of thinking and acting (as prescribed by the habitus) and the disposition of individuals to conform, or not. Moreover, it is unclear how historical change could be accounted for – or equally, how significant change could occur at any point in the future. Questions of agency are raised; are the processes of the habitus as deeply embedded and inevitable as suggested? If they are not so entrenched, under what conditions are judicial dispositions amenable to change and adaptation?

King observes the irony that the reductiveness of the habitus is most evident in Bourdieu’s own writings (King, 2000, drawing on Bourdieu’s anthropological work),

and as suggested here, the same observation could be made of its use in *Force of Law* (1987). If correct, the usefulness of *habitus* is limited; it is a concept which effectively captures and accounts for some processes of reproduction and stability in judicial practices, as a result of an inherent predisposition towards stability and reproduction. As Lane (2000) observes, if Bourdieu's work is unable properly to account or even allow for the possibility of change, this would be a serious limitation indeed.¹⁶

It was a source of frustration for Bourdieu's that the concept of habitus was criticized for implying the very determinism that it was intended to overcome, and this criticism has certainly been sustained (see Brubaker, 1985; Jenkins, 1982; DiMaggio, 1979; but for some defence see Harker, 2000; Calhoun, 1993; Ostrow, 2000). As Farnell (2000:401) notes, Bourdieu attempts to avoid determinism by suggesting that the habitus does not *determine* an individual's conduct; it merely *pre-disposes* them to act in a certain way. And he continued to insist, particularly in his later work, that the concept of habitus could be used to show the 'generative capacities of dispositions' (1990b:55):

...the *habitus*, like every 'art of inventing' is what makes it possible to produce an infinite number of practices that are relatively unpredictable (1990a:55)

As Sweetman notes, the limits on this capacity for invention are set by the conditions and structure of the field in which the agent is operating, and by that individual's history and prior experience (2003); in this way, the habitus is unlikely to produce either 'unpredictable novelty' or 'simple mechanistical reproduction' (1990a:55). The sense of adaptation and pragmatism that Bourdieu clearly intended for *habitus* is perhaps most evident in his use of the *game* metaphor. In this use, as a 'feel for the game' (1990b:61) Bourdieu conveys the sense of improvisation and adaptation within bounds - i.e. within the rules of the game - and the inter-relational dimension of practice that requires actors to respond to the state of play and adapt their responses in light of other players:

‘The good player ...does at every moment what the game requires’ and this presupposes a ‘permanent capacity for invention [which is] indispensable if one is to be able to adapt to infinitely varied and never completely identical situation’.

(Bourdieu, 1990b:63)

However, this objective is compounded by Bourdieu’s own logic of practice in which the dispositions instilled by the habitus are durable *because* they are habitual and unreflexive and ‘cannot even be made explicit’ (Bourdieu, 1977:94). This suggests serious limitations to the usefulness of *habitus* in explaining social change, as this writer, summarizing the broad basis of criticism, explains:¹⁷

If the habitus were determined by objective conditions, ensuring appropriate action for the social position in which any individual was situated, and the habitus were unconsciously internalized dispositions and categories, then social change would be impossible. Individuals would act according to the objective structural conditions in which they found themselves, and they would consequently simply reproduce those objective conditions by repeating the same practices.

(King, 2000:427)

The reflexive judge revisited

One way through this impasse is to recognize the ambivalence of the concept of habitus as *theory* but take seriously Bourdieu’s injunction to employ this conceptual framework additionally as *method*; here, its usefulness for empirical work which has as one focus of its enquiry the capacity of institutions for change becomes more evident. Bourdieu’s sociological ambition for *The Weight of the World: Social Suffering in Contemporary Society* (1999) is to take personal stories about ‘the apparently most subjective tensions of the social world and their contradictions’ and show how they frequently ‘articulate the deepest structures of the social world and their contradictions’ (1999:511). Bourdieu *et al* realise this aim by drawing on narrative accounts from a diverse range of individuals to demonstrate and explain the human impact of the neoliberal restructuring of the economy.¹⁸ Within the volume of forty-eight interviews there are two narrative accounts of magistrates, providing insight of tension and ambivalence in their judicial lives and careers.

Couldry (2005) notes that Bourdieu's work prior to *The Weight of the World* has drawn criticism for neglecting the voice of the individual; this makes the emphasis he places here on the 'evidential value' of the narrative accounts more remarkable. Earlier in this chapter I drew attention to Bourdieu's *theory of practice* which reserved to the researcher alone the capacity to reflect on social structures and conditions of possibility in the social world. Here in *The Weight of the World* is the first indication of a revision in Bourdieu's account of the reflexive capacity of individuals:

.....situated at points where social structures 'work', and therefore worked over by the contradictions of these structures, these individuals are constrained, in order to live or to survive, to practice a kind of self-analysis, *which often gives them access to the objective contradictions which have them in their grasp, and to the objective structures expressed in and by these contradictions.*

(Bourdieu, 1999:511, my emphasis)

He continues later:

Certain interviews bear numerous traces of the respondents' attempts to master the constraints contained within the situation by showing that they are *capable of taking in hand their own objectification and of adopting towards themselves the reflexive point of view that is inherent in the very conception of the research.*

(1999:616, my emphasis)

Bourdieu observes that not all individuals have this capacity of insight about, or access to, the 'core principles of their discontent or their malaise'. Moreover, without intending to mislead, their 'spontaneous declarations' may be capable of different interpretations (1999: 620). Bourdieu has not thrown too much reflexive caution to the wind here, despite some claims to the contrary. Although he develops a methodological position - 'participant objectification' - which involves balancing objectivity with close identification of the participant's perspective, he continues to insist on objective rigour.¹⁹

As with Bourdieu's discussion about the research benefits which accrue from 'homologies of position', the significance of this revision goes surprisingly unremarked in scholarship in the sociological field but has considerable importance

for this study of judicial culture and sensibilities.²⁰ Although, as Nash (2003) notes, the formal concept of *habitus* is almost invisible in *The Weight of the World*, its place as the generative site of dispositions appears unchanged.

If we consider again Bourdieu's earlier statement that the dispositions instilled in the individual by the habitus are durable because they are habitual and unreflexive and 'cannot even be made explicit' (Bourdieu, 1977:94), some implications of this new position become clearer. In this earlier reading of practice, the common-sense notions of practice and of social reality on which agents tend to rely amount to a form of false consciousness. However, if agents (such as judges) in fact have the capacity to reflect on some of the '*objective contradictions*' they face, and are capable of '*taking in hand their own objectification*' – recalling here that this task, usually the preserve of the scholar, entails reflecting on the conditions of their own possibility and on the taken for granted categories of thought and perception - then reflexivity of this sort could be the genesis of change and transformation of the judicial habitus.²¹

Conclusion

The usefulness of the conceptual framework of Bourdieu's *theory of practice* and *habitus, field and capital* for studying judicial culture and sensibilities can be summarised as follows. Firstly, it provides a 'middle ground' between subjectivism and objectivism for exploring the personal accounts of judicial actors. By insisting that the structures and causes of social phenomena – such as the punishment practice of sentencing - are located in objective relations in which neither mental nor social structures *alone* determine action or practice (i.e. neither agency nor structure), *habitus* facilitates two important dimensions of this study of judicial culture. Firstly, it brings to the fore the question of how and where an individual's dispositions are formed (Couldry, 2005) but also addresses some questions of power and structures which narrative research sometimes overlooks. In addition, it provides a flexible framework for exploring judges' accounts of experience and practice, encompassing a range of judicial responses and dispositions such as avoidance and conformity, and

consideration of both limitations and possibilities of the judicial role, particularly in relation to some of the parameters of judicial discretion.

Secondly, in accordance with Bourdieu's broad challenge to inherited categories of thought, it renders the 'taken-for-granted' problematic' (Reay, 2004:437) and challenges certain reified accounts of the judicial role – 'master narratives' such as judicial independence - in which practices have some external meaning and reality beyond the actings of agents. Further, in the concept of *symbolic violence* – the subtle process by which dominant groups mask the arbitrary and conditional nature of their power through the 'subtle imposition of systems of meaning' (Wacquant, 2007) – there is a profound challenge to the forms, functions and meanings of judicial discourse, with some obvious application to the idea of sentencing as a signifying process. Judge's narrative accounts of judicial life cannot be exempted from this process.

Moreover, awareness of the embedded nature of dispositions – acquired through an individual's history in the field and the product of both early and subsequent influences – directs our attention to those institutional features of the judiciary which produce and reinforce homogeneity of disposition. Importantly, it also alerts us to those accounts which tell a different story, and prompts curiosity about the meanings and effects of some different individual histories and career trajectories; this dimension is central to the biographical narrative accounts of judicial careers explored here. Indeed, the concept of *habitus* promotes the historicity of accounts, as integral to how they shape the present and the future 'habits' of actors. Bourdieu explains it thus:

Why did I revive that old word? Because with the notion of *habitus* you can refer to something that is close to what is suggested by the idea of habit, while differing from it in one important respect. The *habitus*, as the word implies, is that which one has acquired, but which has become durably incorporated in the body in the form of permanent dispositions. So the term constantly reminds us that it refers to something historical, linked to individual history, and that it belongs to a genetic mode of thought, as opposed to essentialist modes of thought....

(Bourdieu, 1993:86)

Finally, *habitus* provides a valuable framework for the exploration of the ‘immediate fit’ between judicial culture and the penal field in routine, everyday practice, and of the circumstances in which that fit may *not* be so settled. Herein lie valuable insights about the conditions and processes of penal change – as well as continuity and reproduction – with implications for sentencing reform.

In the next chapter, I explore the judges’ accounts of their early years as lawyers and judges for what they suggest about the formation and shaping of the judicial habitus and individual sensibilities. These narratives provide insight about social class, judicial diversity, the status of criminal legal work, judicial conduct and training.

¹ The concept of judicial dispositions or sensibilities about crime and punishment is an artificial though necessary abstraction: the range of human dispositions cannot easily be cabined within a ‘punishment’ frame of reference, however broadly defined, nor can the term ‘judicial’ adequately contain only those sensibilities arising in the course of judicial work.

² In an insightful yet curious aside, Bourdieu explains his ‘pragmatic’ relationship with texts and authors; he describes turning to them as ‘people you can ask to give you a hand in difficult times’ (Bourdieu, 1987:28). This possibly overlooks the combative relationship also much in evidence.

³ Reay (2004) uses the concept of habitus to explore educational issues and in particular to examine ‘small’ research contexts such as classrooms, staffrooms and playgrounds. This is entirely consistent with Bourdieu’s own conception and intended use of the idea:

‘The summum of the art, in social science, is, in my eyes, to be capable of engaging very high ‘theoretical’ stakes by means of very precise and often very mundane empirical objects.....in [the] capacity to constitute socially insignificant objects into scientific objects...or what amounts to the same thing, to approach a major socially significant object in an unexpected manner’. (Bourdieu, 1989:51)

As Nash (2003) observes, the school is an important object of attention as a site of social reproduction and for the transfer of cultural and social capital.

⁴ For Bourdieu, ‘research without theory is blind and theory without research is empty’ (Wacquant, 1989:5). His aversion to theory for its own sake is well documented:

I need not give examples of these endless and unassailable ‘conceptual melting pots’ of neologisms, refurbished categories, and pseudo-theorems, generally closed by a call for future research and empirical application, preferably by others... (Wacquant, 1989:50).

⁵ Continuing this metaphor, Nash (2003:188) regards *habitus* as the ‘Swiss army knife’ of the sociological toolkit.

⁶ Bourdieu develops this approach in trenchant opposition to simplistic positivistic methods. For Kenway and McLeod (2004) his failure to acknowledge the extensive challenge already posed to those methods by sociology and post-structural scholarship, particularly by feminist and post-colonial scholars, is surprising.

⁷ Bourdieu has in mind here scholarly discourse about particular topics – with clear relevance to the judiciary - but his observation is correspondingly apt in relation to judicial accounts of practice.

⁸ He expresses this outlook less mechanistically in his later work *The Weight of the World* (1999) as the task of *understanding* i.e. ‘seeing’, and explaining points of view.

⁹ This omission is significant because proper names and cases tend to evoke and summarize a ‘whole system of previous information’; what is thereby excluded from the account is the agent’s entire ‘universe of reference’ (Bourdieu, 1977:18).

¹⁰ In his study of the academic and education world in *Distinction* (1979) and of the art world in *The Logic of Practice* (1990), Bourdieu shows that the theoretical distortions which arise from this ‘intellectualist tendency’ are not the sole preserve of anthropology.

¹¹ These concepts are ‘troubled’ because of the structural contradictions and tensions which form the context of liberalism in western societies. I consider this more fully in Chapter 7 in relation to Norrie’s concept of the ‘penal equation’.

¹² In sentencing scholarship, this is usually part of the broad critique of indeterminacy in sentencing. Duff and Garland (1994:17) for example describe the reasoning process of judicial sentencing as ‘homespun compromises between different goals which would not stand up to close philosophical scrutiny’. Some writers acknowledge the compromises of principle involved in criminal justice practice (see Duff and Garland, 1994; Duff, 2005; Tata 1997)

¹³ It may be, as Villegas (2004) argues, that Bourdieu’s account of the juridical field should be understood as reflecting the particular disciplinary debates between lawyers and sociologists that exist in France, and which are grounded in a specific form of political domination through law that is characteristic in France; he argues that the limitations of Bourdieu’s model should be read in this light. Wacquant (1989:30) is critical of this sort of ‘*intellectual ethnocentrism* – the inclination to refract Bourdieu through the prism of native sociological lenses’. The force of this criticism presumably still applies to its use in a French context.

¹⁴ Lane (2000:41) traces the etymological derivation of *habitus* to Aristotle who used it in its original form of *hexis* to denote simply ‘habit’. Bourdieu, however, borrowed the term from Mauss who used it to describe the ways social conventions became incorporated into people’s deportment and dispositions.

¹⁵ Hutton (2006) usefully draws attention to the malign effect that these ‘common-sense’ notions can have when used uncritically to inform judgements about lifestyles and social conditions of offenders; these ideas, he observes, are no more than socially constructed values and classifications.

¹⁶ Even favourable critics such as Couldry (2005) and Fowler (1996) concede that there is a tendency in Bourdieu’s work to focus on the natural ‘fit’ of the *habitus* rather than search for ‘the norm that might provoke us into developing an alternative theory’ (Couldry, 2005:357).

¹⁷ This is endlessly recursive and as King (2000:427) notes, represents something of a *reduction ab absurdum*: individuals are unaware of their own habitus and so cannot reflect or re-interpret their practice in response to new circumstances; but new situations would not occur because everyone else is unknowingly reproducing their own practices.

¹⁸ In so doing they achieve the linkage of the personal and the public which neo-liberalism often obscures (Frank, 2002).

¹⁹ As Couldry notes, Bourdieu is at pains to distinguish journalistic or popular accounts – which include individual’s own ‘de-contextualised’ accounts - from fully sociological treatment of individual narratives. The former are still ‘doxic’ accounts which the researcher requires to objectify (2005:362). The researcher is not quite yet redundant.

²⁰ It is surprising the number of scholarly articles about *habitus* which do not consider this major text (see for example Farnell, 2000; King, 2000; McNeill *et al*, 2009; Reay, 2004; Sweetman, 2003).

²¹ There is a danger in making the habitus carry the explanatory load of any social phenomena (Nash, 2003:192). Garland (1990: 229) makes a similar point in relation to sensibilities about punishment.

Chapter 5 Twentieth Century Judging

Introduction

In Chapter 2 I drew on some of the key insights about the judiciary which are suggested by the sociology of punishment. In particular, the mutually constitutive relationship between culture and punishment prompts interest in the judge as both the receiver and the bearer of cultural values about justice and morality, carrying some visions of the ‘good society’. In this chapter, I explore the judges’ accounts of early experiences in the criminal court. We gain insight about the place of crime in that society, and begin to trace the emergent push and pull of the habitus on the fledgling judges.

Section 1 The early years: judicial ‘influences

The historical context

Most of the judges interviewed for this project qualified as lawyers and gained their pre-judicial experience in the middle years of the century, before some of the key political and constitutional developments of the 1970s and later years. In terms of criminal justice and legal reform, these middle years represent the period before the introduction of legal aid for persons accused of crime – hence references to the ‘Poor’s Law’ – and before the abolition of the death penalty. It is tempting, in criminological terms, also to locate this period of criminal justice history as the calm before the (assumed) penological storm of the 1970s and beyond. However, I avoid constructing this period in advance solely as a point of comparison or foil in relation to the better documented period of penal policy which follows it (Loader and Sparks, 2004). In any event, having learned in my earlier interviews about the futility of presenting to practitioners neatly theorized notions about some (presumed) dominant ethos or concept such as ‘penal populism’, I hoped to keep open some of the empirical questions about continuity and change. This was made easier by the fact that all of the judges I interviewed were practitioners *across* these periods of time and did not segment the era themselves in any fixed way.

A story has no beginning or end: arbitrarily one chooses that moment of experience from which to look back or from which to look ahead.

(Graham Greene, *The End of the Affair*)

When invited to reflect on his life and legal career up to the point when he was appointed to the bench, *Judge A* began at the very beginning:

I was born on [date of birth] in [x town] in the kitchen. And I was an only child, and as I've told you, my mother was a [names occupation] and my father was a [names occupation]. And I had a very happy childhood, went to [...] Academy, got into Glasgow University without any great difficulty, but without any great genius ...

My question was aimed at the exploration of influences or formative experiences which the judges perceived to be important to the development of their later judicial 'personality', but the more common 'beginning' from which most participants started was the period of their early legal training and experience in one of the two branches of the profession (solicitor or advocate). To the extent that my question to this participant contained any underlying assumption of some direct correspondence between personal background and judicial 'values', this may have been ill-conceived.

Decades of scholarship searching for the holy grail of sentencing – a causal explanation of judicial behaviour that can predict outcomes – seem mostly to confirm that the range of personal and social factors, as well as the political and public pressures, that influence judicial behaviour is complex and not reducible to simple assumptions. Research on the influence of social background variables on judicial decision-making finds few direct relationships (Sisk *et al*, 1998). Moreover, there is little evidence that the decision-making of female judges differs significantly from men (Davis *et al*, 1993; Boyd *et al*, 2010)¹. Recent studies in the US also suggest that political orientation has much less influence than expected (Tamanaha, 2010).

The judicial habitus

The operation of the judicial *habitus* is central to criminological discourse and understandings about the judicial role in sentencing in ways that I outlined in Chapters 2 and 4. In particular, the homogenous demographic profile of the judiciary

leads to assumptions that vested interests or ingrained ways of thinking influence sentencing practice. This understanding informs many historical and contemporary accounts of penalty, and is also reflected in sentencing research. Of some significance, then, is the suggestion that the sentencing practices of judges are ‘governed more by their legal training and legal socialization than by their socially structured personal experiences’ (Steffensmier and Hebert, 1999:1187). This directs us to the operation of the judicial *habitus* and to the ways in which the individual’s history in the field of practice – their training and socialization - is central to the formation of ‘durable dispositions’. How do judges acquire the ‘feel for the game’, particularly in relation to judicial conduct and sentencing practice? How are the norms and values of the group communicated between individual members? What are the processes of collaboration and the ways of achieving consensus or handling disagreement?

Becoming an advocate: ‘What you bring to the Bar’

In relation to my possibly ill-conceived question to *Judge A* about the influence of background on judging, it nonetheless appeared that family background was to play a significant role in which branch of the profession an individual entered, and which therefore directed the form of legal training they gained. *Judge A*, for example, did not have the independent income necessary to pursue his preferred career at the Scottish Bar so instead qualified as a solicitor and obtained a position in civil practice where he remained until his appointment as a Sheriff.²

Judge B, by contrast, became an advocate in 1955 and in the course of his career at the Bar gained extensive experience in criminal law. He served as an Advocate Depute for seven years and as Solicitor-General for 5 years. In the early years, however, having sufficient means but an ‘absence of background’ meant he received more instructions in what he called the ‘sewer’s end’ of an advocate’s range of briefs: criminal work. Prior to the account which follows about his early career experiences at the Bar, I had asked him what kind of influences had led him to orientate his legal career in the direction of criminal work rather than the civil work which tended to be the norm at that time:

Well, ... it's not so much that, it's just that it depends on what...what you bring to the Bar. When you come to the Bar, if your father was ...an advocate, a judge, a sheriff, or a solicitor, in Edinburgh that tends to be so [...]. And so you come along and on the first day you're bombarded with briefs, you see, from your father's or grandfather's old chums. Or there's an old school tie kind of thing. Those of us who didn't come with advantages of that particular kind.....you got a different kind of start to life, and so the highly, highly paid work, for example, was work like planning, trust work and working for the defenders in reparation cases-insurance companies, and the other work was less well paid, it was legal aid work [.....] So, you tended to work with people who were doing that end of the thing, the sewer's end, the criminal end, that's what happened, that was why you went into that particular thing. Whereas someone, say a chap like say [Lord X] I'm just taking him as a good example, an excellent man [...]. I had a great admiration for him, but I don't think he ever appeared in a criminal court at all until he was a judge. And of course his father was a member of the House of Lords and a well-known judge, and that was a good example. And he was also a very able bloke, so he did valuation for rating, he did trust busting, he did this that and the next thing. So ... but the idea of him appearing for the pursuer in a case of a man falling of a ladder, it just couldn't enter his consciousness.

He explained that what led him into criminal work was an '*absence of background*':

So I guess it gave you a very different feel for the thing. You see, if you started life with a silver spoon in the sense - and I'm not trying to say that we had enormous disadvantages - but if you came as the son and grandson and great-grandson, like the Hopes, for example, or the Camerons, or the Johnsons etc. etc., then you almost inevitably went into that side of the thing. Whereas if you started life..... I mean, I was called to the bar on Friday and appeared in the High Court on behalf of a man charged with a bank robbery on Monday. That was not something that happened to somebody whose great grandfather was a well-known WS [Writer to the Signet - a private lawyer's society] in the 18th, 19th century.[...]... Part of my background was an *absence* of background, because I didn't have the tradition of coming from a family that was deeply immersed in the work of the Court of Session.

Notwithstanding these apparently entrenched social factors, *Judge B* also drew attention to some of the social changes which changed the character of the Bar after the Second World War:

Until the Second World War, the catchment area from which the Bar drew its new members was again very limited. It was rather like the English Bar system tended to be from a much longer period. It drew people in who went to public schools and to, in my time and before that, it was a tradition to send [.....].. for a lawyer to send his son to an English public school, and then to Oxford or Cambridge and then to Edinburgh or Glasgow; one of them. So, a lot of people came up through that particular route. It was quite different to mine. So there was that - if you didn't come from that particular background then you came up with different people. Now, until the war, that was the way it was. But when the war came to an end there were two features; one was financial, one was social. First of all, a lot of people who would never have dreamt of going to the bar found themselves mixing in the forces with

people who went to the public schools and universities like Oxford and Cambridge and were going to go to the Bar and so on, and they said well if he can do it, I can. And secondly, when you were discharged from the army, after you'd been in for five or six years, people like [x and y] etc. etc.; these people got what was in those days a substantial grant. [.....] Plus, you didn't earn very much at the beginning, particularly if you were one of the - one of my friends called them the shirtless ones - you arrived without this kind of strong backing. It took a long time to make money. There was no civil legal aid at all until 1949, there was no legal aid in criminal cases until 1966 [.....], so if you came to the Bar without substantial background of the kind I've been figuring, then it was going to be tough. But these - the people who came after the war -1947, '48 onwards - we had quite a lot of them in without that kind of background, and it changed the whole character of the bar.

According to this account, these social changes brought changes in outlook:

The character of the judiciary is much changed. They're much younger. It's less hidebound. Again, there's a tendency, it's nothing to do with the law itself, but there was a kind of colonial attitude. A lot of the people who were judges when I was young or were senior counsel when I started, they were people who came from legal families, professional families from Edinburgh, who had gone to English public schools and later to Oxford [.....] a great many of them, so there was a kind of colonial boy attitude to the Scots middle classes. To be properly educated you had to go to an English public school and an English University. That was very much a class attitude.

Judge D also pointed to changes in the social composition of the Bar which he thought had occurred since his own early days as an advocate. He believed there was now 'a great mix':

One thing that I can say I have noticed ...I don't want to point at any particular individuals but, over the last thirteen years the...the bits of society, shall we put it, from which judges are drawn has changed quite significantly. I suppose in the past there was a mixture of people who went to...well, I think they were called public schools, and there were some grammar school pupils like myself, but...I'm talking not about the schools, but about the... the background of the individual. And when you think of it, that James MacKay's [former Scottish judge and Lord Chancellor] father was a.....was he not a signalman? I think he was. And I can think of one Senator [High Court judge] who says - and this is correct - that he was born and brought up in a Glasgow tenement, and there's one who says that he lives in the New Town, but it's the new town of East Kilbride. I mean, there's a great mix now, which is completely different in feel from the mix there was at the time when I was called to the bar. I've tried not to be...I'm not wanting to be snobby when I'm talking about this....but the background of people is so very different.

I asked *Judge D* what impact he thought this would have on the judiciary over time. His reply seemed to be unequivocal about the benefits of diversity, but left some doubt about the full integration of newcomers:

Well, I think it's all...it's all for the good. I think it's all to the good. And...it's inevitable, I think, and even – for a small group like the judiciary - that people tend to home in and be friendly with people who have similar tastes, similar backgrounds to themselves. That's fine. I don't think it develops into any sort of...difficulty, ostracism, anything like that, but it's inevitable people will tend to go towards people that they feel they've got most in common with.'

Diversity

There is limited evidence of any direct correspondence between the background of individuals and judicial decision-making – at least, any which is capable of empirical evaluation. However, the demographic composition of the judiciary, whether conceived in terms of gender, race, religion and education or less tangentially in terms of social and political attitudes, raises a number of central issues about the nature of judicial authority in a democracy. There is an important tension between the argument for judicial diversity and the principle of judicial impartiality and neutrality, if the argument for diversity is premised on the argument that female judges, those from ethnic minorities, or judges with particular religious beliefs *would* or *should* decide differently in ways which reflect any partisan interests they may feel they represent.

It is unsurprising, therefore, that the 'social legitimacy' argument most commonly employed by those promoting greater diversity is carefully argued on several levels which make no such assumptions. This is the argument that there should be equality of opportunity for those eligible to apply for judicial appointment; that greater judicial diversity allows a wider range of voices and attitudes to be heard in relation to critical legal and moral issues; and that the public may lose confidence in a judiciary which is not seen to reflect society (Report of the Advisory Panel, 2010).

The demographic features of the group of judges interviewed here meant that there was an insufficient pool of retired female judges from which to gain insight of their experiences. Moreover, their very limited number meant that they could be readily identified and thus could not be offered anonymity. Several judges, however, sought to emphasise that in the course of their careers the judiciary had become more diverse and offered examples in relation to social background, education and gender. At the same time, however, the imperative of judicial impartiality and neutrality

means they must also deny that these more diverse backgrounds could imply a ‘different’ kind of judging. As Berns (1999) notes, it is ‘deeply radical and subversive to wish for a voice for otherness in adjudication’: this represents ‘a profoundly dangerous game (1999: 33).

In this way, all judges expressed the view that greater diversity shouldn’t make a difference to the nature of judging. *Judge J* expressed the view of most of his colleagues when asked what might be the impact of greater diversity on the bench:

I would hope none at all. They obey the law whatever it is, whatever their background. From time to time they say ‘Wouldn’t it be good if we had more of this type of judge?’ What do they anticipate? That they would decide differently? I don’t think that can be right. There perhaps was a tendency in the early days to give women more family cases. That was my impression, in the early days, but by and large they’re just exactly the same.

Judge D’s account is also typical, detailing the benefits for the judiciary of greater diversity but treading carefully through the tensions outlined above: making the broad ‘social legitimacy’ case for diversity but rejecting a connection with any particular set of values.

I think it’s partly the presentation of the judiciary as a whole, whether it’s females or whether it’s people from other backgrounds, and also it’s the effect of the ideas that each of them may have will tend to become.... it’s cross fertilisation. But I’m not in favour of giving particular preference to particular groups, let alone saying that for a particular case we must have somebody who is black on the bench for this particular case or...I think it’s quite, quite wrong, because that is an insult to the judicial qualities of the members of the judiciary, that they cannot cope without being from a particular background. But the fact is ...the rest of the background is good for us all.

The approach of *Judge B* reflected the ‘strict equality’ approach to greater diversity:

We shouldn’t go out looking for diversity. We certainly shouldn’t place any barriers in their way by virtue of their background and if people can cross the moats and jump the hurdles, they should be allowed in, by all means.

This was echoed by *Judge D* in relation to female judges:

I think it’s a jolly good idea. Totally in favour of it. I think it’s probably been good, good for all concerned. [.....] There’s absolutely no reason why it shouldn’t become 50:50 or even the other way round in the course of time, but you can’t manufacture these things.

Judge C was more open to other ways of encouraging wider membership:

I'm very pleased to see the average age of the judiciary is much lower, and more women, especially. Not enough, but many more ladies. It hasn't worked out as it should have. There was the whole thing about letting people go part-time, to encourage ladies with children of school age. And that has happened with some, but not nearly enough.

He also pointed to the more rapid inclusion of female judges which had happened elsewhere in the world:

For public confidence in the justice system, there's got to be a much wider and more diverse view. And it's happened throughout the world, and in the United States, France and places like that which are nothing like our system. Their system is through the meritocracy of university performance, the European system. But the American system is similar to our system, but it just developed in a different way because of the attitudes to women at a much earlier stage than here. But I think it's very important.

The optimism of these accounts - of perceived changes in the social composition and 'character' of the Bar and of the judiciary over the course of their lifetimes, and the natural evolution argument - is not borne out by the evidence in the UK. There is a lack of systematic or substantial study of judicial diversity, but the evidence which exists suggests that senior judges are still overwhelmingly privately educated, white men from a select number of universities, and points to the ongoing structural discrimination and exclusion of women and ethnic minorities and other social groups (Thomas, 2005; Rackley, 2007; Feenan, 2008). The lack of data relating to the judiciary in Scotland is striking, though a brief reading of the profiles of Senators of the College of Justice on the Judiciary of Scotland website (Judiciary of Scotland) suggests the same pattern observed elsewhere.

More recently, some of the calls for a more representative judiciary draw attention to ways in which symbolically masculine images of judges, judging and judicial authority are embedded in our collective imagination, and may contribute to the exclusion of women (Rackley, 2007; Feenan, 2008).³ This is reflected in the recent tentative admission from Lord Neuberger, formerly Master of the Rolls in England and Wales (head of the civil courts) that there might be a subconscious expectation of masculinity at work in the lack of female representation in the higher judiciary:

... having an image of a judge with ... male-type qualities and a male appearance. I'm not saying we do have that but there's a risk that we do and it's difficult to know how to cater for it. (Guardian, 2013)

Kennedy (1997) observed that masculinity is symbolically embodied in the mythical role models of the judge – God, the King, Solomon - and Berns (1999) notes our continuing infatuation with the superhero judge such as Dworkin's Hercules'. The extent to which this myth is gendered is evident when semiotically contrasted with models of female virtue or power such as Mother or the Greek Sybil. Increasingly, the concept of 'difference' in relation to female judges is regarded as grounded in 'dangerous and unanswerable myths' (Rackley, 2009:15) and commentators draw attention to the dangers of gender essentialism, such as the idea that female judges might bring qualities of greater care to the work. Berns (1999) turns the question of female 'difference' on its head and wonders aloud: perhaps *male* judges are the problem, persuading us they speak of universal values and objective rationality – but all along, they have simply been speaking as men? There is also the recent challenge to conventional assumptions of the gender neutrality of written judgements and the construction of 'facts' around which they are framed (Hunter *et al*, 2010).

The social legitimacy argument expressed in the accounts here is the basis for the continuing, and increasingly mainstream calls for greater judicial diversity. However, the lack of systematic research about the composition of the Scottish judiciary is exacerbated by the lack of dissemination of such information as is available. It is unsurprising, therefore, that these somewhat rose-tinted accounts of judicial diversity, even when seemingly well-disposed towards greater diversity, do not reflect the empirical evidence. Moreover, there is a sense in which these explanations represent 'attempts at persuasion' (Ochberg, 1996:97) by advancing the 'social legitimacy' argument outlined above. This institutional narrative is also the basis of judicial legitimacy – that judges should reflect but not *represent* particular groups in society. However, if this debate is to be informed by evidence about the current composition of the judiciary, there is an urgent need for systematic evaluation and dissemination of these characteristics.

Rights of audience

To an extent, the hierarchies of power already suggested in the accounts above are also reflected in the profession's arrangements for the governance of conflicts by selected agents. Bourdieu (1987:835) explains the operation of the legal monopoly:

Legal qualifications comprise a specific power that allows control of entry into the juridical field by deciding which conflicts deserve entry, and determining the specific form in which they must be clothed to be constituted as properly legal arguments. Such qualifications alone can provide the necessary resources to accomplish the work of construction which, through selection of the pertinent categories, allows reality to be reduced to the useful fiction we term its juridical definition.

In this way, the rights of audience held by sections of the profession, and the sentencing powers of the various levels of courts help to construct and define the conflict in ways which reinforce divisions of power. Thus, until 1991 advocates in Scotland held a monopoly over rights of audience in the High Court of Justiciary (and in civil cases, the Court of Session). These hierarchies of power in relation to higher and lower courts may also contribute to shared meanings in which disputes in 'lower' courts are deemed petty and professionally less challenging, and the 'higher' courts are considered the sites of real power and of 'real' crime (Harrington and Yngvesson, 1990).

It is relevant to note that these distinctions between higher and lower levels of court have an inverse relationship to their operational and statistical dimensions in Scotland, the higher courts dealing with (proportionally) a very small number of cases and the lower courts handling the vast majority of all criminal cases. Commentators also note the increasingly 'social services' function of judges in the lower courts, and the increasing division between the levels of judicial functions between this 'social services' function and the increasingly constitutional role of judges in the higher courts in the checking and balancing of executive and parliamentary power (Malleon, 1997). *Judge H* recalled another significant change in the appointment of judges to the High Court in the course of his career:

There is one good thing. It is less political now who becomes a judge. At all levels, I suppose, but I was thinking really of the top boys. They used to be really political appointments because they had been appointed by the Lord Advocate who was a

political figure and they had been Advocate Deputes as a result of their political leanings. That was very unhelpful, I think. You got slightly lower value people. It's much more of a meritocracy now which is a very good thing. The people who went into politics used to be the people who weren't making it at the Bar.

Section 2 The emerging habitus

Criminal Advocacy and The 'Poor's Roll'

The tradition of providing free legal assistance in Scotland can be traced as far back as 1424 when it was formally instituted via the 'Poor's Roll'. This was a scheme under which solicitors and advocates gave free legal assistance and representation in court to people of limited means who were admitted to the 'Poor's Roll'. This arrangement subsisted until 1964 when criminal legal aid was introduced.⁴ The 'Poor's Roll' featured in many of the judges' accounts of their early experience in criminal law, before the introduction of legal aid.

Judge F became an advocate in 1960 and practised at the Bar for 12 years before appointment as a Sheriff. His practice involved almost exclusively civil work. To gain criminal experience he did some High Court jury trials on an unpaid basis, 'as a matter of public duty'. Here he recalls the *ad hoc* nature of criminal work at that time before the introduction of legal aid:

When I started, when I joined the Bar, if I had nothing in my diary – and there was nothing in the diary most days - I might go through to Glasgow just to hang around the High Court to see if anyone needed a defence advocate. That was the normal thing to do if you had no work here and if you wanted experience – I had no experience – if you wanted experience, you would go to Glasgow and do your best to represent someone.[...] Solicitors would be around to see who was there, or you would do it through your clerk in Edinburgh – just arrange that so and so in Glasgow was probably looking for an advocate. Or you could go through by prior arrangement but it was all really informal, because there was no legal aid.

Detecting some ambivalence about this area of work, I asked him if criminal work interested him. His answer suggested the distinctions sometimes drawn between civil and criminal work – the former regarded as more intellectually demanding and hence more prestigious:

Not particularly, no. No. [.....] With civil work, you had to do a *tremendous* amount of research – I don't think they do so much nowadays. But you had to do a tremendous amount of research into cases, and into the institutional writers,

especially in conveyancing. Crime, trials, jury trials? Well, I suppose there was a challenge to try and influence the jury, but.....ah, the sorts of cases that a young advocate would get are the ones where there really is very little defence. And....well, I would say... no, it was ... em ... an *experience* rather than a matter of interest.

Judge E qualified as a solicitor in private practice in 1959 and initially undertook civil work. However, unlike most of his peers he *was* interested in criminal work and the Poor's Roll thus offered some opportunity to gain experience:

[...] and then I was asked to go on to the Poor's Roll in Edinburgh. [...] What it was: there were 7 of us, duty solicitors, doing it, and somebody dropped out of it, and there was a meeting to sort it out and I was the only one who turned up at it because there was little interest in crime.

Judge E's interest in crime led to a lengthy career as a prosecutor before eventually becoming a Sheriff. What had been a vice for *Sheriff F* [in relation to the perceived lack of complexity in criminal work] was for *Sheriff E* a virtue:

I enjoyed the civil work but I don't know....I always felt crime....it didn't take so long and it was neatly wrapped up each time.

Judge D became an advocate in the early 1960s and practiced almost exclusively in civil law. He served three years as an Advocate Depute in the Crown Office [prosecuting counsel in the High Court]. When I asked him how much criminal work he had done before taking up this appointment, his answer suggested the influence of his Clerk over his range of work:

Practically none. I remember as a very new junior person called to the bar, only a matter of weeks old, I was thrown into Glasgow High Court. And I did occasionally appear for the Poor's Roll, pre-legal aid, and after a number of years I did a very, very few summary cases – road traffic cases, very few. My clerk disapproved of that sort of work, didn't think it was the kind of work I should be involved with.

Like many of his colleagues, *Judge F* thought that his lack of experience in criminal law amounted to some unfairness to the accused, which the introduction of legal aid remedied:

... the solicitor for the accused could [now] choose as counsel someone who had true experience, and that was much fairer to the accused. The first time I appeared in anything significant in a court was in the High Court at Glasgow.

By contrast with the other judges, *Sheriff M* had no personal experience of the Poor's Roll, having qualified as an advocate in the late 1960s after the introduction of criminal legal aid. However, at our second meeting he made the following prescient comments about changes to legal aid in times of financial constraint:⁵

I was thinking, since I last saw you, that if there's going to be these dreadful economic cutbacks that it looks like we're going to have, it looks like justice is going to be under very, very severe financial pressure. [...] I honestly don't know what's going to happen. I suspect what'll happen is legal aid will be cut, as a first step. Now, criminal legal aid came in in the 50s, was it? But we've had it for about 50 years. Some may say that silence [the right to silence] is a luxury that we can't afford everyone. [...] We might go back to having a Poor Roll's solicitor.

Judge B's attitude to criminal work differed from many of his peers at the Bar, in so far as he enjoyed it and found it much more interesting than civil work (though he was pre-occupied with the extent to which it was 'a financial disaster' to become a Law Officer - as Solicitor-General). His earlier reference to the 'sewer's end' of an advocate's work - criminal law - turned out to be a barbed reference to the attitudes of others towards criminal legal work, and was an attitude which he himself strongly disparaged. He told another story to explain this 'attitude', this time about a former High Court judge, now deceased, who in his later years on the bench had struggled with the work ('he just couldn't do the work, couldn't make up his mind') and therefore presented an management problem for the judiciary:

The system for dealing with judges was very informal but it illustrated the deep attitude. Because [High Court judge X, now deceased] was *so* slow, and so unreliable, and *so* poor, he was moved from civil work to *criminal* work! Now, that was a judgement that criminal work is unimportant: just *totally* the wrong way round.

He then told the story of an escorted visit of foreign guests to the Faculty of Advocates which he thought was revealing of this same 'deep social attitude' towards criminal practice:

And I remember, years and years ago, I was devilling ⁶ at the time, I was sitting in the corridor [of Parliament House in Edinburgh, the home of the Faculty of Advocates] and Lord Clyde, Lord President Clyde, was showing some foreign visitors around, and, you know, walking up and down, taking no more notice of us - we were like the carpet, just sitting there writing away and stuff - showing them this picture and that notice and so forth. And I remember him saying, I can't remember the precise words now, but in effect he says 'We do have some interesting stuff to

do, but we've got the *absolute rubbish* as well, the criminal work. You do have to do that, but fortunately you can usually dispose of that quite quickly'. That's what he was saying: it was rubbish. And that kind of work was regarded as rubbish, and all those who practised in the criminal courts were regarded as rubbish, as the lowest of the low, really. So, there was a deep social attitude that's still there, which I deplore. I remember the late [advocate x] saying to me that he'd read somewhere that the index of a civilisation is how it conducts its criminal justice. You don't look at South Africa under apartheid, or the Soviet Union, and ask 'What are their conveyancing laws like, what are their laws of succession like?' You ask how they treat people accused of crime. So that's the true index of civilisation: how you treat crime. But that's not how *we* regard crime. We regard it as tatty, some necessary relation, somebody born on the wrong side of the blanket and not behaving very well.

At the time most of these individuals were qualifying in their respective fields of legal practice, and before the introduction of legal aid in 1964 which provided state subsidy of legal services, the stratification of the legal profession remained along traditional lines.⁷ Notwithstanding some post-war changes to the social composition of the Bar which were noted by Judge B above, entry to the Faculty of Advocates continued to require significant amounts of economic and social capital (Wilson, 1965).⁸

In his discussion of the symbolic power of law and the structural mechanisms which frame its operation, Bourdieu (1987) draws attention to the supply and demand of legal services. He makes the general observation that the field of law transforms into social capital the professional qualifications that 'guarantee the mastery of the juridical resources required by the field's own logic' (1987:834). He also makes connections between the different classes of the producers and/or sellers of legal services and of the clients of those services, relating the lawyers' positions in the legal hierarchy to the social positions of their clients. Thus he observes:

Those who occupy inferior positions in the field (as for example in social welfare law) tend to work with a clientele composed of social inferiors who thereby increase the inferiority of these positions. (Bourdieu, 1987:850)

For Bourdieu, therefore, the hierarchy in this 'division of juridical labour' is reflected in a hierarchy of specialisms and depends on variations in the power relations. Improvements in the status or power of less advantaged groups will be reflected in the power of their representatives (such as political parties or unions) and lead to greater differentiation in the legal field. Notably, however, Bourdieu observes that

the ‘unchanging prestige’ of civil law is testament to the relative stability, over time, of these variables – and the observations of some practitioners might suggest these hierarchies remain today.

It is not within the scope of this project to map the objective structures of the legal field, as the logic of Bourdieu’s argument dictates. Nor is it possible, on the basis of such a small sample group, to draw any such broad findings. However, some flavour of social attitudes to crime – and its reflection in the structures and specialisms of the legal profession - can be discerned in the accounts given here, such as the ‘deep attitude’ to criminal work which Judge B deplored and believes still exists. The same attitude can be traced in the disdain of Judge D’s clerk towards it, and in the preference of some advocates for civil rather than criminal work. As to whether social background or prior experience of criminal law influenced the type of judge they became, there appeared to be some consensus that no firm conclusions could be drawn about the issue. *Judge B* was typical in his ambivalence:

You should come to the bench with an experience of what it’s like at the chalk face; what it’s like down there. And as I say, there is a congruence between those who come with a kind of silver spoon and those who come with knowledge of what it is like down there. But you can still have an outstandingly good judge who has very little criminal experience [...]. So there’s no absolute rule that says if you’re born with a silver spoon therefore you’re a bad judge. On the contrary ... look at [Lord X] ... he came from that kind of background, but he did a lot of criminal work and so on and he enjoyed it and so on, so forth. Mind you, my cynical friend said [Lord X] secured a tremendous number of convictions and a tremendous number of acquittals. Unfortunately, the acquittals were when he was acting for the prosecution and the convictions were when he was acting for the [laughter].....defence.

Judicial role models

The motivation for seeking judicial appointment was, for the most part, a pragmatic one for these judges. *Judge C* had qualified as both an advocate and solicitor, but went into practice as a solicitor. He thought becoming a sheriff was not only ‘an ideal way of planning a future’ but also a job ‘very worthwhile doing’. *Judge A* thought his personality was ‘as much suited to deciding cases as to presenting them’. For *Judge M*, an advocate, the motivation was rooted in the negative aspects of his career at the Bar:

I was a bit tired of working nights and weekends and things. And in all modesty, I was conscious that there were cleverer people than me around, doing that kind of work. I also thought it would be nice not to have clients anymore and I also very much enjoyed the part-time Sherifing that I'd done. And after I'd got over the initial trepidation, I found everything much more pleasant, to put it that way, in terms of what happened in court, in terms of job satisfaction.

Judge H qualified as an advocate in the late 1960s and became a Sheriff in the late 1970s. He acknowledged a mix of motivations for seeking appointment but among the more important was his early formative experience in the High Court that made him want to be 'a different kind of judge' and provide 'a fair forum:

I would say I was basically a moderate person.....so I was fairly horrified by what went on in the High Court. They were all so antagonistic. If you were fighting for somebody in the court, you were also fighting the prosecutor – so that's alright. But you were also fighting the judge, almost always. They were clever about it.

Judge H qualified his account in this way: 'You must realise that probably nobody thinks the same as I do about it all.' However, his account received some confirmation from several of his colleagues. *Judge C*, for example, observed that he although he came across many excellent judges, the conduct of some fell far short:

But there were others there who were hard, you know, and to me seemed very biased and unfair towards accused persons at that time. We had some *fiends*, you know. That's why I didn't go to the Bar, because of Lord 'what's-his-name'. He was an *absolute fiend*. Frightened the life out of me.

Another High Court judge he described as 'absolutely vicious':

He was abrupt, he was discourteous, he would lose his temper, not only with counsel but with solicitors who got on his nerves, such as not having the appropriate stuff, papers, there. And he wouldn't hesitate to make the point and to use your name. And also with accused people. Generally, the attitude to them seemed to me to be 'You're a crowd of ruffians'. Not all of them, there were some who were otherwise. But when I got there, I thought, I'm not going to be like that. And in the High Court, and the Appeal Court, I remember some judges *barking* at accused, *barking* at counsel and absolutely ridiculing people because of their inability to understand, or their accent or something like that. Not a lot, but there were a few, who shall be nameless, who were completely unfair.

Judge D, similarly, had in mind the kind of judge he did *not* want to be:

The thing I did not want to do was to indulge in the sort of behaviour that one or two judges - the old school – had behaved. [.....] I can think of situations when

counsel, or a witness, has been close to being humiliated by a judge and that is not a proper course of action to take at all.

Judge M, on our second meeting, returned to this question of role models which we had touched on briefly in our first meeting. Being good-natured and kind emerged as important qualities for this Sheriff:

One of the other things I thought of when you asked me [last time] if there were any Sheriffs I modelled myself on when I started... and it occurred to me later, this may sound awful, but there were a lot I *didn't* model myself on because they used to go round the country to different Sheriff Courts, and it wasn't that they were particularly bad Sheriffs that I came across but I've not forgotten that there was a great difficulty in persuading them to *do* anything...to take a decision that struck you as in some way bold or something like that.[...] The other thing about that is that there was a Sheriff that I liked very much, but didn't particularly admire his law because he took ages to make decisions. But the atmosphere in his court I thought was admirable because there was a kind of notion of enjoyment about what was going on. He was a very humorous man, but he didn't make jokes at people's expense, but there was always, mixed up with the serious stuff, there was a possibility of it being good natured and kind ...I liked him an awful lot for it, it was a pleasure to see it.

The idea of 'a kind of notion of enjoyment' in the 'serious stuff' of the criminal court could suggest an egregious lack of sensitivity on the part of judges to the material reality and harshness of punishment. Alternatively, it could suggest the existence of coping mechanisms which some occupational groups employ to manage difficult working environments (see Obrdlik, 1942; Kane, 1997; Sullivan, 2000; Innes, 2002). The characterisation of the judge's demeanour as 'good natured and kind' also militates against this negative reading. For *Judge C*, it was important to have had positive judicial role models in the form of what he considered to be fellow 'do-gooders':

I'd been influenced by all these people and I just knew there was a body of people who felt the same way as I do. That you don't just chuck people into prison, you don't just throw away the key. And gradually the community orders became more important and the fact that one had to, you couldn't impose a prison sentence for first offenders, or for people under 21, you had to get a SER [social enquiry report]. And that was regarded as being namby-pamby, the 'do-gooders', you know, this sort of stuff. And I was so pleased about that, I couldn't have been more satisfied. Even though, as a hoary old sheriff eventually, I thought, these 5 page reports, they're all the same, I know what it's going to say on the next page before I read it.

Change in judicial behaviour: 'no room for the eccentrics'

Not all judicial role models were negative, therefore, and many judges recalled individuals whose conduct they admired. *Judge A* remembered one 'immensely courteous, careful, deliberate sheriff' and in his own later practice, tried to emulate some of his qualities:

... the obvious fairness, remembering to listen to both sides, remembering never to be funny at someone's expense, or be rude to anyone.

Judge M attached less importance to the quality of courtesy from the bench than some of his colleagues:

When you make somebody a judge, [you're] trusting them to do the job properly, to be fair, and to be up to date and to be... I'm not so bothered about things like being courteous. I mean, I know it's important to be courteous, but ...I've appeared before good judges who were far from courteous and I didn't really think any the less of them for that, particularly. I think, sometimes, when I read descriptions of what judges should be, I think, what?...Is this actually a judge I'm reading a description of, or is it a manager of a five star hotel that we're talking about here? But within these constraints I think judges pretty much think *constantly* about what they're doing.

Taking a longer view, *Judge D* believed that judicial conduct had improved as a result of greater scrutiny. As a result, there was now 'no room for the eccentrics':

Judges became much more receptive, much more sensitive to things: for example, such as the effect of conduct on victims, something of that sort. And I think also that judicial behaviour has become much more stabilised: there's no room for the eccentrics. I think that is an influence of outside perception that people [judges] realise that they're being – quite properly, understand – that they're being watched for their performance. They're on trial themselves, sometimes.

Judge C identified other features of the changes in judicial conduct, which included a willingness to understand the lives – and dialects - of others:

I think they're more willing to.....how can I put it? To understand the life that many people live in this world, and to have a different, or broader approach to such matters as reliability and credibility of people. I think it has to be. I saw in my time, in the 60s, in the Court of Session, certain judges who prisoners couldn't understand. That was the great joke in Glasgow – 'Oh, they're from Edinburgh, they speak a different language'. And I saw it, you know. You know the famous trial story:

Counsel: 'And who were you with?'

Witness: 'I just went out to get ginger and crisps'

Counsel (in plummy accent): 'And were you still with your friends Ginger and Chris.....'

And you know, these were jokes, but they were real, you know. They were illustrative of a certain attitude. [.....] The changes from the old attitude of judges in the 50s and 60s to now is marked.

Early experiences of judging

The judges interviewed here were appointed to various judicial posts – as Sheriffs and Senators of the Royal College of Justice – in an era when formal judicial training either did not exist or was provided quite some time after appointment, and even then in a somewhat sporadic and *ad hoc* manner. Coupled with the inexperience in criminal law which was a feature of many judges' early legal careers, the lack of judicial training meant most felt significantly unprepared for criminal justice practice. Here, *Judge G* provided this story of his first day on the bench as a Sheriff:

I was petrified, absolutely petrified, and I'd been in courts for all my life. But going up there...I can remember my first trial, it was theft of some sort of power engine. I had no idea what that even was and it was awful. I felt very nervous. Before I went on that morning, one of the other Sheriffs came to speak to me and said 'Here's a note. Give it to your Bar Officer [court official] if you're stuck and he'll take you off the bench.' It said 'HELP'.

By virtue of his own prior criminal experience, *Judge B* did not find his own early days as a High Court judge so difficult, but in this story he recalls helping out a new colleague with the '14 steps' to getting it right:

I remember one particular judge, now nameless - I won't name him, I won't name him- but when he was going on the bench [on his first day as a judge] he came to me and he said to me 'You know, what do I do? I'm going to a criminal court'. He hadn't been before - well, he'd been in a criminal court once, some years before. And he didn't know. So I said to him, 'Well, you just go on the bench and you do this and that'. So the next time *I* was on the bench - before *he* went on for the first time - the next time I went on to the bench, I thought what *do* I do? And I actually realised there were fourteen steps - I think it was fourteen steps- you took. First of all you make sure you had your wig on the right way round, that kind of stuff, you see, and then you follow them in, and then you bowed, and then you administered the oath to the shorthand writers - you used to do in those days - and you bowed to this and you sort of - and by the time I'd put it all down, it was 14 steps. And I said to him, there you are- I'll call him Charlie- he wasn't Charlie - but I said 'There you are Charlie, that's the things to do'. And he said 'Good God, all that?' But he said it

was useful. And you know, he didn't want to do the wrong thing- bow in the wrong direction, or fail to administer the oath, or whatever it may be.

Judge B then went on to tell another story ostensibly about lawyers' collective inexperience in criminal practice, but also about the misleading impressions of competence which are sometimes conferred by status:

I remember the first murder that Lord [...] did. It's rather interesting because by that time I had... had a good reputation. I hope you're not going to think of me as being immodest, I don't want that. But I had a good reputation as a prosecutor and - it's a funny story - the Deputy Crown Agent, who was [...] came to me and said look, would you mind going to Aberdeen to prosecute in this murder trial? I said not at all, why not. And actually I'd never done one, but to my mind prosecuting a murder is like prosecuting any other assault. And he said 'but the problem is, you see, that Lord [...] is going to be the judge, and he's never done a murder trial'. And I didn't let on that I'd never done a murder trial either. I then went up to Aberdeen, and the Fiscal [...] came up to me and said he was desperately sorry but a death had occurred of some sort or other and he really had to attend the funeral, and would I mind if one of his assistants sat beside me [to assist] during this murder trial before Lord [...]? And he said 'it's his first big case, first murder trial, this lawyer'. So the chap that he brought, he was sat beside me in the Scots Law classes [at university]. So, you know, perspectives and the wearing of wigs and titles, and so on, all these things make a difference to how people conceive of themselves, and have perspectives upon others.

Judge F recalled that the first time he appeared in a summary criminal court in any capacity was *after* his appointment as an Honorary Sheriff, a post for which he received no training whatsoever:

The first time I went to this particular court [...] was the first time that I had *ever*, ever, been in a summary criminal court. I'd been in a court taking solemn criminal trials as a defence advocate but I'd never been in the summary criminal court. I had no idea what was going to happen, to the extent that I had to ask the Sheriff Clerk - do I stay in to sign anything? And I had nothing to sign so he said I could just depart. But I had no training of *any* kind. When I became a sheriff, a short time after, I went to a training course.

Although *Judge C* had some familiarity with the criminal court, he had a similar tale to tell about training:

I had done a bit [of criminal law] because I had an assistant who did the criminal duty stuff and I'd been on the criminal as well as the civil legal aid committees. And I'd even done a jury trial just to get a bit under the belt, you know. But I didn't know a lot about crime, certainly. And the first thing I found myself in was a trial up in Aberdeen Sheriff Court: a Freshwater Salmon Fisheries thing, ridiculous. And [Sheriff X] was there at the time and I rushed into him and said 'Oh God [...] how

do I decide about credibility and reliability?’ and he said ‘Just go for it, you know’. Oh, you got used to it pretty quickly. But I got no training. I think I got training about 18 months after sitting. [...] But no training, that was the situation at that time.

The provision of judicial training, however, could lead to unexpected outcomes. *Judge B* told this story about judicial training which suggested there could be an inflationary effect on sentencing tariffs:

See, in the old days, when I was appointed, judges had no training. If you read Lord Devlin’s book, he says judges should *not* be trained; the whole period at the bar should be the training. But nowadays judges have CPD [continuous professional development] in a sense, and training. So one of the exercises we did latterly- when I say latterly, from my point of view in the early 2000s- was to go to a hotel for the weekend and have seven hours and exercises. And one of the things I would have to write down were things which aggravated the crime [increased the sentence]. Let’s take a sexual crime: you know, were there previous convictions? Was there a relationship between the person committing the crime and the victim? The age etc. etc.? And almost everything you could think of made it *worse*. So, the *teacher* - dear, dear, dear! Or the *parent* - oh! Or the *uncle* - goodness, the age, heavens! So everything made it longer and longer. And I could remember; you know, we would discuss all these things, and then someone would say ‘OK well, here’s the case: this is a case of a 27 year old teacher and a fifteen year old girl and this happened and that happened, so on and so forth’. And you put a few of these factors in; well, then you went round and you say ‘Well what’s the sentence then? [...]’- so then you find someone says six years, and the rest of them say seven years, eight years, nine years and so on, and it goes up and up and up.

Judge H’s experience of the same kind of sentencing exercise suggested that some degree of reputation management operated in front of peers:

You would go into little groups and discuss how you would deal with it [the sentencing exercise]. It was quite funny. All the people who would beat people [accused] down in the courts – the really ghastly people - were sweet and charming, and all the ones who were wet, like me, were fierce because they were ashamed, basically, of what they’d do. So they’d change it for the moment, you know. You’d get very weak sentences from people who you knew were very fierce sentencers – and vice versa. The weak people thought they had to beef it up a bit because they *knew* they were a bit weak.

The creation of a Judicial Studies Board in England in 1979 was regarded with suspicion by the judiciary who regarded it to be a radical change which threatened their independence (Malleon, 1997). Formal judicial training has now existed in Scotland since 1997, when the Judicial Studies Committee was formed. Its successor, The Judicial Institute for Scotland, was established in January 2013.⁹ The earlier

perception that judicial training was ‘at best unnecessary and at worst a dangerous interference’ was recently admitted to have been misconceived (Lord President Hamilton, 2012). Indeed, in something of a sea-change in attitude, training is now considered by the judiciary to *reinforce* judicial independence, though with the proviso that all training is ‘judge-devised, judge-led and judge-delivered’:

... judicial training and education improves judicial confidence, strengthens the independence of the judiciary and thus increases the public’s confidence in us. Judging is changing. It is no longer acceptable, if it ever was, for judges to see the business of being a judge as necessarily separate or isolated or insular. It is not. Judges have responsibilities towards the public which they serve. They must be equipped to discharge these responsibilities and be seen to be so equipped.

(Lord President Hamilton, 2012: 3)

What can be discerned in this endorsement of judicial training is a new consumer orientated approach towards criminal justice services, and acknowledgement of the legitimate expectations of the public to ‘a degree of consistency in the standards of legal knowledge, courtesy, patience and judicial skills from any judge they appear before’ (Malleon, 1997: 664). As Malleon (1997) observes, these changes are congruent with wider political changes in relation to citizens’ rights and greater accessibility to services. However, the use of judicial training to achieve greater judicial conformity by minimising differences in approach is not without some controversy. In particular, it raises questions as to whether a ‘more standardised and social service orientated judiciary with a weakened culture of individualism’ is a change for the better (Malleon, 1997: 667).

Judge D, who had earlier spoken of the benefits of the ‘cross-fertilisation’ of ideas in a more diverse judiciary, provides some insight about the tensions between consistency and individualism, and the pull of the *habitus* towards conformity and homogeneity:

.....judges are not free to get on the bench and do exactly what they think fit. Even a judge who passes a sentence...it is his, *his* sentence, but he doesn’t do it in a sort of vacuum influenced by his ideas of what he thinks about...women, or that sort of thing, because he would quickly find that that was completely unacceptable. He’s part of a system and therefore what he does must reflect the attitudes of that system. But I should point out...the fact that he is not a man but a woman might have some influence on how the system operated. But I don’t warm to the idea that we should

have judges who are...too much influenced by their own feelings and attitude, because if that was the case, then, what would you do? You'd have a sort of heterogeneous mass of judges who would all have different personalities, each, in each case influencing what they were doing. You want consistency. And if you've got to get consistency, then you've got to have something that bears some relationship to what the system as a whole is delivering. So I'm not attracted by that other idea. All in favour of...the influencing of ideas between people of different backgrounds, and ethnic connections. But I don't see the case for judges who are appointed because they bring particular backgrounds to it. They just happen to be...happening to be is *good*, for the appearance and the functioning of the system as a whole. But we are not, in that sense - we are not individual, we're part of a team.

Conclusion

In the accounts given here, it is possible to observe the tension which exists between the two oppositional readings of the judicial role which are outlined in Chapter 4. Judicial narratives of careers and experience are examples of *subjectivist* accounts of practice: explanations of how judges make sense of their lives and work, and their practical understanding of the penal world. These accounts may overplay individual agency yet also underplay the extent to which their actions are constrained by the 'objective structures' of a given field of practice. By contrast, *objectivist* readings of the judicial role draw attention to the 'invisible relational patterns operating behind the backs of agents' (Wacquant, 2007: 267), such as the hierarchies or divisions of power along class or gender lines suggested in the discussion above. On this reading, judicial accounts which obscure or even deny these 'objective structures' can be regarded as a form of false consciousness, with judges acting more or less unconsciously and following pre-ordained patterns of thought.

The issues raised in this chapter about diversity, conduct and training therefore raise additional important questions about the role of the judicial habitus in promoting both conformity *and* individualism and about the capacity for reflexivity. The judges' social background can be regarded as influential though not necessarily determinative as far as future judicial disposition is concerned, though it appeared to play a more direct role in the kind of legal work available to the judges in their early legal careers. The centrality of the institutional narrative about judicial diversity - in favour of greater change but stressing the social legitimacy dimension - can be

observed in these accounts, though the lack of research to properly inform this debate must be a matter of concern. The importance of judicial training is reinforced by these judges' early experiences, and there are some implications for the form of that training: providing new judges with on-going opportunities to see other judges at work, for example.

With reflexivity comes the potential for change, within the bounds of agency provided for the role. In these accounts there is awareness of some of the 'invisible' relational patterns which shape the judicial habitus and about patterns of behaviour and disposition. In this way, for example, attitudes about proper judicial conduct and demeanour were shaped by the young lawyers' observations of a number of judges variously described as 'fiends', 'absolutely vicious' or 'completely unfair', and change in the judicial habitus, over time, is made possible by the resolve of individuals not to follow this pattern of conduct. In Chapter 6, I return to this issue of the judicial habitus and the potential for change in the context of judicial sensibilities about crime, the criminal and criminal justice.

¹ Although there is some indication that greater diversity enhances the fairness and quality of judging (Thomas, 2005) and that the presence of a female judge on a collegiate bench (in the US) can alter the decision-making of male judges (Boyd *et al*, 2010).

² The Scottish Bar is also known as the Faculty of Advocates. At that time, becoming an Advocate was the only route to becoming a High Court judge.

³ Feenan (2008:450) extends this deeply entrenched image of judge, judging and judicial authority as 'white, male, masculine, heterosexual, able-bodied and class-privileged'.

⁴ The introduction of legal aid in 1964 was one of a number of citizenship-based schemes providing access to justice, health, education, social welfare, and housing. The expansion of legal aid meant that by 1970 the legal profession was subsidised by the state to a significant extent, and played a more direct role in the maintenance of social democracy and the welfare state (Hanlon *et al*, 1999).

⁵ In January 2013 the Scottish Government announced changes to the income threshold for legal aid eligibility.

⁶ 'Devilling' is the term used for the period of apprenticeship at the Scottish Bar.

⁷ The legal profession in Scotland consists of two branches: solicitors, whose origins were in groupings around local courts and whose early functions related to property and land transactions; and advocates who are organised centrally through the Faculty of Advocates and specialise in advocacy.

However, solicitors in Scotland have always undertaken most of the advocacy in the lower courts, and unusually (compared to England and Wales) have the right of audience in solemn cases, heard before a jury. Until 1991, advocates held a monopoly on rights of audience in the highest civil and criminal courts; solicitors can now acquire rights of audience as solicitor-advocates. See Paterson (1997) for further discussion.

⁸ Wilson (1965) suggests that during this period advocates needed sufficient personal wealth to carry them through the nine month devilling period when fees could not be collected. Entrants also needed time to build a client base and faced a significant period of delay before fees were paid. Melville and Stephens (2011) suggest that sufficient amounts of economic and social capital are still required today, though in changing forms, and that stratification based on class and gender remains strongly ingrained within the Faculty of Advocates. See also Menkel-Meadow (1989) for discussion of gender-based stratification in the legal profession.

⁹ The new arrangements provide for compulsory induction training for all newly appointed judicial office holders within one year of their appointment. The Judicial Studies Committee is responsible for the delivery of this training which includes, inter alia, the following topics: judicial ethics and conduct; sentencing; social context; equal treatment and diversity issues.

Chapter 6 Judicial Sensibilities: Crime, the Criminal and Criminal Justice

Introduction

Locating the judge as the subject of cultural inquiry entails an understanding of that individual as a penal actor whose dispositions are shaped by the culture in which he or she acts. This represents a useful interpretive exercise on its own, but the frameworks of meanings and understandings which the judge brings to penal practice carry additional interest, the judge being an actor whose sentencing practices have some generative potential in relation to cultural values.

In this chapter, I explore some of the meanings and categories about crime and offenders on which judges draw when talking about their work. This serves several useful purposes. First, it allows insight about the ‘larger frames of signification’ which judges use to make sense of the world (Geertz, 1983: 180) – and how those larger world-views are organised and kept in place. Secondly, the specific representations of crime, the criminal and criminal justice are of interest for their general contribution to the ‘gazette of morality’ (Melossi, 1993) which the penal system transmits to society through its various practices and institutions; these representations, in the order of things, are themselves subject to oscillations and cycles (Melossi, 2008).¹ In this way, judicial discourse allows focus on the character and scope of judicial sensibilities and to changes in disposition that may occur over time.

Section 1 Criminological categories of thought

In some of these accounts of criminal justice, crime and the criminal it is possible to detect certain strands of criminological thought and discourse. These are sometimes explicit; at other times, visible only as fragments of ideas or concepts. The attempt to identify the scope, range or extent of criminological influences on judicial decision-making is necessarily speculative, and almost certainly illusory if expected to show clear lines of impact or effect. I seek here to tread some middle ground between any naïve attempt to trace direct forms of criminological influence on judicial practice,

and the grander ambition of mapping multiple and contradictory lines of influence between criminological research and criminal justice practice or policy (Loader and Sparks, 2004). In some modest way, therefore, I trace some of this influence in the judges' attempts to frame the normative questions intrinsic to their role.²

Several individuals drew on criminological issues and ideas in a purposeful way. *Judge A*, for example, drew on an understanding about the process of attrition in criminal justice when reflecting on the effectiveness of criminal justice as a means of crime control:

Criminologists tell us that only about 5% of crime gets to the courts. So, if we're only dealing with about 5% of crime then we're not going to be able to deal with it very well.

And here, talking about the manipulation of public opinion in a punitive direction, *Judge H* makes a passing but specific reference to *anomie*:

One of the reasons why the rest of the people want all the others locked up is because they see these people who apparently are doing it for greed, and they're *told* it's for greed. They don't know about anomie.

Judge M, talking about the limitations of criminal justice, introduced the question of economic determinism this way:

At one stage I had a notion – this is partly from talking to another sheriff and partly from something I was reading - that our economic setup has a built in understanding that a certain amount of people will live in poverty, and poverty is the principal cause of crime. If it is, then we've designed a system that makes crime either necessary or inevitable, and if that's the case then I'm thinking there's not much we can do much about it. I can't remember where I read that now. I think I read it in the Guardian actually - somebody had written a book about it - because I did try to read a bit of criminology occasionally.

And in the course of conversation with *Judge B* about the influence of the media on sentencing policy and practice, he showed a significant degree of engagement with criminological topics:

There was a study done in the United States-- a very careful study indeed - which showed that as the murder rate in California fell, so the press increased their reporting of the murders, the more dramatic reporting. And of course, the public wanted more and more hangings and floggings and what have you, but it was largely stimulated by the police and the prison authorities who were preserving their jobs

and their incomes by creating the public mood for more and more severe punishments.[...] I don't remember who the story was by - because I used to be a member of a group in California -unfortunately I changed my email address and lost my contact with them - a group in California, or San Francisco,[...]. Anyway, they looked at all these things, yes.³

Moreover, some of the 'metaphors, narratives and vocabularies' of criminological thought (Loader and Sparks, 2004) can be heard in judicial accounts in passing, and in less self-conscious ways. In a general way, Melossi (2008:6) identifies two broad representations of the criminal offender in the 'gazette of morality' displayed in the penal sphere. The first descriptive portrayal is characterized by a tendency to *exclusion*, and manifests itself in an attitude of distance or antipathy toward the criminal, sometimes falling within conceptions of monstrosity and thus beyond any human empathy. This approach conceives of social order as a given, to be simply established or re-established. The second portrayal is characterised by an impulse to *include* and displays an attitude of empathy towards the offender. In this conception, social order is considered to be 'justly or at least reasonably contested' and the offender is regarded as either the victim of fate or of social circumstances. With echoes of Merton, the representations of the offender may also come within some conception of 'innovation' (2008:7).

Some elements of these frameworks of inclusion and exclusion can be read into the accounts drawn on here and in other chapters relating to sentencing practice. Some of these readings and representations are clear, as with *Judge C's* explicit statement of empathy with offenders:

The fact of the matter is that for the vast majority of these people who do appear before us, the facts are straightforward. They have a horrible childhood, they have inadequate parents, usually family circumstances which are disjointed from a very early stage if they've not already separated - you know what I mean.

Judge L, who said he had no time for people who regard offenders as '*untermensch*', gave more of a mixed message:

You can't put people in a box – apart from people like the Yorkshire Ripper, they're in a box of their own. People are individuals and you have to think: how did they get like that?

Through these accounts, however limited in scope, we gain some sense of the range of representations of crime, the criminal, and criminal justice which form the basis of judicial discourse, if not practice. As Melossi (2008) observes, these collective representations orient the activities of those social institutions whose task it is to ‘frame’ questions about crime and punishment; and notwithstanding the often ‘oblique relationship’ between what people say about criminal justice and what they do (Cohen, 1985) some shaping effect on the sentencing practices of individual judges is likely. As the logic of the cultural approach suggests, these representations also reflect the values and pre-occupations of their times in ways that allow us to observe cyclical change and perhaps some glimpse of the contingency of the present.

Criminal justice: normative theories and justifications

In this section I consider some of the ideas and meanings about the general concept of ‘criminal justice’ which are suggested by the judges’ accounts. These are understandings about criminal justice as a form of governance, of its various functions, its systemic features and its normative framework. These ideas are important because they play a central role in structuring and legitimating the activities of penal agents (Zedner, 2004). For Bourdieu (1987:831), the ‘entry ticket’ into the juridical field requires the acceptance of an essential tautology: the ‘universalizing attitude’ that conflicts can only be resolved juridically, according to the rules and conventions of the game. These rules and conventions include the reconstruction (or ‘retranslation’) of the conflict in legal terms, the determination of ‘facts’ in ‘black and white’ manner, and the rendering of judgements according to legal concepts and doctrines; these are some of the ‘unthought’ categories and precepts which prevent practitioners from reflecting on contingencies in the field, and may thus act to inhibit change.

Conversation with these judges about criminal justice in a broad sense quickly drew us into normative theories about crime and punishment; this is unsurprising in view of the central issues of moral legitimacy and justification which punishment raises (Garland, 1990; Duff and Garland, 1994). Here, *Judge A* invokes social contract

theory, and a story from practice, as the basis for the legitimacy of criminal justice as well as justification of the judicial role:

Somebody said that the whole system of law is to protect the citizens from the state and the state from the citizen. If you don't have a formal way of dealing with unacceptable conduct, you will have an *informal* way of dealing with it – people will duff each other up....*informally*. And therefore there must be a perception that unacceptable conduct will be dealt with in a formal and fair way. I had an example of that – must have been pre-1986 - where I had a causing death by dangerous driving [case]. And that was in the days before it became fashionable to impose 4, 5, 6, 7 years for that. And I thought that a custodial sentence was inevitable...and it was then on what I thought was the low side, as most of my sentences were. And I imposed 8 months. Nowadays it would be about 5 years, because I think we've become very much more punitive. [...] But the point was that I was told, as the accused was being taken off the cells, that it was just as well he was being taken off to the cells because relatives of the deceased were outside the court, ready to do him in. So, if you don't have a system which is perceived to be fair then you will run the risk of.... they say revenge is a kind of wild justice. You will have vigilantes, you will have self-help, and that's something I would very much react against, people taking justice into their own hands. That kind of reflects the fact that judges are an essential part of civilization. It sounds awfully pompous but, I mean, you've got to believe in what you do and I did believe that I was doing something that was worthwhile.

Judge E drew on similar notions of order and disorder to explain the function of criminal justice:

I think it's important for people to know that they're living under the law: they're obeying the law and the law is there to support them as well as for them to support it. Unless we live that way - and it's not a question of religion or morality, it's just a question of practicality really - unless we live that way, you've got chaos.

The particular logic and intrinsic limitations of adversarial trial processes are extensively documented in criminal justice literature, and while most judges' accounts conceived of criminal justice as a mechanism of dispute resolution, these conceptions were peppered with practitioners' scepticism of the adversarial process.

Judge B, for example, scorned the idea that it was a means of reaching the 'truth':

It's a mistake to suppose that having arrived at the end of the trial, you've somehow arrived at the *truth*. You haven't arrived at the truth: you've arrived at a proof beyond reasonable doubt of a certain limited number of facts. That's not the truth; it's certainly not the whole truth.

Savelsberg (2010:106) describes the ‘binary logic’ of criminal law as ‘a gross simplification by psychological standards’. *Sheriff H*’s comment about the public’s misunderstanding about questions of guilt and innocence captures some sense of this:

They [the public] think it’s like TV and that somebody is a bastard and somebody isn’t. Well, usually both sides are bastards, actually, and sometimes they’re fighting out something which isn’t on the paper. They’re trying to achieve some particular objective which you have to try and suss out and perhaps never say that you’ve realised.

Criminal justice as a ‘system’

When my conversation with *Judge M*, a retired Sheriff, strayed into broad questions about the purposes of criminal justice, he picked me up on my use of the phrase criminal justice ‘system’:

I don’t think there’s a criminal justice *system*; I think it’s just a series of collisions. I was attracted by the idea that if there was such a system, what were the different parts to play in the role, and what proportions and what different ways of thinking?

I asked what he meant by ‘collisions’:

Ideals, ideas, political beliefs, moral beliefs, ideas of fairness.... Now, a most common thing [in the courtroom] is an accused sitting between two policemen - is that fair? Some people think that’s *terribly* unfair; some people think there’s nothing wrong with it - there’s a presumption of innocence. I remember someone saying: ‘Does that mean the court presumes the police have got the wrong bloke?’[laughs]

At our second meeting, the same judge returned to the question about whether criminal justice was a ‘system’, and provided this extended account in which he detailed each of the different roles, interests and ‘ways of thinking’ which he believed ‘collided’ in daily and routine criminal justice processes:

[...] people talk about the criminal justice *system* and ...I was just thinking that it’s not a system that’s designed as a system, it’s something that’s developed organically, I suppose, with different people having different ways [...] at different times. But...start with the police. Now, I don’t think it’s any secret that the police don’t regard giving evidence as the most important part of their job. I see a wink is as good as a nod when it comes to that, but that is a difficulty. I think they regard the solving of the crime – apprehending somebody – as their job, and often, almost, sometimes a level of resentment in having to come and explain what they’ve done. It’s not all that uncommon. More common I think is to find that an officer’s never actually given evidence before, and they’re not always terribly good at it, even if they’ve been in the police quite a long time. So that’s one part of it.

The other...the next person who can shock you is the Fiscal, and you don't really know what they're doing, why they've passed on their cases, why they charge people with 20 things and accept a plea to one? Is it because they're busy, is it because the witnesses aren't there, is it because something – not more sinister – but have they bunged in everything so they can take something out?

The defence: I would say roughly speaking that you've got two sorts of defence agents. One that does what their guy tells them and one that doesn't. And so there's two differences of approach there, obviously.

And the Sheriff I won't say anything about because, it's obvious if you think about it, but you never know what another Sheriff does – you're never in another Sheriff's court, to see what they do. So, we'll go as far as that. We then have, assuming there's some kind of guilt, a whole lot of other people coming in offering their services: social workers, psychiatrists, so on. [...]

And then you've got a disposal to make. Once...people are giving advice about which disposal should be made, they will have different considerations and it used to be notorious that in social inquiry reports there would be sympathy for the accused which didn't appear to take account of what he had actually, or she had actually done. [...] But the psychiatric report, people seemed to have found them pretty helpful. They're dealing with a different kind of problem and increasingly [...] they're helpful in the sense that the system didn't want anything to do with it. [...] And then of course there's the community service people and other people.

So, in that sense I think people have different kind of objectives. But if you include victims or complainers, whatever you want to call them, they've got *interests*. I see the press as being how people learn about what's happening in court, who are part of the system if you call it a system as well. And I once went to a conference where the news editor of the Sun spoke and he began by saying 'I'd like you to understand the purpose of my newspaper is to make money and I have no other consideration', and people were talking about the duty of the free press and stuff like that and he said that was humbug, which was very refreshing. So there's a number of different interests operating [...].

With these thoughts, he invokes a strong image of a 'system' which is characterised less by its systemic qualities than by a haphazard mix of (sometimes competing) objectives, interests and practices: 'it's not a tidy business' he remarked.

As Zedner (2004) observes, there is a presumption today that coherence and co-ordination in criminal justice is a quality to which governments and agencies should aspire, and much effort goes into advancing these objectives through inter-agency co-operation and co-ordination of activities. An alternative view is that the 'collisions' of values and interests described by the Sheriff above are likely to better protect individual liberties than a fully integrated and centralised system (Zedner,

2004). This alternative understanding was reflected in Judge M's answer when I asked if he thought criminal justice *should* be more coherent: he thought it was better that different people should bring 'different perspectives to it and different values.'

The limits of criminal justice

No doubt influenced by long years in practice, most judges had strong views about the limits of what any system of criminal justice or penal policy could achieve. *Judge A*, for example, stated wryly: 'I don't know if very much of the criminal justice system has much to do with reducing crime.' *Judge C* drew on some colourful examples of social liberalisation to make a related point:

I do still believe that there's a lot more we can do in this country to avoid binging our people into prison. As I say, lots of people would say that's a softly, softly approach. [...] We've got to try to avoid sending people to prison and get to the roots of what's causing the person to offend. Now, that is easy to say, but it's a huge cultural thing. Can the criminal justice system address those concerns, those social issues? Ah, it can to an extent, but I think it's much wider than that. It's going back to basic education, going back to family life. The one parent family is a disaster in the way it has come about. One understands why that happened, though, and how that happened. [...] Although I have views about the adverse effects of religion, I think there was a very good aspect to that, and I'm not just restricting it to Catholics - Christians, Muslims, and Hindus etc. as well. You can see, in the Muslim community, there's a much better family life existing, and they send their kids to Catholic schools because they think the discipline is better. And I think that's all contributed to it since certainly the late 60s and early 70s, you know. Swinging London and the liberalisation and stuff that I certainly remember, has just gone to an extent which is outrageous, you know. I mean, youngsters drinking from the age of 10, 11, taking cannabis, cannabis being flogged at schools. Aw, it's....it's gross, you know. I think it's important to turn that around. And the criminal justice system can't do that. The criminal justice system's coming in at a time when the seeds are well sown and growing.

Judge L thought talk about 'progress' in criminal justice could be disingenuous: 'It's all *progress*; the question is whether it's uphill or downhill.' But in any case, he said, progress could only be defined in relation the question: what is the overall goal?

If the goal is to have some utopian society where no-one would commit crime – if that's the goal, you need to come to some clever decision about how to stop people committing crime. There are some people who will always commit crime because of their circumstances or because people can just be downright evil. There will always be people like that, such as Harold Shipman and Frederick West. These people need to be detected asap and locked away for as long as thought necessary if they're a danger to society. But that category is a very small category indeed. What about the rest? How do you stop them, if that's your aim? It depends on the extent to which

you want to use the criminal law as a means of regulating society as a whole. The problem is that the criminal law is a very blunt weapon. Over the last 40 years, the state has intervened more and more, and now a lot of the matters that appear before the criminal court as contraventions of the criminal law are not what the man in the street would call crime. There's certainly very little in the way of moral implications about it. Although a lot of minor crimes are now dealt with by way of expanded fixed penalties, there's still a whole range of behaviour which is dubbed criminal because it's dealt with in the criminal courts but could be dealt with in other ways. There's something to be said for removing administrative matters from the courts according to the principle of *de minimis*.

In similar vein, *Sheriff M* drew on the Hippocratic Oath model to argue for a minimal role for the criminal court in relation to the victim:

It used to be, I think, that the person who was aggrieved came along and they gave their story. And I think at that time they understood they were a witness, like everybody else. [...] Somehow or other, a philosophy came in, and I don't know where it came from, that somehow or other the court could put matters back to what it was like before things went wrong. [...] the idea that the court in deciding sentence – that the court could make matters better. And of course you can't do that. The first thing doctors try not to do is not make it any worse.

Developing this point, he drew attention to what he called the 'slippage' in understanding about roles in criminal justice, particularly relating to the victim. He believed the fatal misunderstanding was to think that the court could 'put things back' to how they were before the crime, or impose some penalty which reflected the loss or harm done:

The second thing: you see, the obvious example, and I'm sure you've thought of this before yourself, if you've got death by careless driving [...] you've got a careless act with dreadful consequences and the bereaved people will understandably somehow be looking for a disposal that equiperates with their loss, as to the fault. Now, this has been encouraged, whether by newspapers, or by victim support organisations. [...] Now, I know a lot of people look at it in different ways, but I don't think victims understood that when the state prosecuted they weren't doing it on their behalf, that they were doing it for other reasons.

But there's been a sort of slippage in understanding what people's roles are. Now...that sort of slide could lead to the wrong person being convicted, if you're trying to help victims but you're doing it the wrong way; it's not really helping them at all. Obviously, if you're a witness in a serious criminal case, you're going to be asked questions that suggest either that you're not telling the truth or you're leading an immoral life, or some other reason why you shouldn't be believed; and within limits this is justifiable. But looking at it from the other point of view: if something horrible has happened to you, then here's another. No wonder people don't bother coming to court. So you then begin to wonder if we're using a 19th century model we should have departed from ages ago. We should be looking into restorative justice

and all these kind of things. [...] All in all, everybody's got a view of the courts... otherwise it's not really doing a very good job in society, I don't think. But that begins with understanding that things can never be put back as they were before the event.

Most of the judges wanted to see a narrower role for the criminal court in some areas: the removal of 'administrative' (minor) offences, the diversion to health services of persons addicted to drugs; the expansion of restorative justice and the Children's Hearings Service. As well as endorsing restorative justice, *Judge L* thought that there was a place for mediation of some criminal cases along the lines of civil law, using the 'Oh, to hell with it' rule:

In civil courts, one party feels he has been dreadfully wronged by the other and so raises an action. But the party being sued doesn't think he has wronged to the extent being claimed. So, rather than a whole civil proof, parties will often agree a compromise: 'Oh, to hell with it, we'll settle for £xxx'. This could work for minor crimes. The accused might say 'Ok, I did call you an A, B and C but I didn't call you a D'. And the victim might just say 'Oh, to hell with it. I'll accept your apology and £100'.

It was apparent from many of these accounts of penal practice that judges were acutely aware of punishment's 'tragic' element - that the most effective means of promoting social control and responsible conduct in the individual lay in mainstream processes of socialisation, and that mechanisms such as criminal justice could only ever be a 'coercive back-up' (Garland, 1990). *Judge C* expressed similar views about the realistic scope of criminal justice, but his lengthy experience in the Drug Courts meant that he retained some optimism:

But there's still stuff we can try to do, because otherwise it's a doctrine of despair. We can't just say there's nothing we can do about it except jail, we've got to try. And I think it does work. I saw that working in the Drug Courts, people *desperate* to be helped.

While otherwise holding views about the limits of criminal justice processes to correct social failings, *Judge M* did draw attention to what he considered the broader communicative and educative role of criminal justice through the enforcement of new laws designed to change attitudes:

I think to an extent you *can* alter public views about things. I think the seatbelt law did, I think drink driving did, and obviously smoking has done. So you can't just dismiss it and say you'll never change things by a law that's given effect to.[...]

There is an argument that by legislating about something you can change the public's mindset. It seems to have worked with smoking, it seemed to work with seatbelts, seemed to work with drink driving. But these were all things where it was demonstrable that it was better to do it: always better to have a seatbelt, obviously better not smoking inside...so I think there you can see a cogent reason for doing it, as well as the fact that people would be in favour of it.

Against these positive changes, however, he cited less welcome legislative changes which the courts had to enforce:

... three bad things I can think of: racial aggravation, victim statements and the death by careless driving [legislation], I think these [changes] are all the result of pressure groups.

Criminal Justice as a 'gateway' to services

Most of the views expressed by judges about the limitations of criminal justice were variations of the conventional understanding in penal literature that criminal justice services and programmes, by themselves, cannot protect the public and control crime. However, most judges also insisted that some positive effects could be achieved for some of the most vulnerable or needy offenders who came before them. This is the argument that the criminal justice system can act as a 'gateway' to services which would otherwise not be accessed. *Judge M* expressed a commonly held view:

This question of the social services function of courts is a very interesting one. I'm sure it is [a social service]. Because for many people, committing a crime is a gateway for getting some kind of help. Dreadful situation, but it's true. You can get fast-tracked into help with drug problems, which you won't get otherwise, get expert help, so on and so on. That's a criticism of society I suppose.

A notable feature of this narrative study is that in their various representations of crime and the offender, and through their stories of practice, the disposition most commonly displayed by these judges was strongly characterised by an attitude of empathy towards the offender and an impulse to include. I address this question more fully in the discussion about rehabilitation in Chapter 7, but note here that this disposition was the basis for many approbations of the use of criminal justice to access services. *Judge M*, for example, while otherwise in favour of the removal of minor crimes from court, observed that an unintended consequence may be that some

of the ‘social service’ or ‘gateway’ functions of criminal justice for people who were ‘teetering’ at the edge may thereby be lost:

Well, people that are repeatedly offending, that are in debt, that can’t find a house to live in, their children don’t go to school - all the things you wouldn’t want to have in your own life. It may be - though it *shouldn’t* be - that just coming to court when they’re in the grip of something else may make a difference. Now...because some of them *do* want help at that stage, some are pathetically grateful for anything you do. Others of course are very thrash; just want out the door as quickly as possible. And I think, although this is pure suspicion, I think a lot of that depends on their lawyer, actually. If they’re lucky enough to get a decent solicitor, they’ll try and turn the court to their genuine advantage. If they get someone that just wants to get them off, then very much it depends on the solicitor giving you a chance to do it. If they [the defence lawyers] say next to nothing and they say something like ‘He just wants it all to be over with’ and stuff like that. But...you know, we’re talking down at the minor crime end of things, but there’s such a lot of it in court and if that’s going to be dealt with by Fiscal Fines [alternative to prosecution] then any kind of pastoral role of the court being developed will disappear.

If the person was kind of teetering ... all sorts of things going wrong then you might try and step in. Now maybe you shouldn’t, because we used to discuss, those of us who were interested in this, quite often *why* offending should be a gateway to getting any kind of help - it’s very odd, as it should be.

Judge C told the following story about the implementation of Supervised Attendance Orders (SAOs) when they were taken over by Apex⁴ in order to show the existence of criminal justice programmes which he believed actually worked:

And I got to know the people in Apex Scotland and there were several wifies, but one in particular called Betty, who was the salt of the earth. We [the Sheriffs] used to get really fed up with people saying they didn’t turn up (for SAOs) so we wrote a letter to them - but half of them couldn’t read, of course. So we asked [the SASO⁵ people] ‘Well, what did they do when they got your letter?’ and we were told they didn’t get a reply and so we asked ‘Well, did you find out if they could read?’ Anyway, Betty would say ‘Well, I wouldn’t have that, Sheriff [x], I did a wrap-around thing. I’d get in my car, I’d get round to their house and up the stairs to their bedroom and haul them out of bed and say ‘What are you up to?’ And then she said ‘I would take them for their breakfast, then I would take them to the supermarket, and taught them’. She *taught* them. How to *buy* things. They didn’t have the basic idea how to make a meal, how to budget, how to spend their money, how to check bills, and stuff like that. She was just great. And I said ‘If we had people like you, these orders would work’.

Keen to make these schemes work, this Sheriff was galvanized into further action, engaging local community groups and businesses:

And I still see reports now [about Apex], it wasn't just [x region] that got the contracts, they've got them in [other regions] and they *work*. Because they have the people there who are interested and will make them work. And it's not just having them do things in the community. They also have modules where they teach them a whole lot of stuff. And there's a Fast Board or something, like a big television screen where they can touch things[...]. And they got that through support from local communities. And I also went round with one of the social workers. I got hold of him and said we've got to make these CSOs work and we went to various local companies and said I was really keen to have them take people on. And we got various plumbers, joiners to take people on. I got a phone call from Tom ...KwikFit...saying would you come to a breakfast meeting at Stirling Castle. He said he'd heard about the Drug Court and was interested in helping, which we needed with the drug people when they got to the end of it because we couldn't abandon them. I used to be dead keen to make sure they weren't getting into trouble.

These accounts of the court's 'pastoral role' are qualified by some awareness of the negative aspects of the 'gateway' approach, and it is evident that it is not regarded by all judges as an unqualified good. The positive (and negative) uses of criminal justice as a gateway to services for homeless people and those suffering mental disorders is well documented (see for example Liska *et al*, 1999; Zapf *et al*, 1996), and the consequences of 'coerced' treatment are also observed (Barton, 1999). Criminal justice has now become the principal gateway for drug treatment (Hughes and Anthony, 2006) and there is some evidence that this may have net-widening effects (Malloch and McIvor, 2012). More broadly, Drakeford and Vanstone (2000) draw attention to the routinized compulsion in treatment programmes which is implied by this form of intervention.⁶

Many of these troubling features coalesce around the use of imprisonment for female offenders as a gateway to services, and several recent studies show that sentencers send women (and other offenders) to prison, even for relatively minor crimes, because they believe that prison programmes (particularly psychological reprogramming) can more effectively address their 'needs' (Tombs, 2004; Carlen and Tombs, 2006). Similarly, in their study of Scottish judges' decisions to imprison in borderline cases, Tombs and Jagger (2006: 809) suggest that judges employ strategies, such as 'role distancing', to normalize and justify their decisions in ways that allow them to 'deny final responsibility for their own decisions'.

Judges' accounts of these difficult sentencing decisions and of new, intrusive and possibly net-widening programmes can thus inspire suspicion of evasion, denial or

even the Sartrean concept of ‘half-consciousness’ which Kennedy (1997) calls judicial ‘bad faith’. An alternative reading is that these studies underscore the need for judicial practice to be fully informed by research and training. The observations of *Judge D* provide hints of this more progressive influence:

I suppose one has inclinations about cases. For example, we’ve heard so much about women being put in prison in Cornton Vale when they’re really more to be pitied than punished. So, there might be an inclination to take a strong view – you wouldn’t do *that* unless there was really absolutely no alternative. Sometimes even for the woman’s own protection.

Section 2 The Drug Court

There is, of course, no linear or straightforward relationship between penal practice and research, and these accounts can do no more than hint at the capacity and willingness of criminal justice actors to reflect on criminological and other social science research. Moreover, the accounts can be interpreted as indicating a range of complex motivations rather than unthinking complicity in routinized coercive treatment. They also suggested attempts to reconcile piecemeal knowledge gleaned from training or other sources with the ‘situational, adaptive ‘fuzzy logic’ (Wacquant, 2007: 273) of daily practice. Some sense of these tensions is gained from *Judge C*, whose earlier conversation suggested that, like *Judge D*, he was aware of the research concerning the damaging effects of imprisonment on women. Here he recalls a case from the Drug Court which led him to imposing a custodial sentence on a female offender ‘for her own good’:

Yes, [I remember] one woman in particular. She was going to lose an arm because...well, *she* was very good but she was living with an absolute *bastard* who was making her prostitute herself, and then when we got the truth out of her, her 14 year old son, who she’d been telling me had been doing well at school, turned out *he’d* been forcing her into prostituting herself, too. And when he came to court....big guy for 14...I gave him hell. I said ‘How *dare* you. If I ever hear of this happening again, I’ll report you to the Children’s Hearings System’. When this woman came in, she knew what I was going to do because I had warned her – if you miss another appointment, or produce another positive test, I’m going to lock you up. For your own sake I want to put you into this system run by a nurse in Glasgow. It [the 218 Centre programme ⁷] was fantastic, but they would only take you if you were clean. But this woman, I was told by the medics that her arm was useless, and it was going to be amputated, because she kept on puncturing it. She was like a skeleton. And she was subject to this abuse at home. So I said, ‘Right, enough ‘care at home’ from your family, I’m putting you into Cornton Vale. I want you stabilized so that when

you come out, I'm going to have someone meet you and take you to this place in Glasgow where I want you to stay for 3 or 4 weeks.'

It was evident that Judge C's experience in the Drug Court was a powerful one, and it permeated his accounts of his judicial career. The complexity of the history and operation of the Drug Courts in Scotland is such that a review is beyond the scope of this discussion, but of particular interest here is the extent to which the involvement of the judiciary is regarded as a critical component of the success of the scheme. In particular, the Drug Court requires a very different kind of dialogue between the judge and the offender from that typically encountered in the courts.⁸ Judge C spoke enthusiastically about the programme and described its operation in some detail:

We had so much more involvement, me and my drug team. It was a wrap-around service. Two of my colleagues could be back-ups if necessary but I did it all. [...]. I was in charge and would preside over all the meetings. We would have the social workers, counselors from this and counsellors from that, and specialists who did all sorts of stuff. It was evaluated by Professor Gill McIvor from Stirling University. There was a 3 year pilot and she did a great report after that, very supportive. But Cathy Jamieson [Minister for Justice, Scottish Government] at the time wanted to roll it out for the whole of Scotland and they took about 18 months and she couldn't get the support from fellow ministers because medicine and health, education etc. were seeking the money as well and there was only a certain amount to go round. So what could she do? All she could was to roll out the DTTOs [Drug Treatment and Testing Orders]. But DTTOs were a minor fraction of what we were doing. We did everything, it was holistic. We looked at everything in their lives. They had benefit problems, family problems, not just their drug and methadone problems and sub-optimum problems. *Every* part of their lives was looked at because, you know, if you didn't, the slightest little upset.... Even in Glasgow they only did them for people over 21 but in [...] Sheriff Court I did them for 17, 18 year olds. Because you know, they would start off taking drugs and then alcohol at age 10 or 11 and by the time they were 17, 18 they were hard-blown addicts. So in appropriate cases I would say 'he's maybe immature but we're going to try'. And it worked with some. [...]

The Drug Court costs a lot of dough, though. I had a complete meeting every morning between me and the solicitor for the accused, the senior social worker, the various counselors, the Fiscal, and the police. They were all involved. It's not just reading the report, you have to say to the social worker or to the counselor, why has this not happened, and for relapses etc., what happened there? And in reports, sometimes there are things missing, and in court [the non-Drug Court] you can say to the social worker, do you know what happened here but of course she doesn't, she wasn't the one who wrote the report. Whereas I had this team of people on the ground, and they would give me the complete background as to what went wrong. But they would also say 'This guy's been brilliant, or this girl's been brilliant' and give you examples, and the person wasn't there. So when the drug court sat in the afternoon I was able to say this and pour on praise.

I asked him what he thought was the main benefit of this approach and he answered that it was the depth of attention paid to the social problems in the lives of offenders:

It was the way that it got right into the complete lives, going back to what caused their problems in their lives in the first place, and looking at ways of ensuring that these were dealt with by one member of the team, or several members of the team: if it was drug addiction, or if it was sexual abuse in the past, or if it was money problems, or partner problems, or mental health problems, or literacy problems. I mean, the numbers of times that people wouldn't tell their social worker or any of their counselors, that they couldn't read their timetable. I would say 'Did you get your timetable?' 'Oh, yes, Sheriff..' 'Why didn't you turn up?' But I didn't want to embarrass them, I'd spoken to them in the morning. So I'd say, ok, we know the answer – this guy couldn't read. And he had no-one to ask. We dealt with people between the ages of 16 and 25, 26 because you start seeing the very serious changes as they mature. But by that time, the numbers of kids who are either rat-arsed every weekend or they're up to their eyes in heroin *and* a cocktail of drugs....

Dzur and Murchandani (2007) argue that the inception, development and operation of problem-solving courts such as the Drug Court - with their emphasis on rational, open and ongoing debate and on the inclusive participation of a broad spectrum of actors, agencies and community groups – point to the potential for a procedural theory of punishment. This approach involves the recognition of value pluralism – in particular, sensitivity to the 'different values, experiences and interests caught up in the practice of punishment' (2007:169). Dzur and Murchandani (2007) point to the additional role the judiciary could play in fostering and being responsive to debates of this kind, though they question whether current configurations of the judicial role were capable of this involvement.

In my earlier discussion of Bourdieu's theory of habitus, I drew attention to his conception of practice which entails a form of 'learned ignorance' on the part of the practitioner and an inability to question the 'taken-for-granted' categories of thought which are characteristic of the field. On one reading, this lack of reflexivity about social processes would inhibit the sort of change in the judicial habitus which would be necessary for judges to participate effectively in new innovations such as the Drug Court; yet the involvement of the judiciary in this scheme suggests otherwise. In Chapter 7 I draw on other accounts of practice to suggest that the capacity for judicial reflexivity can be traced in additional ways, but I consider first other sources of influence on the judicial habitus.

Section 3 Influences on the Judicial Habitus: Having a ‘dimension’

In one of the few textbooks relating to sentencing law and practice in Scotland, Nicholson (1981:2) acknowledges the competing considerations facing the sentencer. As a source of information to help the sentencer declares that criminology ‘has now attained a respectability and an authority where its findings must be taken note of’.⁹ As discussed above, the lines of influence on the judiciary from judicial training, research or other source are not capable of easy determination, but the nature and scope of the range of influences have important implications not only for criminal justice practice but also for the potential of change in the penal field.

Judge F adopted a cautious approach, preferring to get his information from ‘sources he could trust’ such as appeal cases, training and colleagues rather than newspapers or the television. More broadly, the importance attached to the impartiality and independence of the judiciary prevents judges from actively participating in politics though several judges spoke of their involvement in criminal justice reform organisations, charities and other forums for penal debate.¹⁰ *Judge D* usefully outlined some of the practical distinctions involved:

The judge shouldn’t become involved in matters of public controversy. So, for example, when Sheriff Peter Thomson had a placard in Princes Street: that led to his removal. And there are other examples in England of the same sort. No, it’s perfectly clear that one should not become involved in public controversy, full stop. If you have an interest in a particular body, then you need to be quite careful about what kind of body it is. If it’s a campaigning body, then you may think, as a judge, that it’s not a very good idea to continue your membership, but you may be able to distance yourself from that in some way or other. I’m sympathetic to Sacro because I think one can do a lot of intelligent, helpful things with offenders to discourage re-offending.¹¹

Judge M thought there were advantages in attending conferences for himself and for others, too:

I liked to hear what people had as ideas of reform. I also liked the people; I liked to see it from a different point of view. I didn’t like *all* of the people I met because I thought some of them had a very monocular vision about things and were really only interested in their particular group. I also thought that, I suppose a few of us did, that we were useful by being there and being able to explain practical things to people if necessary.

Judge C was involved in a wide range of organisations and thought it provided him with valuable insight for sentencing practice:

It brings me into direct contact with what we make orders about and we don't always understand the niceties of it or the problems that are faced by those who are doing it. We just blithely say 'Right, 18 months probation with the following conditions, community service or supervised attendance or whatever'. So I was sad that several of my colleagues were so annoyed at the inadequacy of the system. Being involved in Apex, for me, brought direct contact with the problems and *how* they could best be solved. And so, that's primarily the benefit. And now, having been involved with Apex, I've seen the other services they provide which I didn't know about. [...] They do a lot of stuff with people who are illiterate and innumerate – many, many courses to help them write application letters, do CVs, and stuff like that, you know. In a supervision requirement report it will say 'so and so's done such and such a model, Scotvec model' or whatever, and you don't really know the details. So for me, knowing these kind of things I found very helpful.

Further discussion suggested that involvement of this sort not only influenced the way he sentenced, it allowed him to 'shape things' at other levels:

Oh yeah. Because I knew for the individual offender, what the social workers were suggesting. But I was also able, as it were, to evaluate myself, what a particular guy needed, or girl. And I was able to say, before the report was ordered, I want you to concentrate on the following, which I know, for example, that Apex can offer, or that Sacro can offer. I think they should work more together than they do, because they could share costs. It gave me great insight into the actual ways of keeping people out of prison, which we're all being urged to do, of course. Mr [...] who was then Her Majesty's Inspector of Prisons, who I knew, he always used to come to me and say 'What's going on here?' And at Apex, I would be able to put my pennyworth in and say 'Look, this has got to be resolved in such and such a place', because you read the reports you get and you wonder why we're not getting proper results from, say, Highland Division, or Southwest Division – we got tables showing so many SAO's but no finishers, or a percentage of finishers which looked to me to be inadequate, and then I would have that explained to me. And therefore, I was able to go back and use that to my benefit. And then, in other courts, as a part-timer, I was able to do that with a much wider range of colleagues, some of whom are still very sceptical about the way social work departments provide the courses they're supposed to and very often can't do it because of a mixture of lack of funding, lack of staff and a lack of enthusiasm on the part of the individual. And Sacro – the numbers who every year want to go to the SASO conference in Peebles, is interesting. There's always a lot more people who apply to go [...] and I think some of them just come for the day, some will come for the whole weekend, but they're very enthusiastic and they take part with a wide variety of people in the exercises and problems which are set up, and do it very well. And that is interesting because of the ivory tower idea which used to persist, and still does with some sheriffs and judges – but I'm talking about high court judges as well, not just sheriffs. So it was beneficial to me to be involved in Apex as a sheriff, for the benefit of offenders. It just gave me a much more direct way of shaping things.

Judge B had spoken at length about his involvement with a number of organisations and I asked him what he thought were the benefits:

Well, the benefit is that you do encounter people who are concerned with dealing on a day to day basis with those who've been convicted of crime, or are involved in crime, including, to some extent the victims, because the victims were also in the SASD [now SASO]. So...and partly because you don't want to go in ignorant, you tend to read up something about it and you meet people from Sacro or from Howard League, wherever it may be. And you listen to the lecturers and they talk about this and you began to realise there's a whole epidemiology about crime that you've not been aware of before, because your interest in the criminal ends the moment you convict him- did he do it or did he not? That's the thing we're quite good at, with the assistance of juries. But how to dispose of it, we don't know very well at all. So, bodies like SASD etc., yes they do teach you. Even SAMH, the mental health charity tells you. You realise from the information that they put out how many people go into prison because they've got a mental health problem, rather than a wickedness or evil problem. So, association with all these things is very important.

Judge B further explained that having 'a dimension' – a broader outlook – held the possibility for change among judges:

Where you have a judge who, partly for personal reasons, partly because of political experience etc. etc. has got a dimension [...] you felt there were things that could be done. [...] Even so, you'll still find that they [other judges] don't want anything new; they want to stick to traditional remedies, even though they *don't work*. I mean, somebody has defined madness as being constantly doing the same thing in the same way and expecting a different result, and that's what we do in the courts. We constantly- and indeed the legislature too - we constantly provide the same remedies. Or worse, stronger ones to deal with the situation; they don't work and we go on and do more. So if two years won't deter, then they give you three years, won't deter and they give you five years and it still doesn't deter.

For *Judge B*, his involvement in these organisations allowed him the opportunity to 'influence the general thing':

I'd become aware when you read the papers, and you read the statistics [...] - there are government statistics like the crime survey on the one hand or the reported crime things on the another, which I would always be aware of and you've always access to them because they're printed in the paper. You've also got access to analysis by people like Sacro who compare the rate of imprisonment per 100,000 of the population with Finland and Denmark and Germany and France and Portugal etc. etc. So you get some idea of what's going on. Also, because I was a member of the International Bar Association, and was an opening speaker at two of their events and I attended many of their conferences; well, you could attend any one of 4 to 7 hours on a particular day so you went to two or three and usually they were on crime and punishment. So you did get insights into what's happening in the rest of the world. These were important influences, and indeed in the light of them I actually had to address my fellow judges on a couple of occasions. Once we had a joint meeting

with the judges in Northern Ireland, and some judges from England and the Scottish judges. And also we had seminars where it's just been the Scottish judges, and because of my political work ...and Law Officer etc. background, I sometimes addressed them. So you do get a chance to influence the general thing.

I asked him: influence it in what way?

Well you could argue in favour of not having the highest prison population in Western Europe, which I had argued in favour of a lot, but it just hasn't made much difference, because we still have - or pretty well.

Judge E spoke at length about his membership of SASO and I asked him how he thought it influenced his practice. His answer indicated a broad range of perceived benefits, including a force for moderation:

I think it did, yeah [influence his practice]. When it came to severity of sentence or the like, I learned from SASD [now SASO] that it didn't necessarily improve a regime to have a practice of severe sentencing - that it might be counter-productive. So it came back to treating people as individual cases. Yes, if you treat the populace harshly, you will find a harsh populace. And that's what you've got to be careful about. And that's the problem with guidelines: you can't lay down a general rule. [...] I think it might shape how you actually put things into court in the start. Again, coming back to this question of trying to be reasonable and explain what you're doing and treating people with respect and fairness. It all comes back to that. Those are some of the things I learned from SASD: if you treat people fairly and give them human respect then that will reflect how the public sees sentencing as well. Whereas, if you treat them harshly; well, it creates good headlines but the public perception will be of harshness and to create harshness is to create problems generally, for society generally. In the same way as if you - say you have brutal sentencing, you're likely to have a brutal society. And people just accept brutality as the norm. [...] I remember I used to go to [...] SASO and you used to get some interesting information from their meetings. For instance, I remember going once and somebody produced figures about a course in Germany and it was revealed that the harsher the court, the higher the rate of re-offending compared to a more lenient court, where offending stayed down. So that was part of my thinking as well - not to be too harsh if there was an alternative.

I was a member of the Glasgow branch. I used to go once a month. I think you got a feel for how the others involved saw sentencing. And you also got good information sometimes about how, say, community service actually worked. And meeting some of the people involved in that - community service - and you saw how some of them tripped up when they were working outside and got supervised more strictly and seeing how that worked and seeing that the supervisors really were quite strict, you began to appreciate that they were really working at it. And the same with dealings with Sacro - accommodation and things like that - and seeing again the chap who ran Sacro in Glasgow, he had a record himself, and knew what he was dealing with. Yeah, he was impressive and you got the feeling that if you could get an offender into something like that, he'd get some of the support that he needed and hopefully it would do some good.

Judge D provided an important insight into the additional benefits for judges of forums where they could listen and absorb information without necessarily having to publicly comment – with important implications for judicial independence:

SASO is a different matter because that's a kind of broad church, a forum where lots of people get together, you could absorb all sorts of ideas without saying you agree with them. But you're much more aware of what's going on, so it really is an opportunity to meet people and hear what their perspectives are.

Notwithstanding these positive accounts of involvement in organisations and broad reflections on the benefits to judges and others, *Judge B* provided insight of a different kind: a habitus less open to outside influence and about suspicion of that 'influence':

I would say different judges have different experiences, so an example. For all kinds of reasons that were personal and otherwise, I was heavily involved in things outside the court. So I would, you know, I would address Sacro and Apex, I would visit the prisons [...] I had a lot of things [...]. And, by the way, some judges criticised me for that. They say you should, you know, not be involved in any of these things at all, because you're subject to influences there, you see. [...] But even so, there were some whispers saying 'keep out of these things'. But why they imagined you become free from prejudice by giving a lecture at Sacro but you don't by standing at the bar of the New Club talking to your Tory colleagues, is another matter.¹²

In this discussion about influences on judicial dispositions, I have pragmatically situated the judges in their sentencing context as penal actors. However, their career histories and judicial roles mean they are also *legal* actors with legal sensibilities. It is therefore possible to read into these accounts of engagement with penal research and criminal justice organisations a more complex appraisal of the motivations involved. Tracing the history of inter-disciplinary socio-legal scholarship, Tomlins (2000:963) observes that in the post-war period social sciences such as sociology and political science were increasingly demonstrating their ability to compete with law in the struggle to define social problems and to offer solutions.¹³ During this period, legal scholarship had been 'traipsing from door to door, looking for methodological refuge' (Rubin, 1997: 521) and part of law's success in re-establishing itself as a 'discourse of state expertise and governance' was the appropriation of the social science it needed (Tomlins, 2000).

Kalman (quoted in Tomlins, 2000:964) believes that the law and society interdisciplinary impulse is part of law's 'restless search to justify its authority'. Adopting Tomlins' (2000) typology of the two fields of encounter in inter-disciplinary research, it is possible to argue that judges' engagement with criminological and other social science research enables them to move beyond the first field (a 'modality of rule') and enter the second field of encounter: a modality of self-explanation or legitimation. This new form of engagement allows them to explain and legitimate their power and authority to their wider audiences: government, policy advisors, criminal justice 'stakeholders' and the public – perhaps even criminological researchers. As Melossi (2008) notes, criminology is a social science which has always been closely linked with the question of political legitimation, and this natural affinity may explain some of the enthusiasm as well as the suspicion suggested by the judges' accounts given here.

Conclusion

As Bourdieu intended it, *habitus* is a pivotal concept which links the past and the present through dispositions and attitudes already acquired in the field, and through adaptations to new encounters. Importantly, however, *habitus* carries the genesis of cultural change only if practitioners have the capacity to reflect on some of the conditions which structure practice in a given field, and thus constrain them in practice. In these accounts of their early years of legal training and judging, of models of judicial conduct and of their conceptions of crime, the criminal and criminal justice, we can begin to trace some of those conditions of practice as well as the formation and consolidation of judicial dispositions in response to the circumstances they encounter. We can also begin to see ways in which some judges recognise factors which operate to shape and constrain their practice.

The accounts of involvement in outside organisations and of their access to information and research provide insight about certain aspects of the judicial habitus which are little known, particularly relating to the formation of dispositions and sensibilities. This points to some of the ways in which research, information and debate on penal issues - key ideas and information about imprisonment levels, penal

moderation and severity, and the implementation of community penalties - is received and evaluated by judges, and how it may influence practice. Not only does this underscore the continuing importance of judicial involvement in organisations such as Apex and Sacro who do ‘intelligent, helpful things’ with offenders, it also highlights the need to consider the nature and form of judicial engagement – questions about access, involvement, membership, dissemination of research and information. In particular, it suggests the extra value of organisations such as SASO who provide a forum for discussion and debate in an environment where judges can ‘absorb all sorts of ideas’ without necessarily having to publicly agree or disagree with them. Further, these accounts suggest some of the ways in which information gleaned from these and other sources is used to inform conversation and debate with government and policy advisors, and with judicial colleagues. Finally, in relation to questions about the transmission of penal culture, these accounts support the conception of the judge as both the receiver and bearer of cultural values, and suggest the reflexive judge as a key vector of penal change.

In Chapter 7, I continue this enquiry about judicial frameworks of meaning in penal practice and consider the relevance of the ‘master narrative’ of judicial independence for trial and sentencing processes. I briefly re-appraise several dimensions of sentencing practice in light of recent findings in neuroscience, and explore the concept of sentencing as a signifying process.

¹ These images of guilt and innocence, subject and society, individual responsibility, neutrality and independence also form the basis of legal reasoning in criminal law, and have the same capacity to generate understandings. As Lacey (2007: 195) observes, these are ‘discrete objects of criminal justice knowledge’ which merit close examination.

² Occasionally one comes across very direct lines of criminological influence on judicial thinking, such as the Plenary Address given by Rt. Hon. Dame Sian Elias, Chief Justice of New Zealand (Elias, 2005) entitled ‘Criminology in the Age of Talk-back’, which draws extensively on work by a number of contemporary criminologists.

³ I wondered if the book to which he referred was Beckett, K. (1997) *Making Crime Pay: The Politics of Law and Order in the Contemporary United States*.

⁴ Apex (Scotland) is an organisation that works with ex-offenders and young people and adults at risk, and aims to help equip them with the necessary skills to change their behaviour and lead fulfilling lives.

⁵ Scottish Association for the Study of Offending.

⁶ Drakeford and Vanstone (2000) also draw attention to the Orwellian-sounding language of the 'gateway' approach and to the Labour government's pursuit of social policy objectives through criminal justice against the evidence which suggested that criminal justice objectives are better achieved through social policy means.

⁷ The 218 Centre was established in Glasgow in August 2003 with the aim of providing a range of services for women in the criminal justice system. The Centre provides a day service and supported accommodation. In addition to prescribing facilities, it offers support - residential or daily - for detoxification. See Scottish Government (2006) 'Evaluation of the 218 Centre'.

⁸ McIvor (2009) explains that although the Drug Court Sheriffs were not operating explicitly within a model of therapeutic jurisprudence, a key focus was on creating supportive conditions through which participants could attempt to reform their drug habits, with the recognition that drug misuse is a relapsing condition. Research on procedural justice suggests this innovative approach may have important implications for the perceived legitimacy – and hence effectiveness – of the programme.

⁹ Nicholson summarises the principal findings of criminology as follows: no form of sentence is any more or less successful than another in preventing recidivism.

¹⁰ The Judiciary of Scotland website contains the following statement:

'Judges should have no involvement in political activity other than exercising their right to vote. On appointment, any ties with a political party or organisation must be severed, and caution has to be taken to avoid the creation of a perception of bias in any other way. Justices of the Peace and part-time fee paid judges are free to have party political involvement, but must nevertheless ensure that this has no effect upon their independence when acting in their judicial role.'

¹¹ Sacro (Scotland) provides a range of direct criminal justice services aimed at reducing conflict and offending and promoting safe and cohesive communities. Services include restorative justice and reparation, community mediation and work with schools.

¹² The New Club was established in 1787 and is a private club in the New Town in Edinburgh. Membership is private, open to men only and is believed to contain many establishment figures including judges.

¹³ Some interesting parallels - and distinctions - could be drawn between the development of judicial and police authority over the power of 'legitimate naming'. See Loader and Mulcahy (2001) regarding police authority.

Chapter 7 The master narrative: judicial independence

Introduction

In this chapter I continue the approach adopted in the two preceding chapters, exploring some of the frameworks of meaning and sensibilities which contribute to 'judicial culture', and here broadening the inquiry to sentencing practice. In the first section, I consider the 'master narrative' - judicial independence - and its relevance to sentencing. In the second and third sections I consider the various judicial role conceptions, punishment orientations and normative commitments articulated by judges and which are suggested by their stories of practice to explore several key dimensions of sentencing practice; discretion, rationality, intuition, emotions and collegiality. In the final section, I consider the idea of sentencing as a 'signifying practice' in the context of the central tension for criminal justice which is inscribed in the judicial role: the 'social question'.

Section1: Judicial independence: the master narrative

It is easy to adopt an attitude of scepticism or even suspicion towards the concept of judicial independence.¹ Despite extensive critique, this is a concept still characterised by opacity, defying conceptual precision (Stevens, 1999) and empirical analysis, and thus easily characterised as 'a grab-bag of vague but salutary qualities' (Tiede, 2006:160). More critically, legal realist and critical legal scholars identify it as a reified account of the judicial role, with mythologizing and legitimising functions, and giving the appearance of some transcendental basis for judicial decisions. Legal scholars are critical of the worshipful tone and 'rhetorical effluence' (sic) which accompanies its use (Cross, 2003) and of its trumping 'say no more' quality when employed in opposition to almost any judicial reform (Malleon, 1997).

Feeley and Rubin (2000) observe that political scientists in the US academy (wherein most studies of judicial behaviour take place) are inclined to adopt a view from afar, regarding all judicial behaviour as driven by attitudes and beliefs, and thus paying little attention to legal doctrines (such as judicial independence and the rule of law).

Legal scholars, on the other hand, are inclined to issue prescriptions about the correct doctrinal positions which should be taken regarding these doctrines. The consequence of these dual stances is that little attention is paid to the understandings and meanings judges bring to bear on those doctrines – the doctrines that judges actually employ in practice. For Rubin and Feeley (2000), this is to treat judicial beliefs and legal doctrines as mutually exclusive categories, and represents something of a methodological gap.

A similar gap can be observed in criminological scholarship. Although the concept is usefully discussed in its constitutional ‘trumping’ function in relation to sentencing policy, reform and innovation (Ashworth, 1995; Tata and Hutton, 2003), it is elsewhere dismissed with little examination as merely the ‘potent myth’ of a hegemonic judiciary (Cavadino and Dignan, 2007: 105). What appears relatively unexplored in criminal justice research is the question of the independence and impartiality of the individual judge, the subjective meanings of the concept, and its role in the sentencing process.

Krygier (2008: 45) observes that there are many reasons for the avoidance of close sociological exploration of legal doctrines – ‘too normative, too legal, too political, too formal, too disconnected from life’ – but asserts that where these doctrines matter legally and politically, they matter socially, too. This ‘sociological innocence’ about legal doctrines is all the more striking since legal doctrines such as the rule of law and judicial independence are classically regarded as offering protection against the arbitrary use of power - a central social concern (Krygier, 2008: 45). However, the greater challenge for a social science approach to judicial independence (one aimed at social explanation as opposed to doctrinal understanding) is the ‘macro-micro problem’ which arises: the difficulty in developing explanatory accounts which link individual and collective behaviour (Rubin, 1997: 556). In advocating greater social explanation of the doctrine, Rubin (1997: 558) points to the potential:

Since law is both a set of norms and a system of meaning, an account of the decision-maker's relationship to the organization that is phrased in these terms is likely to be particularly useful. None of this will resolve the normative debates that animate legal scholarship. What it might do, however, is to provide a rich empirical context to channel those debates.

More pointedly in relation to criminal justice, Lacey (2007:195) notes that legal doctrines are ‘discrete objects of criminal justice knowledge’ which merit close examination, and are equally important for criminal justice as the rest of the process:

Once we have conceived criminal justice as an integrated process with certain complex functions, it almost amounts to bad faith to place so much emphasis on these doctrinal values at one stage of the process while virtually ignoring them at the other

(Lacey, 1987: 222)

Judicial Independence and Sentencing

MacCormick (1992:5) provides the understanding that if law is imagined as a normative order, ‘institution-concepts’ such as judicial independence are useful ways of organising legal thought and understanding and provide the basis for knowledge claims about law and its processes. As a juridical and ethical commitment to which judges and governments attach importance, and perhaps carrying greater significance than Fielding’s (2011) conception of judicial ‘workplace narratives’, judicial independence can be regarded as the central organising principle of the judicial role and of the habitus. As the *master narrative*, it is a thread which runs through many conversations with the judges, and particularly the topics discussed in this chapter: the exercise of discretion, judicial role conceptions, and the management of emotions. Before these substantive discussions, I first consider what the judges say directly about the operation of the judicial independence and the implications for criminal justice practice.

Judge C outlined the first meaning of judicial independence which relates to the independence of the institution and the separation of powers:

Well, on one level it meant a great deal because many of my colleagues would be on their high horse about being called ‘colleague’ or what was the other one.[...] ‘stakeholder’! Ho, ho, that used to drive my colleagues berserk. And it annoyed me a bit, too, because, you know, the office is an independent office. And especially if it came from government. It seemed civil servants, and about half the MSPs were completely oblivious to the separation of powers. And from that dignified point of view we would say ‘Do you realise that.....?’ I had a colleague in [X Sheriff Court] who had a huge fight with his local councillors, before whom he had to appear to explain himself. He went absolutely apoplectic. It’s on that more basic level.

Others spoke about threats to judicial independence as a result of administrative interference, workload pressure, career structure, and complaints: cumulatively, these were described by one judge as ‘the loss of independence by 1,000 cuts’ and by another as ‘executive creep’. Not without controversy, many considered that government interference with judicial discretion also represented a threat to judicial independence. *Judge B*, a former High Court judge, provided useful insight about some of the ‘checks and balances’ which he believed protected judicial independence. These, it appeared, were informal as well as formal means: communal dining, and the Appeal Court:

And the other thing is that this whole system is full of checks and balances, all the time, because of the way the judges live in a kind of enclosed environment for the most part. On the whole, judges don’t go into pubs...they meet for lunch every day together, used to almost always eat altogether. In fact they still do nowadays in Scotland; they all meet in the one dining room. And, of course, the Appeal Court is reviewing what you’re doing, so there’s a lot of checks and balances, and that I suppose is one of the guarantees of judicial independence.

In relation to the second form of independence – the independence or impartiality of the individual judge - *Judge H* was most direct:

The secret of it all is being independent. I do think it’s the most important thing. Being independent of someone – apart from the Appeal Court – who can come to you and say ‘That decision you gave today was ridiculous’.

Judge M observed that it was important to have a judiciary ‘that’s not frightened of anything’ and *Judge B* expressed this in a similar way:

I suppose it’s to know that you are, in a sense, *untouchable* in terms of what you do, provided you don’t misbehave. Then...you should try to make something of your independence, and not be unduly influenced by what is thought to be the public mood which, as I say, is a very doubtful concept indeed.

But *Judge B* believed that recent changes to the composition of the judiciary in terms of age carried significant implications:

The result is that the bench has become younger, and to that extent, slightly less experienced and slightly less above the battle, if you like, just because older people tend to be slightly more remote in a sense.

The traditions of the institution

Much has been written about the extent to which the power of law, and particularly criminal law, relies on elements of performance, imagination and symbolism. Rieke (1991:43) makes the seemingly unassailable point that despite the aura of mystery created by judges' robes, raised benches, wigs and pomp, judges 'do not at once acquire extraordinary powers of reasoning and molt their humanity' simply through the act of being 'elevated' to the bench. For Kahn (2006a), the performativity element of the judicial role is directed at stabilising the position of law in a 'highly contested symbolic field'.² This competition is fought out in the realm of the imagination, and the law brings two resources to the debate: a conception of law as the product of the sovereign will – its democratic basis - and as the product of reason. A key element in the construction and the maintenance of this 'legal imaginary' is the personification of these traditions in the person of the judge. This requires the transformation of the individual judge and the suppression of their individual subjectivity: in *Judge C's* phrase, the ability to situate him or herself 'above the battle'. However, as Kahn (2006a: 4) observes, even if no one 'fully believes' this legal fiction, it still has some force:

But everyone sort of believes. We believe it as a background assumption that sustains the rule of law. The suppression of the individual subjectivity of the judge is central to the judicial performance: the court, not the judge, speaks; the decision is always spoken in the name of the law, which appears to us as the will of the sovereign people.

The legal realists' critique of these normative claims – that they represent some kind of transcendental nonsense and that far from having any democratic basis, law is entirely in the service of politics – fails to capture or explain the extent to which legal actors believe *themselves* to be constrained by law. Narrative has a role to play in explaining this middle ground between the formalism of law and naked individual or group preferences, capturing the idea of *integrity* or *ethos* in practice and placing it in the context of a shared community of commitments (Garver, 2004; Kahn, 2006b).

Capturing some of these ideas about judicial independence in practice, *Judge A* offered this explanation of the 'automatic' operation of independence:

I wasn't physically doing it: it happened. It was just a feeling; this just happened automatically. You realised this was totally....I have to behave in a totally judicial manner.

Judge B spoke at length of the effect on judges of the traditions of the institution. He returned to the subject of an earlier conversation about the effect of background on subsequent judicial conduct in order to illustrate what he perceived as the transformative effect of office:

I talked earlier about people who couldn't keep an open mind or people. Well, one of the most remarkable judges was a man I ultimately came to admire, having disliked him intensely – Lord [...]. He came from the traditional background. His ancestors were on the bench. He himself went to [...] school and went to Oxford, I think, and then to Edinburgh. And he acted invariably for the NCB (National Coal Board) rather for the NUM (National Union of Mineworkers). But when he went on the bench, to my astonishment he was an excellent, absolutely excellent judge. And... and *totally fair*.

He continued:

And once you get up there, the great thing - they said this of the American Supreme Court too - is that it doesn't matter in one sense who you appoint: the traditions of the institution can be so powerful that it changes you. It *makes* you independent. Another thing which I've often said - and I don't know how much support there is for it - is that when we go on the bench, we wear a wig and a gown, and a special gown and a special wig and a different gown for criminal cases etc. And the purpose of that is not to frighten the punter or to impress the public. The purpose of that is to remind you who you are, to remind you that you're not just [full name] earning so much, and looking to a pension, and with his background. That you're there, you're exercising a great power on behalf of the people through the state etc. So that's why I still advocate the wearing of wigs and gowns, for it helps to remind you who you are. So the institution is very important, and the whole tradition.

In later parts of this chapter I discuss some of the strategies which judges adopt to manage their emotions and other challenges of the work. These stories suggest the idea of a neutral state of mind which judges purposefully enter in order to perform their independent role. Taken together with the accounts here about judges' beliefs in independence and their ability to situate themselves 'above the battle', this points to a strong 'enabling' role for the concept of independence and impartiality. To a significant degree, however, acceptance of these stories relies on an attitude of faith or trust in the individual judge as well as in the institution. Berman (2001:120) makes the case for taking seriously these subjective accounts of belief in legal principle:

... only by taking the judges' belief seriously will we become aware of the possibility that the belief itself might function as a constraint on judicial discretion. Thus, judges who believe in legal principle and repeatedly tell themselves and the world a story about both the non-ideological nature of their work and the substantial constraints on their discretion may, in fact, be more constrained in their decision-making, regardless of whether or not a critic can 'prove' that such constraints are illusory.

Section 2: Sentencing in Practice

Introduction

In Section 1 above, I noted the 'sociological innocence' about the concept of judicial independence which exists in relation to criminal justice practice. In relation to the first use of this concept (the independence of the institution), Lacey (2008) observes that the nature and extent of judicial insularity is an important institutional variable in the analysis of ways in which systems of criminal justice respond to calls for increased penal severity. She also notes the attachment of the UK judiciary to a strong 'Olympian' version of judicial independence, and the implications for judicial power and authority. These observations raise important issues about the separation of powers and the susceptibility of the judiciary to external influences from government, media or public sources which I do not directly address in this thesis. However, the concept of judicial independence also has relevance for the routine practice of criminal justice and in this section I consider dimensions of sentencing practice for the insight they provide about the operation of the judicial habitus and judicial culture. In particular, I consider several accounts which challenge the conventional understanding of judicial independence as 'distance'.

The occupational life of judges – their experience of the work, the routine tasks, and the challenges and demands of office – is a relatively unknown world. Several recent studies examine work-related stress in the judiciary, mostly in the USA (Eells and Showalter, 1994; Chase and Hora, 2000; Bremer, 2003; Chamberlain and Miller, 2009); others have explored emotional and routine aspects of judicial work (Anleu and Mack, 2005; Cowan and Hitchings, 2007; Mack and Anleu, 2007; Scarduzio, 2011) and 'work-place culture' (Fielding, 2011). Little of this relates to the

sentencing task itself, however, or even more broadly to the judge's role in criminal justice.

In this section I explore aspects of sentencing as an occupational task and some of the cultural influences and pressures to which they are subject in daily practice, particularly those which can be considered emanating from within the judicial habitus. By focusing on these cultural dimensions of practice, I do not attempt to invoke a free standing concept of *judicial culture*, or to disregard the broader field of forces and interests within which judges operate and which contribute to penal practice and outcomes. As Garland (2006: 437) observes, there is a complex range of forces which shape penalty:

Economic interests, political projects, intra-group dynamics, dominant ideologies, professional claims, experienced insecurities, psycho-dynamic processes - all of these are implicated in the emergence of that cultural formation.

Discretionary sentencing: a structured paradox

Notwithstanding seemingly global trends towards the diminution of sentencing discretion (Franko Aas, 2005; Tombs, 2008), sentencing law and practice in Scotland is still characterised by high levels of judicial discretion.³ Plans to introduce sentencing guidelines are still extant but to date, Scotland has not experienced the major sentencing reforms seen in other jurisdictions. This is due at least in part to the ability of the judiciary to 'head off' what they perceive as unwarranted interference in sentencing policy and practice (Tata, 2010).

Sentencing discretion has long attracted critique because of its associations with indeterminacy and disparity. Frankel (1973: 5-8) described the US system as 'terrifying and intolerable' and seemingly 'subject to no law at all'. Writing before the introduction of sentencing guidelines, Tonry (2002) characterised the English system as 'lawless', and Hutton (2003) has likened the Scottish system to a form of khadi justice for which there is no rational justification. However, any impression of wide and unconstrained judicial freedom may be illusory and many scholars acknowledge what can be considered the *structured paradox* of discretion: that it is

also inherently patterned and ordered (Black, 1976; Baumgartner, 1995; Hawkins, 1995; Tata and Hutton, 1998; Hutton, 2006; Tata, 2007).

In practical terms, this ordering is most likely achieved by ‘a dense fabric of customary norms, training and informal sanctions’ (Rubin, 1996: 1299).⁴ Hutton (2006) draws more explicitly on the operation of the judicial habitus to explain this phenomenon, drawing attention to social factors such as judges’ shared education, training and experience which promote homogeneity of judicial disposition. The extent to which the judicial habitus promotes agency, or mostly operates to induce conformity is centrally important to the question of penal change. *Ex facie*, sentencing is a highly agentic task, but the systemic impetus to produce a more ‘patterned, ordered, and rule-governed’ activity (Tata, 2007: 430) may restrict the scope for agency and for change.

Imprisonment levels and the judiciary

Sentencing discretion is central to several current debates about penalty in Scotland. Much has been written about the ‘swarming circumstances’ (Garland, 2001) which shape and influence penal policy and practice, and more recently, operate as the drivers of penal populism. Central to these concerns is the size of the prison population, in which judges are both directly and tangentially implicated. One influential reading of the crisis, drawing heavily on the hegemonic model of the judicial habitus, considers that sentencing is ‘the crux of the crisis’ (Cavadino and Dignan, 2007: 101). The seemingly inescapable logic of rising imprisonment levels – greater numbers of people being sent to prison for longer periods of time (Millie and Hough, 2003) – leads some commentators to the conclusion that it is the result of increased judicial punitiveness. Tonry (2004:65) concludes that the (English) judiciary was ‘at the heart of the problem’, indulging a ‘judicial taste for punishment’ and displaying ‘a deeper stain of moralistic self-righteousness and punitiveness towards deviance and deviants’ than in other countries, apart from the USA.⁵

Commentators in Scotland provide more nuanced explanations of the penal crisis in Scotland, pointing to the complex gearing of sentencing dynamics and the relative

and shifting significance of statutory changes, operational practices of other criminal justice agencies (bail breaches, early release, parole) as well as changes in the ‘counting’ of the prison population. Tombs and Piacentini (2010: 239), for example, find explanations for the increased rates of imprisonment in an interplay of factors including a more punitive climate of political and media opinion, changes in patterns of offending, judicial perceptions of changes in patterns of offending, changes in criminal justice practices and procedures, and legislative and policy changes that have encouraged an upward drift in sentencing tariffs. Ashworth (quoted in Downes, 2011) is forthright in his observation that levels of determinate sentences in the UK – for which judges are directly responsible – have leveled off or even fallen slightly. He concludes that the drivers of prison rates are indeterminate sentences, breach and recall numbers for which governments are responsible, but sentencers are not.

A complex picture of judicial motivation therefore emerges from the literature in Scotland, though our knowledge of this is still partial and little researched. Armstrong (2009) identifies a set of seemingly contrary judicial impulses:

[...] the significant increases in the prison population in Scotland over the past decade have been accompanied by increased use of community-based penalties. This and other practices suggest, in contrast to Lacey’s primary argument, that higher imprisonment rates are not driven solely by greater punitivism (a complicated concept in any case), but also by ameliorative impulses – such as using alternatives to prison – as well.

Sentencing as a discretionary practice

In light of other findings that judges across the world intensely value ‘ownership’ of their discretionary powers (Ashworth, 1995a; Tata, 1998), it is unsurprising to observe that the judges interviewed here demonstrated a similar attachment. *Judge C* extolled the virtue of judicial discretion in the context of the Drug Court and the ability to give offenders repeated chances:

That’s the great thing about Scots law: the office of Sheriff is such that our discretion is enormous, you know, if you choose to exercise it.

Judge M made the broad case for judicial discretion, dependent on a high level of trust:

I think myself that if somebody's made a Sheriff, they should be trusted, broadly speaking, to get things right. [...] But you can't make somebody a Sheriff and say 'Do what you like for the next 30 years'. Which is, to one way of looking at it, what happens.

Judge L spoke for several judges in identifying the scope for creativity as one of the key advantages of sentencing discretion. He recalled in detail several cases in which he was able to exploit this potential: in one case, for example, sentencing a major oil company in a case involving an explosion in which 4 people were killed and others maimed for life. Knowing that the victims' claims for damages in the civil courts were likely to encounter delays of 3-5 years, he imposed a swingeing financial penalty and ordered the company to pay high levels of compensation to each injured person within 14 days, failing which the company's bank accounts would be frozen. He also recalled working in a jurisdiction where, at one stage, there were no funds available from central and local government for community service penalties, so in relevant cases he made it a condition of probation to do specified work in the community. Other judges cited ways of using the deferred sentence option to give an offender the opportunity to make recompense to the victim or to the community, to gain a key skill with support from a named organisation or to write letters or essays reflecting on the harm they caused. In relation to offenders suffering mental health problems, or drug and alcohol addictions, *Judge C* welcomed the flexibility to create 'packages of punishment' to help them stay in the community and avoid the 'revolving door' syndrome.

Weaver *et al* (2012) describe desistance from offending as a process involving a complex interplay of factors: internal factors such as the conscious decision to change behaviour as well as structural factors such as employment opportunities or relationships. The accounts of many judges suggested awareness of both these key elements, with widespread endorsement of the work of organisations such as Sacro and Apex in providing accommodation and helping with employment, and the need for judges to expect lapse and relapse (Glaser 1964). Crucially, most judges

expressed the view that their discretion allowed them to give offenders repeated chances where necessary. *Judge L* explained this in terms of human fallibility:

People are fallible. You put people on probation hoping they won't offend again. Very often they *will* offend again. You have to give them more than one chance. You've always got to have exceptions, got to be flexible when you're dealing with human beings. You try to be understanding of human nature – that people can make mistakes despite their best endeavours. They can try but fail, keep trying and keep failing. But if they keep trying you've got to give them credit for keeping on trying. People make mistakes and do daft things. You've got to allow for that.

Judge C explained how he used his discretion to give the offender repeated chances:

Firstly, I used to use probation as a starter and I used to mark the papers and say 'I'm marking the papers so that if you breach this, you'll go to jail, do you understand?' But then of course, when it came round, and they came back to the sentencing sheriff, if it was me, I would always think again, depending on the reports, because they weren't always the bad guys, you know. Sometimes they'd done well, but something had happened: the girlfriend gave up on them, or the granny died, some factor you couldn't ignore, and I would say 'Right!' - rage, rage, rage – 'you've got *one* final chance. I'm going to extend your probation period by 6 or 9 months and I'm going to impose a fine just to demonstrate that the breach is not regarded as nothing'. But you'd impose the fine at £50, and allow them to pay it at 50 pence a week, because they were living on absolutely minimal benefits and otherwise they'd just go and shoplift or something like that.

All of these things go through your mind but you're trying to steer a course which may ultimately make a real difference to them. Now, that especially came with the Drug Court and with the DTTOs [Drug Treatment and Testing Orders], but with the CSOs [Community Service Orders], that was a great introduction when it was formally introduced. I used to want these guys to use it. I would say to them: 'You've got this order, you've got a year, if you breach it you'll have to go to prison. It's a direct alternative to prison and I will be the guy to deal with you'. Again, however, I got to the stage where even though I'd given that warning, circumstances were never the same and I would *always* give them another chance. So sometimes they had a third chance, just desperately trying, especially if they hadn't been to prison[...] Oh, I was known for saying 'Right, you've got your final, final, final chance' [laughs].

Discretion: the challenge of judgement

Further discussion about sentencing practice suggested that the discretionary framework presented some personal challenges as well as advantages. When asked about the qualities required for judging, *Judge M* was quick to identify the virtues:

...patient, wise, self-confident ... all the things people aren't.

Confidence was a recurring theme in judges' conversation about the qualities of a good judge, *Judge B* believing that it helped to be 'almost brashly self-confident'. Several linked confidence with decisiveness and were critical of others who were indecisive and could not cope with the workload. *Judge L*, for example, recalled a colleague who had a 'windscreen-wiper' mentality: 'on the one hand ... on the other hand...' *Judge H*'s account of his own practice hinted at some difficulty in this area but he thought lack of confidence could be, if not quite a virtue, some corrective to instinct:

I'm not a brilliant person, you see, like some of these very clever people. They always had the confidence, the advantage. I was always more inclined to think I might be wrong. I never really got to the definite stage in anything. When you've had cases like I've had, where you were absolutely convinced, but you were quite wrong ... that was a great lesson for me. Instinct can be terribly wrong.

Judge J, an academic lawyer as well as judge, expressed a similar lack of confidence in his own judgement:

As a lawyer, one of my lacks is a lack of confidence. Some people have great confidence in their decisions. Even if my judgement is right, I don't have confidence in it. In most cases, I probably found unnecessary difficulties. I probably have an inordinate admiration for people who are very intelligent and you see it in some of the lawyers who are very good. I was a bit bemused by them. I thought they made these submissions in the court and they're all so confident they're right. I just didn't have confidence that what *I* was doing was right. But as a judge, you have to make the decision.

He explained that when sentencing, he tried to overcome his anxiety by reasoning with himself in the following way:

If you make a decision, you have a 50% chance of getting it right. But in fact, until you're appealed you have a 100% chance of being right, because that's the decision.

Judge M articulated the daily challenges of having to be decisive:

Oh, it's very bad for you. You have to keep ... well, you have to keep making your mind up, and that's bad enough for you. You have to make your mind up about something, heaven knows how often every day. Some people can do it more easily than others. Some people found aspects of the job very, very wearing, like writing judgments, which is really to do with making your mind up. Some, I think, found it very affecting in that they were having a pretty big impression on the life of people they didn't really know.

Sentencing as judgement

The nature of the sentencing task itself is commonly evaluated along the time-honoured distinction between art and science (Tata, 2007). The legal-rational tradition, suspicious of discretion and intuition, and emphasising its indeterminacy, depict it as an art - hence lacking in rationality, certainty and coherence. The new penology perceives a trend towards (pseudo) science, consistent with the diminutions in discretionary power observed in many jurisdictions, and forming the basis of moves towards more structured forms of sentencing such as guidelines and mandatory penalties. As Tata (2007) observes, these polarised accounts – art or science - tend to draw their evidence from official policy discourses, leading to ‘top-down’ assumptions of change. In particular, they pay limited attention to the agency of penal actors such as judges. Tata’s concept of sentencing as craftwork usefully challenges many of the customary oppositions routinely employed in discussion about sentencing, such as rules versus discretion, reason versus emotion, offence versus offender, and intuition versus analysis, and captures their dynamic inter-relationship in the field of practice. As Tata observes: ‘These qualities co-exist dynamically, are synergistic, and inhabit each other’ (2007: 427).

What is suggested by Tata’s account of sentencing as craftwork is a more rounded concept of sentencing: as a form of *practical judgement* entailing a range of cognitive abilities, and as a ‘hybrid faculty’ which balances rational, perceptual and emotional capacities (Thiele, 2006: ix). It is relevant to note that recent research in cognitive neuroscience provides some evidence to support this understanding of human judgement, as well as providing empirical vindication of many philosophical accounts through the ages. Drawing on Thiele’s (2006) discussion of the significance of developments in neuroscience for the understanding of human judgement, I point to some of the scope for extending our knowledge of sentencing as judicial work.

Rules and discretion: a ‘matter of judgement’

The interplay of rules and discretion was apparent in the judges’ conversation about sentencing practice. Almost all stated that sentencing was the most difficult judicial

task they encountered, with the phrases ‘very worrying’ and ‘very anxious’ recurring in conversation and often volunteered by them. *Judge H* reported that the anxiety of sentencing difficult cases often led to him waking at night, having seen a way through a case calling the next day, and ‘rushing to write it down, in case you forgot it, like a dream’.

Not all judges expressed anxiety about sentencing, and *Judge F* spoke for a small number when he expressed the view that it was important to leave cases behind:

I didn’t go home and worry about it. I think it’s important for any Sheriff, once a case is finished with, to just accept it as finished with. If you’ve made a mistake – unless it’s a mistake by sentencing too leniently – it can be corrected on appeal. If you haven’t made a mistake, you shouldn’t be worrying about it.

For those others, at least some of the difficulty appeared to lie in the complex mix of rules, ‘facts’ and discretion involved. Some of those troubled by the indeterminacy of the task appeared to employ a range of strategies to help deal with the uncertainty. *Judge J*, for example, who had earlier outlined his statistical reasoning for decision-making, also employed an arithmetical approach to sentencing in an attempt to impose some rationality on the process:

You look at the crime first: that merits such and such. Then there are pluses and minuses for good behaviour in the past or a genuine job on Monday or something like that....

He employed what he called another ‘systems method’ when assessing the reliability and credibility of witnesses in trials;

I used to put in the margin, when I’m writing down the witnesses’ evidence, Alpha, Beta, Gamma, Delta for their credibility. I did worry about this a little – it’s a very vulnerable judgement. I adjusted my Alpha Beta assessment as the trial went along.

When I asked *Judge D*, a former High Court judge, about his approach to sentencing, he provided at first this brisk account of his own ‘ordered approach’:

It’s a glimpse of the obvious. Starting off perhaps with, first of all, what kind of case it is. What kind of crime is it that I have to pass sentence on? Now, that will take me a certain distance down the road. The next thing, I suppose, would be what is the involvement of the individual accused that I’m dealing with? Because, obviously, people can differ very much in the extent to which they’re involved. And then, when I’ve put those points together, I would have to see what mitigating factors there

were, apart from degree of involvement as far as actual commission of the crime is concerned. That would lead me into other areas such as the attitude, *post facto*, to the offending. The question of the plea of guilty, the significance of that. And then, another dimension, are the circumstances of the accused, including, of course, any rules I *have* to follow, such as don't imprison unless there is no alternative because the case is of a certain sort. And that is how I would proceed. That's simply applying an ordered approach to the accumulation of information I've got in front of me.

I then asked him if he considered any part of sentencing a difficult task, and this query produced a much less secure response:

The whole exercise is difficult, because you know very well thatwell, for a start you're working on the basis of what's been served up to you, or you have probed, and got. But you never know if you've got everything that needs to be known, let alone with quite the accurate focus. You also know that if you've taken a particular decision, that someone else in your precise position, with precisely that amount of information, might reach a different result. It's.... it's not, as you know, a precise thing with a precise answer. And you know just how easy it is for things to be misunderstood, whether it's by the press, the public, the accused, or anyone else, or the victims. But you just have to do the best you can. It's just..... I never enjoyed sentencing, I must say. I always found it a very, very difficult task indeed.

I invited him to tell me a bit more about why sentencing was difficult, compared to other areas of judicial work:

Because it is *so* much a matter of judgement. Because it is so much the *opposite* of there being a clear.....um, reasoned ... in the sense of, you can reason yourself to a precise answer, with many legal issues or matters of fact. But when you've got facts which are.....some are quite distinct, others not quite so distinct, it's....it's still very much an open matter as to what the right answer is. It's just difficult. And it's.....it can be.....at times it can be an extremely, *extremely* anxious process and quite necessary often to take the opportunity of thinking about things overnight. But no, no. It's not easy. Nobody's ever said it's easy. If they do, there's something wrong.

Some clue to the difficulty and discomfort expressed about sentencing by so many of the judges can be found in the intrinsic nature of sentencing as a form of judgement. Thiele (2006:11) notes the many commonalities between ethico-moral judgements (such as sentencing) and other forms of decision-making, but insists that there is one key distinction: unlike other forms of judgements, moral and political judgements are never 'uncontestably right or wrong'. The difficulty with this form of judgement arises, therefore, not simply from the broad and diverse range of variables to be taken into account but from the multi-dimensionality of moral and political life itself and the 'indeterminacy of the criteria of success and failure' (Thiele, 2006:12).

Rationality, intuition and discretion

The counterposing of rationality and judgement in *Judge D's* account above – judgement as the opposite of reasoning – hints at the operation of some of the complex cognitive faculties involved in practical judgement, such as emotion and perception, which make sentencing a difficult task. But the sharp distinction between judgement and rationality underplays the role of rationality itself in judgement, and the role of emotion in rationality. In this way, the distinction invokes the binary oppositions which Tata (2007) complains have the effect of limiting scholarly and policy sentencing imaginations.

Thiele (2006: 150) outlines the broader and integrative conception of judgement which is suggested by cognitive research. This involves a complex synthesis of conscious and unconscious activities:

Rationality contributes to justice in the form of analysis, calculation, logical consistency, extrapolative forecasting, and retrospective reconstruction. Tacit knowledge and skills precede and ground these rational operations while exceeding their purview. Most complex human activities, including practical judgement, bespeak the interaction of conscious and unconscious efforts.

Thiele's reference here to 'tacit knowledge and skills' includes those elements of practical judgement in sentencing which operate at a sub-conscious or unconscious level, and which are closely linked to discretionary decision-making. For some sentencing scholars, discretion is the Trojan horse of sentencing, providing scope for judicial bias (or 'extra-legal influences') and thus providing a gateway for disparity and inconsistency.⁶ On this reading, discretionary decision-making proceeds on the basis of 'hunch' or instinct, is sometimes equated with capriciousness, and capable of rationalisation only in *post hoc* manner. The logic of this argument is that greater 'rationality' and systemisation requires to be introduced into sentencing by way of guidelines or other structuring means.

Hutton's (2006: 168) account contains some elements of the realist critique of intuition and discretion as the basis of judgement:

Most routine sentencing decisions have to be made quickly with little time for reflection [...]. The decision comes first. In all but the hardest cases [...] judges

‘know’ what the right decision is, call this ‘instinctive synthesis [...] or whatever you like. If required to justify this decision, *post facto* arguments can be constructed.

Thiele (2006) directs the reader to cognitive research findings, as well as the philosophical arguments which foreshadowed them, which suggest that good judgement is not a fully deliberate, methodical and reasoned process but is *necessarily* grounded in unconscious capacities and certain affective states such as emotion, empathy and imagination. On this basis, moral judgement is accomplished by an *integrative* process of intuitive capacities and our more deliberative and reflective aptitudes. Moreover, it is arguable that some intuitive knowledge, including biases in the neutral sense of beliefs or orientations, precedes *all* judgement and forms the basis for critical reflection.

This argument is not directed at minimizing the importance of reason and analysis in good judgement, or suggesting that free rein should be given to judicial intuition in the form of unfettered discretion. As Thiele (2006: 142) observes, intuition is fallible and certainly problematic when used without reference to context or experience. However, there are strong arguments for strengthening the reasoning skills of decision-makers, and for ‘educating’ intuition so as to minimise the play of intuitive biases. Moreover, the realm of the habitus remains centrally important since all intuitions are shaped through ‘active participation in socio-cultural environments’ (Thiele, 2006: 136).

Affective states: emotion and imagination

As well as displaying suspicion of intuition in judgement, the ‘sovereign self’ or positivist model of judging which I outlined in Chapter 2 embodies Kantian wariness about the intrusion of emotion into rationality, and is a key element in the mythological constitution of the judge. Moreover, as Tata (2007) notes, the new penology also counterposes reason and emotion as binary opposites in their critique of reforms which aim to rationalise sentencing.

As suggested above, this strict demarcation between reason and emotion is somewhat contradicted by research which indicates that emotions and other affective states are central to decision-making and should not be regarded simply as obstacles in the way

of rationality. Thiele (2006: 166) sums up the inter-connectedness of these capacities:

...rational judgement in moral and political affairs simply cannot arise in the absence of emotion. Affect gets reason off the ground and subsequently drives its operations. If we are to improve human judgement, there is no alternative but to grapple with the rich, multi-layered, typically clandestine, occasionally deleterious, generally beneficial, and always vital interaction between reason and emotion.

Thus, neuroscience points not only to ways in which affective states precede and induce certain dispositions, behaviour and judgements, but also to the benefits of 'negative' as well as 'positive' emotions, and more generally of the role of emotions in producing 'empathetic impartiality' (Thiele, 2006). Nussbaum (1995, quoted in Thiele 2006: 187) captures the role of emotions in practical judgement when she observes that contemporary judges

...who deny themselves the influence of emotion deny themselves ways of seeing the world that seem essential to seeing it completely.... Sympathetic emotion that is tethered to the evidence, institutionally constrained in appropriate ways, and free from reference to one's own situation appears to be not only acceptable but actually essential to public judgement...[I]n order to be fully rational, judges must also be capable of fancy and sympathy. They must educate not only their technical capacities but also their capacity for humanity. In the absence of that capacity, their impartiality will be obtuse and their justice blind.

These studies have the potential to provide greater insight about sentencing as an occupational task – how it is experienced and performed, articulated and defended. One issue which arises immediately from the judicial accounts given above is the frequently expressed lack of confidence by judges in their judgement, and in the anxiety expressed about the task of sentencing. Perhaps counter-intuitively, there is some evidence from cognitive science that optimism is 'not an optimal state of mind' for decision-makers and that some level of anxiety *facilitates* good judgement (Thiele, 2006: 180). Moreover, psychological studies point to the 'overconfidence effect' which leads some individuals to have an exaggerated estimation of their capacity for sound judgement.

The relational dynamics of the interviews seemed to be particularly significant in these discussions about sentencing and anxiety. Many of the judges' statements about their lack of confidence and anxiety about sentencing were prefaced and

punctuated by ‘sharing’ or ‘knowing’ comments such as ‘You know what I mean’ or ‘You know this yourself’, or sometimes drawing on our shared knowledge of particularly difficult cases. Several stated that they had not admitted to this anxiety elsewhere. Although the insights above suggest that lack of confidence about judging and the anxiety it tends to provoke may be integral facets of the task, greater recognition of this dimension of sentencing in judicial training may facilitate greater openness and discussion about the challenges of the task, and direct attention to equipping judges with strategies for coping with these demands.

Emotions and judging

However important emotions may be in the exercise of good judgement, the control of personal *displays* of emotion remains central to conceptions of good judging. The judiciary shares with other professions a cultural and normative expectation of ‘disinterestedness’ on the part of its principal actors (Parsons, quoted in Anleu and Mack, 2005: 599), but the heightened cultural meanings and associations of neutrality and independence which are carried with our conceptions of the judge may place a greater onus on the management of judicial emotions.⁷

The judges themselves were quick to acknowledge the presence of emotion in sentencing practice and gave detailed examples of situations and strategies employed to manage its effects. *Judge L* condensed his advice in the statement that one should never sentence if ‘tired, emotional or hungry’. Many judges stated they sometimes deferred sentence to the following day, or simply took themselves off the bench in cases of particular difficulty. *Judge C* was typical of many in this account of going off the bench:

Sometimes you *are* affected by it, you know. I have been affected by even the prosecutor’s account of what’s happened to certain people in rape, or attempted rape, or any sexual offending, especially to children. But you’ve got to take a very common sense view of it and I think the vast majority of us are well aware of the need to take time. You know, if you get a particularly harrowing case [...] I go off the bench frequently, to not make an instant and perhaps angry judgement for a start, and secondly, to check up, particularly in the case of photographing, pictures of children and stuff like that, which – well, I know you’ve seen this kind of thing – are absolutely gross and upsetting. That has the effect of making you want to look only at a few, only enough to give you the flavour, but that... I’ve always gone off for that. And in fairness, I have to concede that we have looked at the English High

Court guidelines in respect of penalty. But that's so you have an idea of views. The benefit is to give you time - if you're angry, which frequently you can be. Or if you're genuinely upset because of the distress in people you see in court. And we all have feelings, obviously. And so you go off. Well, I go off anyway, and I know my colleagues have done that as well: (a) to have a cup of coffee and not immediately think about it and then (b) to check up on the most fair way of dealing with it.

Judge B explained why he sometimes took advantage of an adjournment before sentencing:

...sometimes, if the whole atmosphere was very charged, which it could be, sometimes it was highly desirable to get off the bench and come back the following day. Sometimes, obviously, if it was a murder case...there's obviously cases involving children, or sometimes where... you get some kind of battle breaks out which results in the death of one member of a family and the conviction for murder of a member of the other family- the Capulets etc. So, if you get this kind of battle-two families are destroyed by the thing -that can be very, very moving when this, all this comes out. And it's also extremely common, as you know, in the High Court, when there are situations like that: two families involved, the accused's family, friends and the victim's family and friends, for them to be in the court. And there's a lot of public reaction there. Now, as you know, there can be shouts of 'No, no, no..' ...etc. So, there's a lot to be said for just getting out of that atmosphere before you pronounce sentence, because every sentence should always be done with deliberation, rather than as a response partly influenced by the public mood.

Judge B told this story of a difficult case which exemplified the need to 'get away from the scene for a while':

It was a neighbour's dispute really, but the chap from upstairs, who was causing a lot of the problem, came downstairs to the other household, and he was stabbed to death by somebody in that house, the knife allegedly having been supplied to the stabber by a girl who was about sixteen. And...there was no doubt about it, that the man, the stepfather as it were, or the ...the lover of this girl's mother, that he did the stabbing. But there was evidence that the girl supplied him with the knife. And...well, there was a whole background to the thing, and...often a judge knows things he shouldn't know. So, for example, I learned, presumably through the clerk of court, I was told the case is probably going to settle, and the prosecution have said they'll take a plea of not guilty from the girl, if the guy pleads guilty to murder. Well, that didn't happen. And then the jury returned a verdict of guilty of murder against them both. So, then you get a sixteen year old girl convicted of murder, for what she may have done, given him the knife for whatever reason, and didn't do the stabbing but convicted of murder. And everybody was destroyed. There were...there were two families destroyed there, by this thing. [...] Anyway, the end result, I was left with no possibility but to impose sentences of life upon each of them. So that's... that was a very, very moving occasion indeed, very difficult and very difficult to handle, because I thought there was a good deal of injustice being done there. But there we are. [...] And the way [to deal with it] is to get away from the scene for a while; that's the way it works.

Sentencing as a solitary practice

Our conception of sentencing as the solitary burden of the individual judge is qualified by some awareness of the extent to which the sentencing task is shaped by earlier processes and collaboratively performed with other criminal justice actors (Shapland, 1987; Hutton, 2006; Tata, 2007). Nonetheless, sentencing is experienced by the judges themselves as a solitary exercise in ways which provide useful insight about judicial independence. Several judges cited the intrinsic loneliness of judicial work as a challenging factor, stemming largely from the need to take independent decisions. *Judge M* explained the nature of the problem:

I think you're probably more lonely than you realise. [...] You don't really talk to anyone. You're taking big decisions, but not really talking to anyone about them. You're constantly trying to resolve things that are not easily capable of resolution. I would guess the...the kind of...level of breakdown, health or whatever, is not all that high, actually, of the judges, as far as we know, but there may be coping strategies that you're adopting that you don't know about. I remember going to a lecture by a psychiatrist and he said that in any organisation, the first thing that people that belong to it did was to make arrangements for their own self-protection.

For *Judge E*, loneliness took the form of loss of camaraderie and a sense of being imprisoned:

You can't go out with the boys; you are restricted in what you can do and what you can be seen to be doing. In some ways I think that's why I wanted a change from Glasgow [Sheriff Court]. One sunny day I looked out of this window where I was imprisoned and thought that when I was a Fiscal I used to be able to go and visit Stranraer or Dumfries on a day like this. Also, if we were doing a murder enquiry or something, I'd put a bottle of whisky on the table and say to the cops who were with me 'When we solve it, that's when we open it'. So you had all that camaraderie and then suddenly you're on your own. In [...] Sheriff Court I had a piano keyboard fitted in my chambers and I used to play that.

Judge M returned to the question of judicial isolation to impart what he called 'the most important thing' he thought he could tell me - the importance of always having 'a little bit of ice in your heart':

I think it was the sense of isolation. [...] It's not a thing that you're particularly well prepared for [...]...in fact, this is probably the most important thing that I could say to you. You are in a unique position. You're being asked to do something that other people *could* do, but in this particular case they are not being asked to do it - *you* are being asked to do it, only you can do it, and you can't get help from anyone, and the responsibility is yours to do it. And it may be in a situation which you feel for one

reason or another uncomfortable because you're not ... among friends, or anything like that. Not among hostile people necessarily, but I think there has to be a sense of isolation there.... You know they say that writers have always got a little bit of ice in their heart? [...] To be uninvolved and emotionally uninvolved and...not unduly swayed by inappropriate things. I suppose...to be neutral.

It was evident from the accounts of several judges that these cultural meanings and associations in relation to the judicial role were central to their own self-image, in ways that had an impact not only on their performance of the role but on their management of the personal challenges and demands of the work. So, for example, when reflecting on the challenges of judicial work, they judged their own performance and conduct against the idealised 'sovereign self' model of judging, invoking it as an aspirational rather than necessarily representative role model. In an earlier conversation, *Judge M* expressed it this way:

... to operate properly as a Sheriff, you have to have the self-image of nobility, competency, mental robustness... independence, the ability to make up your own mind...

In later interviews *Judge M* spoke at greater length about the personal challenges of being a judge and the danger that judges' perceptions of what they should 'look like' to the public would prevent them obtaining help. Several judges mentioned a proposal that judges should have access to pastoral and support services, and one spoke further about the 'hurdle' of self-image :⁸

I think it's now being acknowledged that there may be certain instances in which sheriffs or other judges may need help from... stress and strain manifesting itself through ill health, drinking, that kind of thing. And I think that must be a good thing. [...] But it would have to get over this hurdle of the judges' self -image. They'd have to think that they could get help without acknowledging that they weren't up to doing the job. That would be the great difficulty. [...] I'm really talking more about how I would have seen it myself; other people may feel quite differently. But...you learn a kind of a self-confidence if you do it, do the job, and if you start having doubts about your ability to do it... Now, the paradox there of course is that if you do need help, you aren't actually [...] a person who should be doing the job, ideally. You may be getting along alright, so any idea of a person happy about accepting help, indicating that they were vaguely weak ... I think it could be got round by doing it in a skilful and sensible kind of way.

I then asked him: Do you think there's anything positive to be gained by more openness about the stresses and challenges of the judicial role?

Now.... that's an absolutely huge question, though you put it very briefly and charmingly. But...the idea of the ideal judge is pretty much like the idea of what God would be like, isn't it ...strict but kind. And ...I don't see how you could have a model that was any different, really. You would have to have something that you aspired to. [...] I mean, within that bubble, people have reputations obviously, judges are thought to be [...] you know, one thing or the other, one thing one day ... all these criticisms you hear of sheriffs. Now, whether they're true or not, I don't know, because if you ever look at who are supposed to be the heaviest sentencers, they almost always turn out not to be, because they've got a perception that they are. So I don't know, but I think you would have to have...an ideal for the judges; not that they're fallible, because if they weren't you wouldn't need an appeal court. That they are *reliable*. Maybe that's the best word.

This discussion suggests that the idea of seeking help runs into difficulty with judges' public and self-image, and has implications for judicial training and provision for pastoral and support services. However, it is also possible to speculate that a younger generation of judges may have less attachment to a strong formalist self-image and hence less difficulty with admitting some temporary lack of 'reliability'.

Section 3 Sentencing as a collegiate practice

The rules of occupational morality and justice, however, are as imperative as the others. They force the individual to act in view of ends which are not strictly his own, to make concessions, to consent to compromises, to take into account interests higher than his own.

(Durkheim, 1967)

Studies which situate the judge as part of the court community and explain sentencing as a collaborative task provide useful insight about the extra-judicial forces and influences which shape sentencing practice; but less about the 'rules of occupational morality and justice' internal to the judicial habitus. For Rubin (1997: 556), the institutional character of the judiciary is obscured because of the 'macro-micro' problem which arises. On the one hand, the institutional features of the judiciary are apparent: the judiciary possesses 'collective norms, a hierarchy, an internal structure regulating workload, a boundary controlling information flow, and all the other institutional attributes' And yet, the institution also comprises a group of 'semi-independent, discretionary decision-makers', whose functioning is also shaped by the forces of the institution. For Rubin (1997), this requires an approach capable

of addressing both levels of action. Bourdieu's (1977) conception of agents as 'virtuosos' who rely on a 'sense of the game' rather than rules and principles captures this aspect of judicial decision-making, particularly in the way it requires a finely-honed understanding of the norms and values of other group members.

Without some explanation at the level of the habitus which connects both these levels of social action, the structured paradox of sentencing – its relatively patterned nature in a wide discretionary framework - would be puzzling. At a broad level, therefore, it is acknowledged in sentencing research that a range of informal norms, pressures and influences must operate in sentencing practice to produce this patterned effect (Tata and Hutton, 1998; Hutton, 2006; Tata, 2007). Little is known, however, about the specific practices which contribute to this effect, though some obvious means of transmitting these norms will be found in legal education and experience, and judicial training. Obtaining greater information about these practices has the potential to provide a fuller account of judicial decision-making.

Given the broad parameters of sentencing discretion, informal discussion between judges about sentencing tariffs is a predictable means of attempting to control disparity and inconsistency, and the existence of some inter-judge discussion is shared tacit knowledge among criminal justice practitioners. Nicholson (1981) provides a brief mention of the practice, and Hutton (1995) cites the practice as evidence of the lack of rationality in sentencing, on the basis that information about these informal practices is anecdotal and the arrangements are unlikely to be standardized, shared by all local judges, or used in any systematic manner. There is some institutional inhibition against formal or public recognition of the process, quite apart from the unsystematic nature of the practice noted by Hutton (1995) above. This reticence lies in the concept of judicial independence, according to which the individual judge bears sole responsibility for the decision and should not be subject to influence or pressure from any external source. The practice of consultation or collaboration therefore appears to be in some conflict with the principle of individualism and independence of judgement.

Judge M articulated some of these tensions, drawing a distinction between *discussion* with fellow judges, which he considered acceptable, and *debate*, which he thought unfair. He expressly disavowed the term ‘collegiate’ to describe the practice:

I think what you would normally do is try and tell the person the facts but not tell them what you’re thinking of doing, and see what they would say. Then you might say ‘Oh, that’s what I was thinking of’ [...] but you’d be pretty careful not to debate it because that would be kind of unfair. I think your colleagues that you liked and respected, you would take advice from, but there would be no question of any collegiate kind of approach.

The concept of *collegiality* to which *Judge M* refers is more usually employed to describe the collaborative and sometimes strategic ‘team-model’ approach to judicial decision-making which occurs on multi-judge benches of the US appeal courts, especially in relation to so-called ‘hot-button’ issues. Indeed, among the ‘steadying factors’ which the legal realist Llewellyn (1951:26) identified as serving to counter the arbitrary exercise of discretionary power on the US appellate bench was this process of judicial interaction which served ‘to smooth the unevenness of individual temper’.

The most detailed analysis of collegiality in the US is that of Edwards (1998:1645) who defined the concept this way:

... a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered. Specifically, it is my contention that collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.

The practice of inter-judge discussion in Scotland is not directly analogous to this purposeful consensus-seeking exercise, but there are other aspects of the practice which are captured by the idea of *collegiality* and which provide insight about the workings of the judiciary as an occupational small group. Levine and Moreland (1994: 306) provide a useful definition of a ‘small group’ for this purpose: a group of individuals who ‘interact on a regular basis, have affective ties with one another, share a common frame of reference, and are behaviourally interdependent’.

Capturing some of this sense of interdependence, one judge observed that the isolation of the sentencing task meant he was ‘lonely, but not in the sense of the person on the desert island’. Discussion with colleagues about sentencing was mentioned by most judges as a source of support and guidance. *Judge D* was circumspect but acknowledged the practice of ‘having a word’:

[...] if you’re sitting as a judge in Inverness, you’ll be entirely alone. I mean, you have no other judge sitting with you. But if you’re sitting in Glasgow, then you’ll have other judges sitting there. I can imagine that a judge sitting there might have a word with one of his colleagues if he was bothered about how to handle something; or perhaps he was even wondering what sentence to pass...These things, these conversations do take place. And if he was really in a difficulty - because after all in one sense we don’t have quite the same time pressures in the High Court - he might have said ‘Well, I’m going to defer sentence for a week, or a day or overnight so as to think about it, talk to somebody else’.

Judge B was unfazed by the prospect of being told he’d ‘got it all wrong’. Indeed, he positively welcomed it:

I don’t think for myself that my own self-confidence would be impaired by going and speaking to colleagues whose opinion I valued and them telling me that I’d got it all wrong. Ok, fine, that’s what I go for to hear. And it would influence me.

For *Judge C*, the small size of the Scottish jurisdiction worked in favour of this practice:

I’ve known so many Sheriffs that whichever Sheriff Court I was in, I would go up to one and say ‘Look, I need to talk to you about this’ and never, ever had a problem with having an open and detailed discussion with someone I felt I could speak to. So I just feel that the whole situation in a country of our size has worked well.

Judge M spoke about the benefits of being given a ‘steer’ by disinterested colleagues:

And of course, there’s plenty of colleagues you can speak to, and they’ve no interest whatsoever in the case, no technical interest in the case, so they gave you truly disinterested advice, and...a steer. Because sometimes you can make a big mistake; you can find you’re wildly excessive or wildly lenient, as it were. But you don’t want to be like that, because the law says that you know, if you deliver an unduly lenient sentence, or an unduly severe one, then that’s a miscarriage of justice, which is the last thing you want to do. So, if you can find other ways of balancing and checking your own, as it were, intuitive response to the situation, well and good.

The ability to commune

Woods (1998) identifies *elite spatiality* – the ability to commune and perform key functions in spaces with restricted access – as an important feature of the ability of powerful individuals to exercise power. The importance of having opportunities and locations to commune was evident in the judges' accounts of practice. *Judge B* narrated a long and detailed story about a case in which a farmer had set up shotguns on farm premises which had been repeatedly vandalised and set on fire. Two young men entered the premises unlawfully and triggered the shotguns; one was seriously injured. The farmer was convicted by the jury of two charges of attempted murder, despite the judge's pointed attempt to steer them in the direction of lesser charges. Before sentencing, *Judge B* 'went up to the lunch room':

Well, that was a most interesting case because the guy was a decent sort of guy, he was about 45 or 50, and I felt that...well, that *I* wouldn't have returned a conviction of attempted murder. And so, my directions to the jury reflected that and in effect I was saying, you know, there is *another* offence called assault to the danger of life... [...]. However, despite my best efforts, if you like, the jury unanimously convicted him of two charges of attempted murder; both the guys. So, I gave him seven years. Now, one reason why I gave him seven years [...] was I went up to the lunch room. There was five or six judges, and I'm saying 'well here's the story, you know the story because it was well reported'. Someone says five years, someone says seven years, someone says nine years, someone says 12 years; do it by two cases or give him 10 years on each, all this kind of stuff. But...the average was much higher...and I guess I'm still thinking that the better conviction would have been assault to the danger of life, but felt I couldn't go below seven, so I gave seven; whereupon I was *castigated* in the press [for leniency].....

Judge A gave this account of a case before him which involved possession of a firearm and ammunition. Being unsure about the appropriate sentence, he went up to the judges' Common Room:

[...] it was prison, I thought, it had to be done. It was ammunition, for God's sake. So, I went up to the Common Room and quite a few people agreed with that. Then I spoke to [Sheriff X] who is *not* a bleeding heart, and he said: 'Look, [...], what was involved here? No question this guy was ever going to use this. Ok, he was holding it illicitly and was going to perhaps sell it which would have been also illicit. But he put it in a place where nobody could possibly get it. Isn't it just too mechanical, too routine, to say he must do 6 months?' And most of the people in the Common Room *had* said that [6 months] to me... [laughs]. But if I'd got that advice from, say [Sheriff X with a reputation for leniency] I would have said 'Oh well, that's interesting', but to get that advice from [Sheriff X]! So, as I say, you don't follow *all* the advice you get but you come to your own judgement in the light of the various

advices. And ultimately I decided 300 hours CS or something, and waited for the Crown Appeal [against sentence]....

Another location featured in *Judge B's* account of the first time he sat as a judge at the High Court in Glasgow. He started this story with a reference to the Sentencing Information System (SIS)⁹, viewing it a source of guidance comparable to consultation with fellow judges:

Well, I found it a useful guide, in the same way as I could sit in the lunch room and say to the guys, what do you think? What would you give? What would *you* give?

He then narrated a story about a set of circumstances – and yet another location - in which it was ‘legitimate’ to consult other judges:

But my most interesting experience [...] was the very first time I ever sat as a judge at the criminal court in Glasgow. In those days, the judges used to stay in the Western Club and there'd be maybe five [judges] there. And right very early on - we'd all meet for a drink you see, and some would have dinner, some would not - and we all meet for a drink, and it was perfectly usual to talk briefly about the case you were in, or whatever it was. And it was perfectly legitimate to do what I did and say, ‘Well look, gentlemen, this is the first case I've ever had of this particular kind, and it's fairly unusual and here are the circumstances. He's pled guilty and I've adjourned until tomorrow morning for passing sentence. What would *you* give?’ You see, and you know, three years, four years, five years, six years, seven years were suggested; that was actually what happened. So...that was legitimate, and I think I would settle for five in those circumstances, as it were.

‘When a judge sits down to decide.....’

Edwards’ (1998, above) defined the concept of judicial collegiality in the US as a process that is geared towards a common interest in ‘getting the law right’. In the Scottish context, it is possible to substitute for ‘the law’, the shared interest of the judiciary in reducing sentencing disparity and promoting consistency. However, *Judge B's* account suggests that for the individual judge in the High Court this is a very singular business, focused on ascertaining the ‘going rate’:

.....when a judge sits down to decide what's the appropriate sentence for this crime, he doesn't just pluck a figure from the air. First of all, he realises that he's got an Appeal Court, so he's got to think in terms of what will happen. He also is bound nowadays to think in terms of what the public may think. But most of all, he wants to know what the current going rate is. And the current going rate is not derived from some wonderful intellectual prayerful exercise; there's no inspiration. You just look around to see what others have done.¹⁰

However, the drive to ascertain the ‘going rate’ may have unintended inflationary consequences as far as sentencing tariffs are concerned. *Judge B* made this point while explaining the legislative change which he believed had contributed to the effect of driving the judge towards the middle ground:

Until the 1990s, I think it was, you could appeal against a sentence on the ground it was excessive, but the prosecution had no appeal. The prosecution was given the right of appeal on the ground that it was unduly lenient- and that’s a very elastic phrase. So that - the consciousness when you’re sitting as a judge that there’s an Appeal Court which has got the right to review your sentence *either way* - tends to drive you towards the sort of middle ground. And, you know, the middle ground *plus*. [...] It’s not going to be *excessive* if it’s 10% above the average, it’s not going to be unduly *lenient* if it’s 10% above the average. So find the average and add 10%. That soon raises the average. So, too much machinery for reviewing the exercise of... what’s the word you use? Discretion? Discretion in a sense hardly comes into it. Discretion is to.... to try to avoid being overturned on appeal if you care about these things.

Judge B also drew attention to the ways in which the need for consistency limited the scope for moderation on the part of the individual judge:

I mean, you remember the late Lord Stott ? [...] He would have been very lenient and he was quite knowledgeable about penology – he didn’t believe in prisons. But I remember him saying to me, ‘You know, there’s nothing, *nothing* I can do about it. There’s no point in my being known as the lenient judge if all my judgements are being challenged’. He said: ‘I really have to do what the other judges do. I can’t step out of line’. And he was right about that. [...] He said you can’t have people saying ‘let’s get the case before Lord Stott, because he’ll give us less’.

Judge F’s account suggests a similar awareness of the need for consistency in the Sheriff Court, but his qualification ‘*if I wanted to be consistent*’ and the assertion of autonomy in the final decision points to some difference in emphasis:

Well, I would [consult colleagues] if I had the opportunity and [...] if I wanted to be consistent. Because consistency – I think I’ve already said that – is important, and if I thought that there was a risk that I might be going out on a limb, far distant from what is consistent, then I might discuss that with others. But if what I was told was not along the lines that I was thinking, then it’s me who makes the decision.

Spigelman (2008) observes that judicial collegiality or consultation serves the further pragmatic function of ensuring that a body of collective wisdom and experience is passed on to new members. *Judge B* articulates this particular benefit:

It was partly for consistency, it was partly because a lot of people naturally came to the High Court really ignorant of what the tariff was, of what the practice was, of what was usual. So they had to ask around.

Collegiality and Judicial Independence

As Maleson (1997:664) notes in relation to judicial training, the idea of collective judicial behaviour aimed at achieving consistency or standardisation is also at odds with the principle of autonomy. She points to the strong individualism which is embedded in our understanding of judicial independence and which informs debates about judges' discretionary power. This is perceived in a negative light when accompanied by suspicion about political or other influences on the judge's individualism, but more favourably where activism and creativity are considered appropriate uses of judicial discretion.

Maleson (1997:665) suggests that the largely homogenous social basis of the UK judiciary to date means that a strong culture of individualism has been accommodated without much loss of systemic coherence. The effect of greater diversity, however, may be to erode the 'informal and individualistic culture of a club' which characterises the judiciary at present:

The larger and more diverse a group becomes, the less individualism can be accommodated if it is seeking to maintain, or in the case of the judiciary, increase, the level of consistency in its behaviour.

This is a problem if, as Maleson believes, judicial independence is founded upon independence of mind, and it presents a challenge for training, policy and practice to achieve some balance between individualism and consistency.

As far as the practice of informal consultation is concerned, greater judicial diversity has the potential to enhance the cross-fertilisation of views, in possibly unexpected ways. Peresie's study (2005), for example, suggests that the presence of a female judge influences the voting of male judges on US multi-member benches. Moreover, to the extent that the judges' accounts narrated above suggest that effective consultation depends on networks, opportunity and location, the following questions should also be asked: who seeks out whom, where and why? There may be a need to ensure that minority groups are fully integrated and have the same access to informal

networks and locations.¹¹ There may also be a case for providing judges with more opportunities to discuss cases (Kirby, 2004).

Being ‘unlucky in your judge’

The practice of inter-judge consultation on the ‘going-rate’ is an informal means of structuring professional judgement in a discretionary decision-making framework, and almost certainly contributes to the patterned form of sentencing in Scotland. In this context, judicial collegiality can be regarded as part of ‘an evolving group interaction’ (Rieke, 1991:41) which reduces the chance of being ‘unlucky in your judge’ (Waldron, 2008:186):

... lucky or unlucky because the best explanation for the resulting disparity has to do with the judge who happened to be assigned to decide the case. One might get lucky or unlucky in one’s judge.

Waldron (1998:186) observes that although luck plays a part in many areas of our lives, the possibility of chance in judicial outcomes is troubling. This is because we value predictability, non-arbitrariness and fairness in the law. To reduce the chance of judicial lottery, the ideal judge would be ‘a little more collegially convergent with what she took her brother and sister judges to be doing’. However, rejecting the extreme scepticism of some legal realists who portray *all* judicial decision-making as essentially irrational, Waldron (1998:209) believes it is not possible to entirely eliminate disparity from the decision-making of individual judges other than by radical means:

I am not imagining that the reasoning of the judge who sentenced P differs from the reasoning of the judge who sentenced Q, because the first judge ate something for breakfast that the second judge didn’t or because some random neuron fired in the first judge’s brain that didn’t fire in the brain of the second judge or because the two judges belong to different political parties. There is no element of the irrational here. There are just two people in robes — each in her own way a competent moral reasoner — each reasoning as best she can about the issue that the law (and morality) requires her to address. But as long as they reason separately, there is likely to be something of a lottery involved for the defendants. The only way to eliminate the unfairness associated with this lottery is to somehow yoke the two judges to the same standards of gravity-of-offenses, either by requiring a single judge or panel of judges to pass on all sentences, or by binding them with determinate sentencing guidelines furnished as a matter of positive law.

It is possible to displace this question of disparity and the possibility of unfairness with the language of individualised justice. Tata (2007) draws attention to some of the ways the ideals of tariff consistency and individualised sentencing are balanced in practice, as distinct from the way they are formally counter-posed in sentencing debate. *Judge M's* rationalisation of the process, and the potential for unfairness treads some of this middle ground based on the 'appropriateness' of the sentence according to the individual circumstances:

I don't think that in terms that there can be a right sentence, for all sorts of reasons, and that is quite an interesting point when you consider law reform. But if you don't really get a right sentence, only one that's appropriate, then consistency, to me, doesn't seem to matter terribly much, as long as it's in the approximate kind of area, and the discretion of the Sheriff is set pretty wide, subject to be corrected by the Appeal Court. [...] Now, that might mean that if you did something you'd be fined £600 in one place and £400 in another. But by the time you teased out about all the other things – about how much a person earns, how many children he's got, has he done it before, whether he said he was sorry - it might be that in a certain court you could find a pattern of sentences that were heavier than another court, but I wouldn't necessarily think that mattered terribly much. I kind of take a sort of broader axe approach to it, partly on the basis, as I said before, it's not something that's going to happen to everybody, every day. But if you're fined £600 a day when somebody else is fined £200 a day for the same thing, I can see, yes, you would get fed up with that.

Section 4: Sentencing as a signifying practice

Introduction

Garland's (1990: 256) description of sentencing as 'a signifying practice of some importance' follows from his foundational argument that punishment is a cultural practice which constitutes and produces local and general knowledge through its processes, discourse and rhetoric.¹² This broader argument in turn derives from cultural studies such as Geertz (1983) and Williams (1981) which explained culture itself as a signifying system – a means of explaining, communicating and reproducing a social order through an articulation of representations, identities and values. For Williams (1971) this is both an active and selective process through which the dominant culture organises what is often a quite disparate set of meanings.

The origins of the idea of penal practice as a form of social signification provide useful context for this discussion. It points to some of the connected frameworks and

ways of configuring social meaning upon which judges draw in sentencing, but also highlights the limited potential of this 'proxy model of culture' (Rock, 1998) to achieve social effects in the broader scale of social forces.

The signifying function of sentencing

Many social and penal commentators today acknowledge the Durkheimian message that penal practices such as sentencing serve expressive and demonstrative purposes beyond their instrumental objectives (Erikson, 1966; Bourdieu, 1987; Garland, 1990; Mathiesen, 1994; Rock, 1998; Henham, 2000; Smith, 2008). Garland (1990: 68) describes the performative and didactic dimension of sentencing:

In witnessing the penal ritual - whether directly or through second-hand reports - citizens are led to experience for themselves the emotional drama of crime and its resolution in punishment. It is a social occasion which simultaneously structures individual sentiment and gives it cathartic release.... As well as 'getting things done' with respect to crime control, penal rituals are concerned to manipulate symbolic forms as a means of educating and reassuring their public audiences.

The 'signifying' element of the penal process can therefore be read into many of the routines, symbols and rituals of daily practices. It also has a specific application in relation to several dimensions of the judge's task in sentencing. These different aspects can be distinguished from each other as follows: (a) the passing of sentence itself which authorises, legitimises and activates the sanction to follow (b) the message communicated by the particular form of sentence chosen (such as the length of imprisonment, or the selection of a community sentence over a custodial one); (c) the reasons given by the judge for the sentence (this is a statutory requirement in a limited number of cases); and (d) any additional remarks which the sentencing judge may choose to make (usually in *extempore* form).¹³

In sentencing, therefore, the judge performs one of the more public and declaratory functions of penal practice, and this role is necessarily bound up with the symbolic and expressive function of the criminal court. Perhaps to a greater extent than other actors in the criminal justice field, the figure of the judge is invested with a weighty cultural and historical significance. This is represented in judicial iconography, caricature, mythology and legal doctrine, and reinforced by the topography,

proxemics and rituals of the court and judicial attire.¹⁴ The ‘staging’ of criminal justice and the judicial role is similarly well-documented (see for example Frank, 1940; Erikson, 1966; Carlen, 1976; Rock, 1993, 1998) and is evident to even the casual observer of daily court practice.¹⁵

The generative dimension of sentencing practice suggested by this account entails an active role for judges in communicating and shaping some of our cultural sensibilities and values. The emerging literature in the field suggests the importance of this insight to such diverse areas as international criminal justice and human rights (Henham, 2000; 2009; Savelsberg, 2010), sentencing rallies in China (Trevaskes, 2004), domestic violence (Merry, 1990; 1992), the sentencing of street art crime (Young, 2012), and Japanese sentencing practice (Herber, 2009).¹⁶ Savelsberg’s (2010:34) account of the operation of international criminal courts is particularly useful here, demonstrating that criminal justice is consistent with a ‘semiotic model of social life’ in the way it draws upon ‘images, symbols, totems, myths, stories’ and contributes to the formation of a collective memory of ‘evil’. In this way, criminal justice is ‘a speech act in which society talks to itself about its moral identity’. However, the operation of international criminal courts also reminds us of the importance in criminal justice of forces *other* than cultural, such as power relations and institutional contexts: as Savelsberg (2010: 95) observes, legal institutions can (and do) constrain the powerful. Further, lest we regard the court’s signifying function as a benign cultural process, Merry’s studies of domestic violence show that the production of cultural meanings about violence and domestic relations is only achieved by the courts through ‘force and the threat of force’ (1992: 211).¹⁷

A number of caveats seem necessary to this discussion of sentencing as a signifying practice. Firstly, in the absence of much research on the reception of, and responses to, sentencing messages, the likely impact of this form of communication on the various intended (and unintended) audiences should not be overstated. It is perhaps reasonable to assume, along with other punishment practices, that it contributes in a ‘small but significant way’ to the broad formation of cultural life (Garland, 1990: 249). Secondly, sentencing remarks are unlikely to represent a ‘carefully or

orchestrated message’ but rather a varied assemblage of rhetorics and practices (Garland, 1990: 275).

The empirical basis of the ‘signifying’ element of sentencing

Most research in this field focuses on the final stage of the sentencing process – the judge’s sentencing remarks - to gain insight about judicial attitudes in relation to specific categories of crimes or offenders, as outlined above. Less researched areas include judicial sentencing remarks as a genre,¹⁸ the reception of messages by the intended audiences, and the question of the broader judicial intentions and motivations in the making of sentencing statements.¹⁹

Several commentators point to the difficulties of exploring the meaning and reach of this ‘transmission mechanism’ (Hudson, 2005). Rock (1998: 598) believes the signifying premise to be ‘intuitively persuasive’ but highlights the fragile empirical basis of the neo-Durkheimian understanding in light of several key features of the criminal justice process: the high attrition rates of cases prior to court, the backstage processes of case negotiation, and the reconstruction of the case when it reaches court. Mathiesen (1994) notes that it is unrealistic to expect all the choices between sanctions or levels of punishment to be recognised by the recipient of messages since these differences may be slight. Taken together, these features suggest that the cultural meanings of those few cases which do reach court may be altered and obscured by the processes of criminal justice.²⁰

Garland (1990:257) provides a detailed account of the ways in which meaning is communicated through sentencing – through particular conceptions and vocabularies of criminals, criminality, motive and conduct which feed back into wider society and conventional wisdom – but is careful to note that these theoretical arguments ‘outrun the available data’ (1990:251). He points to some inherent methodological problems with research in this area: the ‘unavoidable imprecision [...] the difficulties of accurate measurement, the lack of reliable data, and the impossibility of isolating penal variables from other attitude-forming forces’ (Garland, 1990:250). Inevitably, he notes, attempts to trace some of these wider effects of penalty will often rely on interpretive work for its insight. Rock (1998:598) foresees fewer problems in

devising grounded analysis or other research methods to explore how those larger boundaries of penalty are shaped and sustained, but observes that we know very little about the effects on the recipients of the cultural messages or of the ‘logic-in-use’ of the sentencers approach. In the meantime, he considers it important to ascertain how social and symbolic processes such as these are activated, and how the ‘activating agents’ - judges and others - make sense of what they do.

I consider this last aspect of sentencing practice through the judges’ accounts, in relation to two of the dimensions identified on page 34 above: the message communicated by the particular form of sentence chosen; and any additional remarks which the sentencing judge may choose to make. What is being ‘signified’ by the choice of sentence? What form of messages do judges consider it important or effective to communicate, and to whom? And why do some judges appear to be reluctant signifiers?

What is being signified by the choice of sentence?

Garland (1990) provides several broad examples of ways in which the selection by a judge of a particular sentence conveys a symbolic message. For example, the selection of imprisonment itself is a severe censure, and the length of the sentence conveys an additional message about the relative seriousness which the crime is viewed. Other messages of censure may be conveyed by the selection of an unusually severe or lenient sentence. Sentences, of course, emanate from individual judges whose dispositions influence their choice of sentence within the permitted ranges, and the general reading above of the symbolic messages being carried in sentencing cannot capture any of this specificity. In Chapter 6, I explored some of the representations of crime, the criminal and criminal justice processes which the judges employed to explain their work and experience – the ‘larger frames of signification’ (Geertz, 1983). In this section I explore some of the sensibilities about forms of punishment which are suggested by their accounts, and the meanings and associations carried by their use through sentencing.

Sentencing Sensibilities

If punishment is a practice which seems morally wrong and needs defending (Duff and Garland, 2004), the judicial role in sentencing suggests some necessary equivalence in terms of answerability. Ethnomethodology provides an additional point of reference for judges' narrative accounts of sentencing by introducing the concept of *accountability* as the foundation of human interaction. As Czarniawska (2004:4) notes, people spend their lives 'planning, commenting upon, and justifying what they and others do' and this aspect of human communication may have particular resonance for retired 'professional punishers' (Garland, 1990). Cover's famous observation that the judicial conscience is 'an artful dodger' (1975: 201) alerts us to the processes of rationalisation that are likely to occur in retrospective accounts, and Atkinson (1997: 341) issues this caution:

Autobiographical accounts and self-revelations are as conventional and as artful as any other mode of representation. We sell short ourselves and the possibility of systematic social analysis if we implicitly assume that autobiographical accounts or narratives of personal experience grant us untrammelled access to a realm of hyperauthenticity.

Rehabilitation

The orthodox view that the rehabilitative ideal was either dead or defunct prevailed for some time (see Feeley and Simon, 1992; Bauman, 2000b).²¹ Although there was recognition that rehabilitative programmes still continued to operate in programmes in prison for 'high risk' offenders, and that most of the 'technologies, powers and knowledges' of penal welfarism were still in place (Garland, 2001: 170), the consensus seemed to be that rehabilitation had suffered a spectacular fall from grace and was no longer a guiding principle of practitioners or policy-makers. This now seems a mis-reading of the situation and in particular of the core values of practitioners and policy elites. In particular, these appear now to have been characterised by some greater on-going commitment to the rehabilitative ideal and to the overarching penal-welfarism approach than was first thought (Ward and Maruna, 2007; Robinson, 2008). In the face of other political, cultural and economic changes which occurred in the later part of the twentieth century, however, these ideals were

subject to adaptation and change and rehabilitation may have survived principally by ‘re-marketing’ itself in ways which were capable of alignment with the ‘new punitiveness’ of this era (Robinson, 2008) and with new preoccupations about risk and public protection (McNeill and Batchelor, 2004). McNeill and Whyte (2007) suggest that rehabilitation in Scotland was in a state of hibernation throughout the 1970s and 1980s. However, reflecting its long history as a ‘parallel and partner profession’ within criminal justice practice - and in contrast to the position in England & Wales – rehabilitation remains an important ideal in Scottish penal practice, albeit now more usually employed as a way of progressing the twin goals of reducing reoffending *and* increasing social inclusion (Robinson and McNeill, 2004). Halliday *et al* (2009) observe that the institutional arrangements as well as the practice of welfarism in Scottish criminal justice require sentencing judges to enlist and employ social work expertise in many cases.

The broader context of penal transformation and continuity in Scotland is usefully explored in McAra (2005). In particular, the discussion there of continuities in penal welfarism, particularly the social work model aimed at the re-integration of offenders in the community rather than the use of prison, raises the interesting question of the role of the judiciary. This is relevant to the continuity of ethos, since the practice would require some on-going judicial commitment to the ethos and values of the model – or, at least, could not have continued in the face of judicial opposition.

Foucault (1977:14) observes that the new ‘distancing’ of justice from the act of punishment itself is accompanied by a ‘theoretical disavowal’ on the part of judges, who declare that they are motivated not by a desire to punish but to ‘correct’ or ‘cure’. This sceptical reading of judicial motivation could find some ostensible support in the articulation of several accounts about punishment here, particularly those which stress their rehabilitative rather than punitive orientations. However, the judges’ fuller accounts of practice and their interest in organisations concerned with the rehabilitation or ‘resettlement’ of ex-prisoners could also suggest more than a notional commitment to the concept. *Judge L*’s account was a trenchant defence of rehabilitation but also suggested a model of treatment *as* punishment:

Unless you *want* the criminal justice system to be a system for locking people up, what *are* you trying to do? Why do you want the punishment to fit the criminal rather than fit the crime? Is it purely about punishment? If not, what then *is* the purpose? It's not about deterrence – let's forget that. You're trying to rehabilitate them. People *can* be rehabilitated if you get them at the right time and in the right way. There is a danger, if you are too severe, that you drive them over the edge and you put rehabilitation beyond them, and then that's it. You've pruned too hard.

Judge D stated that his commitment to keeping people out of custody formed while studying jurisprudence:

I think it probably started in university, in jurisprudence, the whole academic aspect of punishment, the various purposes of it. And in particular, not just the punitive element, the restorative element. And that hit home to me. We had a very good lecturer, I liked him a lot and talked to him a lot about it. And it always stuck with me.

Judge A identified some of the policy ambivalence about rehabilitation in his early years as a Sheriff but appeared not to have wavered in his own commitment:

I think towards the beginning of my time there was a distinct lack of enthusiasm for the welfare approach, the feeling that criminal justice could do any good; that nothing really works. I was never an adherent of that. I'm not sure I always did the right *thing*, though. For example, in my day Borstal was still in existence and I think more modern studies have indicated that Borstal wasn't a terrific success – though it started about 1914 and lasted well into my time. And therefore, if advised that this would be a reforming influence, I tended to adopt it. I think probably I was excessively *non-accepting* of the idea that punishment should be retributive.

Judge L expressed the frustration of several judges when he observed that although they knew the rehabilitative approach did sometimes work, they only saw the failures – the ones who came back to court. *Judge C* said that 'without a doubt' his overriding commitment was to rehabilitation and in his time as a Sheriff he had felt supported in this by a number of other Sheriffs – 'a body of people who felt the same way as I do'.

Rehabilitation: the challenge to judicial 'disengagement'

Bourdieu (1987:830) describes independence as the quintessential judicial attitude which operates as the 'entry ticket' into the field: it is 'the internalized manifestation of the requirement of disengagement'. However, some challenge to this principle of

disengagement is suggested by these judges' accounts of rehabilitative practices and changes in the course of their careers. Two judges were involved in the operation of Drug Courts; this involvement, as narrated in *Judge C's* account in earlier chapters, represented a marked change in the conventional judicial role, challenging the usual 'distance' of office and in their relationship with the accused. In the later part of his career as a Sheriff, *Judge M* identified a major change in the relationship between judge and offender. This involved 'hearing' the accused's voice:

But latterly, when things like drugs treatment testing orders came in- which I thought was an absolutely *exceptionally* good thing - you were in a totally different relationship with the accused, and that's a kind of high point. Well, you *talked* to them for one thing. Quite often you're sending someone down and you have no idea what their voice sounded like [...] They appear, plead guilty and they've got solicitors, as you know, they just sit there looking either pleased or worried, and the solicitor speaks for them.

I asked him what he thought was gained by having the opportunity to talk to the accused directly, and his reply suggested this lay in gaining real insight about an offender's circumstances:

The first thing that was gained was that they [offenders] felt someone was taking an interest in what they were doing and...that's not just my experience, other Sheriffs have told me as well. Also, it's actually quite interesting to find how they thought. I remember someone telling me about shoplifting and how tedious it was to have to do it once the buzz had gone. And other people told me about things like if you're involved in heroin - this one person was. In a matter of six weeks you can have lost your house, your spouse, your job, and you can actually hurtle down into a person living on the streets. And that's why I liked DTTOs, because apart from the actual business of physically trying to get the person to reduce their drug intake and their criminality - and it was the criminality we were meant to focus on, not the drug taking, really - in Edinburgh there was a very good general support system that realised that, in the first place of people taking drugs it might be to mask something else and if you take the mask away you have to deal with the underlying thing. And the second thing was that they understood that people in that situation had other needs like finance and housing, possibly getting back to work, all these kind of things. And I thought the Edinburgh one was very well thought out and that was my impression of it.

Within the limits of courts procedures, several judges spoke of wanting to 'keep tabs on the situation' of an individual offender by using the deferred sentence option.

Judge E explained the benefits:

Well, if you were deferring sentence, that gave you the chance to see if the accused himself was going to do something either to solve the problem and not only stay out

of trouble but do something positive. You could keep a tab on somebody and keep them coming back either monthly or 2 monthly or whatever. It was good having that kind of discretion. It allowed you to keep tabs on that kind of situation.

Several others indicated they would like to become more involved in the ongoing management and review of cases.²² *Judge M* would have liked this aspect of the role to be further developed:

It seemed to me it was much better for everybody. In fact I got to the stage where I began to wonder if we should do something like the French do and have a judge who is in charge of the person carrying out their sentence. I think it's probably called a *juge des peines*²³ in France and it's not necessarily the sentencing judge, though there's no reason in Scotland why it shouldn't be: simply to see the person and see how they're getting on. You've always got to allow for being fooled and taken in because to an extent you're dealing with rascals. But to an awful extent you're dealing with people who have got in a helpless kind of mess. And it was a constant theme that, you know: 'Thank goodness someone's interested in me even though I've done this'.

These accounts of judges talking directly to the offender and gaining real insight about the problems they faced appear to represent a challenge to the concept of judicial independence as 'distance' from the accused. I consider this aspect further in relation to imprisonment.

Sentencing to Imprisonment

In his discussion about the civilization of punishment, Garland (1990: 236) draws attention to the least developed dimension of this transformation of sensibilities: sympathy for offenders and the improvement of penal conditions. This neglect is the result of the ways in which punishment is organised so as to minimise and disguise the violence entailed in its routine practice. Sarat and Kearns (1995:242) also draw attention to the forces which conspire to protect judges from the violence of their role when they observe that the distance between thought and action is both 'a blessing and a difficulty' - it is a necessary part of politics when dealing with 'pain' and death. Law (in the form of the judicial role) must therefore be at the centre of punishment – it is needed for the 'domesticating' of violence. Sarat and Kearns (1995: 236) usefully suggest that sentencing requires a 'structure of social cooperation' to overcome cultural and moral inhibitions about the violence of punishment.

A sceptical reading of this ‘structure of social cooperation’ would find some support in many of the judges’ accounts of sentencing practice: in descriptions of their coping mechanisms, their attempts to control displays of emotion, in the informal practice of collegiality, and in the concept of judicial independence where it means distance and disengagement. Accounts of practice, however, suggest that other readings are also possible.

Continuing his earlier discussion about extending the judicial role, *Judge M’s* expressed his discomfort at ‘washing his hands’ of the offender once he’d sentenced him to imprisonment:

.... passing a sentence of imprisonment, you have *no* idea what’s going to happen to the person after that. Apart from the fact they’re going to prison and [...]. It’s atrocious. Also, [...] getting back to the idea of the judge supervising the sentence to some extent, I thought there was something kind of bad about sending someone to prison and then washing your hands of it. [...] You take this huge decision and you don’t even have to put it in writing while you’re doing it [...]. But you don’t know how they’re going to get on, how they’re going to behave in prison and the thing that struck me as very odd [...]. I thought judges should be involved in that. I thought if they send someone to prison they should be involved in how their sentence was served. Speak to them. [...] Well, say what on earth are you doing, you know?

As *Judge M* continued this account, he had in mind a role for the judge in visiting the accused in prison, or having the accused come to see them for some kind of review, possibly with a view to reduction of sentence if good progress was being made. He mused on the strangeness of the sentencing act from the offender’s point of view:

You could even say to them, you know, what’s going on here? I sent you to prison and now you’re fighting with the staff! [...] I wonder if there’s something we’ve missed here, because if you’re in the dock, and someone you’ve never met listens to stuff about you, takes a couple of years out your life and never sees you again, it’s....it’s *bizarre* if you look at it, in that kind of way.

In similar vein, *Judge D* spoke of the artificiality of the act of sentencing:

One of the fundamental difficulties in a way about a judge is that a judge makes up his mind what is the right sentence. He has no control of, or knowledge of, what happens afterwards. He knows perfectly well that it could be that this prisoner would benefit very much from having a course to deal with anger management or something of this sort. But he has no – well, he had no - control over whether the prison would actually provide that. And that is a barrier to a judge. [...] So it is, in a

way, an artificial exercise. You push someone across a particular line and they simply disappear from view.

These accounts present a challenge to conventional understandings of judicial independence where that is founded upon the judge occupying a position of distance and disengagement in relation to the offender and their sentence. They also suggest that the powerful norms of social avoidance which Garland (2010) observes in relation to punishment may be attenuated in unexpected ways.

However, there may be limits to the extent to which the distance between judge and offender should be breached. Wald (1995) believes that institutional arrangements and doctrines such as judicial independence matter: they can either ‘invite restraint’ or ‘ease the path to violence’ and excess. In her discussion of sentencing as a legitimated form of state violence, Wald (a US judge) states that she favours arrangements and doctrines that require judges to ‘confront the pain their decisions authorize, condone or ignore’ and criticises constitutional doctrines and practices which distance the judge from their responsibility by means of abstraction or depersonalisation (Wald, 1995:82).²⁴ Enabling judges to review and monitor sentences and to visit offenders in prison may be the sort of arrangements or practices that would meet Wald’s objection to ‘distancing’ practices. So also might the continuing involvement of judges in organisations and training events which inform them about the pains of imprisonment and other central issues and debates concerning punishment. This involvement may come at a price, however.

In a conversation about the occupational stresses entailed in judging, *Judge M* spoke about judges ‘making arrangements for their own self-protection’:

How do people [judges] cope? I would guess by *not* always knowing the full consequences of what they’re doing. Well, probably not *wanting* to know. If you send someone to prison you don’t want to know what happens to their family, unless you happen to be a Christian. [...]. You talk to families and you hear horror stories about the effect on people simply in terms of things like simply travelling to the prison to see the prisoner, things like that. I suppose what I’m saying is that I don’t think that judges have always been educated about the full consequences of what they’re trying to do. Whether or not that’s a good thing or not, I honestly don’t know.

Some further insight about the complexity of the relations of distance and engagement was gained from the accounts of two particular judges who, after retirement from the bench, were appointed to the Parole Board. This work, they explained, took them closer to the circumstances and consequences of serious crime – providing them with extensive knowledge about the effect of crime on both the offender and the victim. To this extent, the work can be regarded as achieving the sort of confrontation with the consequences of judicial decisions of which Wald (1995) approves. Strikingly, however, both judges reflected that one effect of this intense familiarity with the circumstances of serious crime was to make them reconsider their previously strong rehabilitative orientation. One commented that he was had been ‘excessively non-accepting of the idea that punishment should be retributive’. This raises the question whether judicial distance, the abstraction and depersonalisation which Wald condemns, may in fact serve a moderating function on judicial sensibilities. This moderating function may be compromised by greater involvement or lesser distance.

Sentencing Remarks

Sentencing remarks mark the end stage of the judicial role in sentencing, and can be distinguished from the reasons which a judge may also have given for the sentence. Sentencing remarks are optional and in the lower courts most usually take the form of extemporized remarks.²⁵ Garland (1990:54) notes the generative potential of sentencing statements; not only do they express sentiments, they also seek to ‘transform and re-shape them’. This may be slow ideological work but can, over time, change sensibilities; some examples would be seatbelt laws, drink driving, racism and other ‘hate crimes’.

Rock (1998:589) observes that the language sometimes employed by judges at this stage of the sentencing process is ‘allusive, denunciatory and didactic’. Moreover, the formulaic character of sentencing remarks is widely observed, and this observation may be more applicable where the judge is simply expressing or affirming public sensibilities, rather than seeking to transform them. The routinized nature of remarks may, indeed, be central to their cultural importance:

Nine-tenths of culture is the work of reproduction. Culture and cultural practice largely consist of the transmission and reproduction of collective meanings, values, classifications and perceptions, undertaken for purposes of socializing the young, binding individuals to groups and motivating meaningful action. Culture is about communicating, coordinating and controlling conduct in the interest of collective action and social order.

(Garland, 2012: 421-2)

Sentencing remarks: audiences

Symbolism and rhetoric are paramount in the signifying endeavour, and the imagined audience and its particular features are likely to influence the signifying practice adopted (Garland, 1990). Melossi (2008:6) follows Durkheim in understanding the primary purpose of the penal system as ‘controlling society more than the criminals, who should actually be regarded as the useful ‘bearers’ of such control’. This latent function is evident in some of the language used by the judges in conversation: ‘signal sentences’ were employed in particular areas to send out deterrent messages about local issues, and there was mention of the need to send out ‘signals’ to ‘the accused and all his pals’ about criminal behaviour, and the dangers of sending out ‘the wrong signals’. However, the relevance of the public as a real or imagined audience for judges’ sentencing was presented by the judges as a question of intractable difficulty. Some correspondence between sentencing and public attitudes was recognised as important for the legitimacy of the system, but most judges articulated the problem of divining the ‘public mood’. *Judge B* expressed a common view when he said that he didn’t attach too much importance to the idea of ‘public mood’ since it could distort judgement. In any case, as *Judge F* commented, it was sometimes incumbent on the judge to take an ‘individual’ view even if the public might think it was an outrage. *Judge L* was unfazed by mail from the public telling him he was ‘absolutely useless’ and another thought that judges should simply ‘try and get around a bit, talk to people, and keep an open mind’.

There was significant ambivalence about the judge's signifying role. *Judge E* gave the more straightforward example of a situation where, as a 'floating Sheriff' covering a number of geographical areas, he had to bring in 'views from outside':

... people in the different areas looked at things differently, [...] call it a local view; in-bred sexual abuse in whole families, for example - it was part of the culture, you could almost say. And this is where the state says 'this is what is going to happen'. And there you had to say 'This is totally wrong' and to be heard condemning it, and passing a severe sentence. It was something you couldn't allow to be carried on, the belief that it was alright.

Like most of his colleagues, *Judge M* was generally reluctant to make strong signifying statements: 'Once you start pontificating about the state of society', he said, 'I think you're kind of overestimating what your duties are.' However, there were some situations where he felt there was arguably some duty to do so:

... often you felt, especially if you had sympathy with the accused, you felt if only other people who are dabbling in drugs could know that this is the kind of thing that might happen, then they might be deterred. And because you're in that, I suppose in a uniquely privileged situation, you *can* comment on it. It may be arguable that we *should*, otherwise it's a sort of 'treason of the clerks' situation, you know, turning your face away from something. It's difficult, that.

In the context of the courtroom trial i.e. at the moment of sentence, the selection and imposition of sentence seems most obviously directed first at the offender; he or she is, after all, 'first in line to be 'taught a lesson' by punishment' (Garland, 1990: 260). There may be some expectation that this 'lesson' includes a moral message from the judge; von Hirsch (1993), for example, suggests that although a penal sanction might by itself ensure compliance, it should be accompanied by censure and disapproval for the offender's moral education.

Among the judges interviewed, there seemed to be a strong aversion to making any of what Bourdieu (1997) calls 'normative utterances' directly to the offender. There were numerous disparaging remarks about judicial 'pontificating', 'moralising', or 'hysterical output' and *Judge M* expressed it this way:

I wasn't a great one for saying 'You're an unmitigated rogue'. I never thought there was a place for that. [...] I don't think it's any of my business; not really my thing. It's not really for me to abuse my position, calling him for everybody.

Judge E gave this account of his own practice in relation to sentencing remarks to the offender:

I felt that you should never speak down to an accused. I never tried to lecture an accused. I always tried to treat them with respect. So whether you're sentencing in open court or not, you always treat them as a person and try to be reasonable. [...] I never tried to bring him down. If it was a serious offence, I'd say so. And if I felt a general warning should be given I'd indicate that future cases would be dealt with in this way. But I'd never try to lecture them on the evils of it. If it was a bad case I'd say so, and sometimes when you're addressing the accused like that, you'd get him nodding. And you'd feel at least someone's listening.[...] I've been in courts where Sheriffs have shouted 'Take your hands out your pockets!' or 'Why are you laughing?' But so often it's nervous laughter, and there's no need to hammer into them. They know they're in trouble. Going back to Lord [X] and some judges who gave sermons in their sentences: there's no point in that because the accused isn't going to listen. He's not going to write it down and put it up in his cell.

Another judge spoke of always trying to say something encouraging to the offender: 'something a friend would say'. In a telling remark, *Judge M* said that he preferred to speak *to* the offender rather than speak *about* the offender.

The reluctant signifiers

The reluctance to make strong signifying messages, especially to the offender, may be the logical conclusion of the difficulty which many judges expressed about the sentencing decision itself; if they are not confident about the 'rightness' of the sentence itself, the correctness of the message will be similarly uncertain. The reluctance to signify may therefore be integral to the nature of sentencing as a form of ethico-moral judgement which is necessarily indeterminate. Thiele (2006: 12) sums up the difficulty this way:

There is no trump card to be found in this game. No one account, no single story can capture the full import of moral and political life or settle, once and for all, the rightness or wrongness of its components. A plurality of narratives compete for our allegiance. To judge well in the face of this inherent contextuality and essential contestability requires moral and political acumen and courage.

Czarniawska (2004:49) notes the 'logic of representation' in account giving: not only are narratives 'well rehearsed and crafted in a legitimate logic', they are likely to have been carefully selected to present the narrator in a good light. This may be especially true of account giving in relation to sentencing, in light of the high level of

accountability suggested by that task. However, building on the other views expressed by these judges about sentencing practice, these accounts suggest several key characteristics of their sentencing sensibilities: an attempt to be empathetic and to be *non-judgemental*. These features may be strongly correlated and Thiele's observation (2006: 199) provides important insight about practical wisdom as well as the importance of managing emotions:

Emotions leave us vulnerable to prejudice and projection. Under the influence of negative emotions, in particular, the exercise of judgement may deteriorate into a habit of hasty censure. Eagerness to blame is not practical wisdom. The good judge is not judgemental. Still, the remedy for an overly judgemental disposition is not the squelching of emotion, negative or otherwise. Quite the opposite. The cultivation of empathy is required.

The 'penal equation'

In Chapter 6, I considered some of the ways in which the judges' accounts were characterised by a tendency to *inclusion* rather than *exclusion* in relation to the offender. However, the inclusionary or exclusionary orientation represents only part of Melossi's typology. The second part relates to a conception of social order: in the case of the inclusionary model, an understanding of social order as sometimes fairly or rationally contested; or in the case of the exclusionary model, as a given establishment norm. The distinction between these understandings of social order has a number of implications for this discussion of sentencing as a signifying practice.

Norrie (2005:42) notes that all legal forms represent

‘the imposition of one moral and political narrative about how people ought to behave, dressed in a language of formality and universality that has to be constantly safeguarded against alternative moral and political possibilities.

Viewed this way, judges play a central role in patrolling the borders of normative debate:

Judges [and academic lawyers], in the name of legal subjectivity and formal rationality, operate as the border patrollers of this moral-political discourse. Its fictive character is revealed by the constant need to repair the boundaries against the corruptive invasion of alternative moral-political accounts – of legitimate and illegitimate uses of property, of violence, and of sexuality. (2005: 43)

As Norrie (2005: 42) explains, one of the ways in which the criminal law seeks to achieve the necessary degree of normative closure about these and other debates is through concepts rooted in a juridical individual endowed with free will. These concepts marginalize questions of ‘social excuse’ and can have the effect of closing down discussion of the social, political and moral contexts of crime. And yet, as Norrie (2005:90) notes, there are two sides to the question of criminal responsibility:

Just deserts from one side is social injustice from another, and we feel the pull of both arguments. There are always two sides to the question of criminal responsibility. It is not that law is wrong to identify individual agency as important to moral responsibility. [...] The problem for law, for criminal justice, for the penal equation, is that it is one-sided in its treatment of people being in control. There is a double, linked exclusion here: of the social conditions of selfhood, and the structural conflicts which inform those conditions.

These concepts of individual responsibility and formal rationality, which can operate as modes of repression and exclusion, represent another set of contradictions since they also form the basis of the liberal conception of law as the sphere of freedom (Norrie, 2000; 2005). Thus for more than 200 years, liberal law has delivered criminal justice through what Norrie (2005:5) calls ‘the penal equation’: ‘crime plus responsibility equals punishment’.²⁶ He explains this more fully (2005:75):

Crime requires punishment as retribution and deterrence, and criminal justice qualifies individuals as deserving of the state’s legitimate sanctions. It is this sense of justice, responsibility and desert, justifying social control through punishment [...]

The construction of personal responsibility by the criminal law in this way, and the corresponding neglect of social contextual factors, means there is only a limited role for substantive or social justice in criminal justice processes.²⁷ In an important sense, also, these tensions and ambivalences are inscribed in the role of the judge, and the performance of their role in criminal justice entails a degree of shifting between the poles of individualism and social control. Norrie (1993: 57) states it in this way:

The judicial role is situated at a point of conflict between a logic of individual justice, which has its modern roots in liberal legal and political theory, and a logic of social control and public policy as viewed by the judges from their particular vantage-point within the social structure.

The sentencing stage of criminal justice represents a distinct shift in both process and outlook for penal agents. The earlier stages of criminal prosecution and trial rest on values of due process, formal legal rationality and individual responsibility, but the sentencing process marks a shift towards values of differentiation, evaluation and discretion. Whether this shift entails the ‘blunt denial’ of the social character of crime (Zedner, 2004: 174) or simply its marginalisation, there is a sense in which the sentencing stage occasions the ‘setting loose’ of the contradictions of law, and the introduction of ‘politically safe’ judicial discretion to manage it (Norrie, 1993).

The ‘social question’

Sentencing brings the individual judge, particularly those sitting in the lower courts where the ‘social services’ function in criminal law is greater, into close proximity with the ‘social question’ - the social structuring of the criminal population (Norrie, 1993:220). For the reflexive judge, able to reflect on some of the contradictions they face and on the limitations as well as some of the possibilities of their role, this presents an unresolvable tension. There was some awareness in judges’ conversation of the general critique that the processes of criminal justice individualise the social problems integral to penalty and neglect their structural determinants. In her public speeches, Chief Justice Elias (Elias, 2005) draws on insights from criminology and other social science research to explicitly acknowledge and engage with the ‘social question’. She observes, however, that in the meantime, judges are left with the criminal justice system - the bluntest form of social control.

Judge F’s response to the social question is emblematic of another judicial response; to acknowledge its existence but to resolutely exclude it from the judicial ambit in sentencing. In the course of our meetings, I noticed some reluctance to engage with topics which strayed into social contexts of sentencing, and several conversations along these lines stalled. Here, for example, I asked him about the extent to which the criminal court concerns itself with the circumstances of the offender:

I expected in social enquiry reports to learn about the background of the person. Where there was a report, that would give an indication of where the person is going..... why he’s got into the situation he *is* in. [Long pause] Well, that’s it. [Further pause]. Yes, that’s it. [silence]

In our last meeting, I detected some resolve on his part to make his position about this issue clear. At the end of the interview, I asked him if his career as a Sheriff had provided him with any useful insights about the place of crime in society. He provided the following extended response:

No particularly helpful insights, no. Not so that I can say ‘Well, I know he’s got here this way, and the way to deal with him is so and so’. No. That really is the point; that every wrongdoer, every person wrongfully arrested, every person wrongfully charged, every person in a civil action, is *different*. And I regard the consequences of that as being interesting. [...] I’m a lawyer, and I apply the law. And I apply the law to changing situations. But each situation is the one in front of me. [...]

I don’t know if one gets that kind of insight. That is the interesting thing; that what has been done has been done on this particular occasion. What *is* to be done requires assistance from social workers if it’s sufficiently serious, to give guidance as to why it’s happened, and what may prevent it in future. [...] I mean, you see patterns of why someone might be carrying a knife; you see patterns of why someone might be getting drunk; you see patterns of why someone driving less carefully than they ought to be. But you’re not dealing with a pattern; you’re dealing with an individual. [...]

Let’s put it this way. If I were to start writing an autobiography, and I’m *not* writing an autobiography, and I’m not going to start writing an autobiography. But if I did, among the things I would no doubt try to get together are issues of patterns and society, and how these things have developed, and how these things have changed. But you don’t deal with individuals on the basis of such patterns. Now that’s not to say that one ignores the social consequences, because we’ve been into this at length. The social consequences are vital. The patterns within society have to be understood. But you don’t analyse them in the rough and tumble of the summary criminal court.

Conclusion

In this chapter, I have tried to dispel some of the ‘sociological innocence’ (Krygier, 2008:45) about the core concept of judicial independence. This doctrine invites criminological suspicion because of its oblique nature and its mythologizing and legitimising functions. These latter qualities mark the concept out as the *master narrative* of the judiciary, and listening to judges’ accounts of its use in penal practice provides valuable insight about its on- going meaning and relevance. Some new insight is gained about the importance of the traditions of independence for some judges, about the operation of discretion in practice, and about the nature of independent judgement itself. In particular, these insights support a view of judgement as the *balancing* rather than the *separation* of rationality, perception and

emotions and open up some space for considering more closely the occupational challenges and demands of judging – and the implications of strategies employed to deal with those challenges.

One of those strategies is the informal practice of inter-judge discussion about sentencing. This practice provides useful insight about the operation of the habitus, shaping norms and facilitating inter-dependency. It can be regarded as a strategy to help the individual judge deal with the indeterminacy of the discretionary sentencing task, but which also helps to promote consistency and reduce disparity. There is some possible conflict with the idea that the individual judge should be taking decisions independently of others. It also raises practical questions about networks, opportunity and location.

The cultural dimension of sentencing becomes apparent when sentencing is conceived as a signifying process (Garland, 1990). Sentencing provides an active role for judges in communicating and shaping cultural sensibilities, and outcomes necessarily reflect, in some way, the dispositions of individual judges. In this context, the *reluctance* of some judges to signify raises interesting questions about the unresolvable tension which the ‘social question’ presents to the reflexive judge: the extent to which social problems can be re-balanced within the framework of criminal justice.

¹ In relation to criminal justice it is useful to distinguish two meanings in the use of the concept *judicial independence*. First, in constitutional debates and in the higher courts, it is used as a corollary of the doctrine of separation of powers and the rule of law. If the judiciary is to uphold the rule of law, it must be a separate branch of government and not placed under any undue influence, control or pressure from the others (Stevens, 1999, McCormick, 2006, Beatson, 2008). In the case of the individual judge, this is assured by security of tenure and fiscal independence and by conventions relating to impartiality – the absence of ‘fear or favour’. This aspect of judicial independence is the most significant for senior members of the judiciary sitting in Court of Appeal, whose primary function is the checking and balancing the power of the other branches (Malleon: 1997, 666). The appearance of impartiality can be brought into question when judges engage in public debate or comment on politically controversial matters. The risk is that judges become ‘just another player in the political process with policy preferences’ (Beatson, 2008:5).

The second use is in relation to those courts that have the daily business of crime as their principal function. Here, independence is used less in relation to the separation of powers but more in relation to the impartiality or neutrality of the individual judge. This reflects the ‘social service’ function of these criminal courts (Malleon: 1997) and the ‘emotional labour’ aspect of the judicial role (Anleu

and Mack: 2005), sometimes requiring the management of emotions. This could perhaps usefully be described as independence in the sense of both *affect* and *effect* i.e. as a coping strategy deliberately adopted to allow the necessary psychic distance; and as a concept which has a rhetorical or legitimating effect where appearances might demand one (to buttress the daily operational demands and compromises).

² Kahn (2006b) gives the examples of markets, law and war and the corollaries of market participants, rights bearers and combatants as some of these competing forces. In relation to criminal law, the competing symbolic forces would include broad conceptions of justice, morality and victimhood.

³ In Scotland, this discretion is subject to appeal, to some statutory limits (except in the High Court) and to guideline judgements and notes from the Appeal Court.

⁴ Rubin (1996) prefers the terminology of supervision and policy-making to explain the control of discretionary decision-making.

⁵ At the explanatory level, an attitudinal change on the part of the judiciary towards greater punitiveness, over a period of time, would be difficult to empirically evaluate or measure. It is interesting to note that much more appears to be known about public punitiveness than judicial punitiveness.

⁶ The findings of some socio-legal studies challenge the assumption that discretion in law always leads to inconsistency or that that the two concepts are related in a simple or direct way. See Campbell (1999) and Stranieri *et al* (2000).

⁷ This alludes to our faith in the judge as a neutral, depoliticized expert and the sense in which judges 'model neutrality for us all' (Kennedy, 1997: 2).

⁸ I was unable to find any information about this proposed service.

⁹ See Tata (1998); Hutton (2003) for discussion.

¹⁰ The nature and extent of consultation about the 'going rate' will depend on several factors, one of which is the jurisdiction of the court. In the High Court, the threshold question of imprisonment or community sentence is seldom in question and judges are more likely to be sentencing 'for the crime' rather than for the individual. As several judges observed, judges there tend to think in terms of *years*. Reflecting the greater social services function, the exercise of sentencing discretion in the Sheriff Court tends to take place over broader terrain, and is likely therefore to influence the nature of consultation.

¹¹ It is relevant to note here that the New Club in Edinburgh, membership of which reportedly includes a sizeable number of High Court judges, remains a gentlemen only club, albeit with a number of 'Lady Associates'.

¹² Even more broadly, Mathiesen (1994: 221) suggests that the entire criminal justice system can be regarded as 'a large machine having the purpose of communicating this message [deterrence and moral education] to the people'.

¹³ In a general sense these are overlapping categories, so that the message sought to be conveyed by punishing a serious crime by a lengthy custodial sentence will be reflected in each of these stages, albeit in subtly altered ways. However, the judges' accounts to follow suggest that questions of audience and circumstances affect the rhetorical content of signifying remarks at different stages, so some distinctions may be drawn where relevant.

¹⁴ See Chase and Thong (2012) for a recent study of the impact of courtroom rituals and settings.

¹⁵ Lucien's (2010) account of the loss of judicial authority through a decline in the staging tradition may be overstated.

¹⁶ See also Bouhours and Daly (2007); McCarthy (1995); Steffensmeier *et al* (1998); Erez (1999); Jeffries and Bond (2010).

¹⁷ Garland (2009) makes a related point in his review of Smith's *Punishment and Culture* (2008) when he suggests that the author presses the claim of a fully culturalist approach too far, privileging cultural

dimensions of penal practice over equally relevant (and inter-connected) aspects of power and control. As Garland (citing Western, 2007) observes, punishment ‘shapes life chances, distributes power and reinforces racial divisions’ (2009:266). The emphasis in this thesis is on cultural dimensions of the judicial role but I make no claims for the hegemony of the cultural over material lines of power which also structure the judicial role.

¹⁸ The only significant study of sentencing remarks as a genre appears to be that of Robertshaw (2004). This study approaches the subject from the point of view of legal semiotics and traces both the historical development and contemporary use of the form.

¹⁹ There is a growing body of scholarship which explores broad issues of public opinion and attitudes to sentencing, although this is not usually directed towards the reception of specific sentencing messages. See Gelb (2006); Roberts (2002; 2003b; 2004); Roberts *et al* (2009); Stalans (2002); Tufts *et al* (2002).

²⁰ Even this is an incomplete account of the problems of researching the signifying and communicating aspects of sentencing, since it leaves out the role of the media. Mathiesen (1994) notes some of the ‘filtration’ and ‘focusing’ effects of media reporting of sentencing.

²¹ Ward and Maruna (2007) note that there is little precision or clarity about what constitutes ‘rehabilitation’ in theory or in practice, although the two principal models in use are the medical version of rehabilitation in which the offender is regarded as the passive recipient of the service, and a social psychological version in which the offender is a more active subject.

²² There are proposals in Scotland to introduce some element of judicial review into the management of community based penalties. See McIvor (2011).

²³ In France, the enforcement judge (JAP) is a judge of the Special Court of First Instance, and monitors the progress of the offender inside and outside of prison. The post was created in 1958 in an effort to individualize the sentence.

²⁴ Wald (1995) develops this discussion by arguing that by wiping out discretion, sentencing guidelines are part of the new development of the jurisprudence of law’s violence that ‘profoundly distances the judge from the violent consequences of the sentence’.

²⁵ Sentencing statements are occasionally made more widely available in high profile cases or where there is thought to be a particularly important matter of public interest. The Scottish Judiciary now employs a Head of Judicial Communications to manage these and other media communications.

²⁶ Halliday and Karpik (1997) note that *legal liberalism* is a narrower concept than the broad political understanding of liberalism; it is closely tied to the rule of law and is not to be confused with political or social democracy. Importantly, Halliday and Karpik note the limitations of this legal commitment and draw attention to the collective failure of lawyers (necessarily including judges) to use the law to challenge the rise of Nazism. To this list could be added Slavery (Cover, 1975) and apartheid (Dyzenhaus, 1998).

²⁷ There are broad debates about the extent to which criminal justice can contribute to social justice (von Hirsch, 1993) and whether law and criminal justice can do political work openly (Hudson, 1995; Hutton, 1999).

Chapter 8 Conclusion

A society is a something in process – in process of becoming. It always has within it, as ours does, seeds of dissension. And it always has within it forces making for moderation and mutual accommodation. The question is – the relevant question – is whether the courts have a significant contribution to make in pushing [...] society in the direction of moderation – not by themselves; of course they can't save us by themselves; but in combination with other institutions. Once the question is put that way, the answer, it seems to me, has to be yes.

HLA Hart (1956)

This thesis demonstrates that valuable insights about criminal justice policy, sentencing practice and penal change can be gained from listening to the reflective accounts of retired judicial practitioners. The voices of the judiciary are rarely heard outside the courts in which they sit, limited as they are by the doctrines and conventions of judicial independence and neutrality. The ability of serving judges to engage in public debate or to express opinions on issues which might bring their impartiality into question is similarly restricted. All this stands in significant contrast to almost all other penal actors, and in this thesis I make a contribution to our knowledge of a particular dimension of penal practice which Hall *et al* (1978) identified some time ago, but about which we still know very little: the 'internal organisation' of the judicial world. This is the realm of *judicial culture*, a concept which has gained surprisingly little foothold in judicial scholarship and which I theorise and develop in Chapter 2.

By adopting a biographical narrative research approach, grounding interviews in the careers and experience of a group of retired judges, I provide insight about the changing conditions of judging in Scotland and more broadly, about the judicial role in sentencing and penal practice. It is perhaps inevitable that assumptions are made about a group of actors whose inner organisation and practices little is known. Yet one key message which can be taken from the recent history of sentencing reform in the UK is that knowledge of judicial culture is an important precursor of reform since change will need to take place at the level of the *habitus* if it is to be fully effective. The capacity of judges to reflect on their own practice and about the conditions which structure, enable and constrain that practice is also likely to be an instrumental

force in that process and for any prospect of social change. I conclude that the Scottish example provides grounds for optimism about the reflexive judge.

In this final chapter, I pull together the key themes and debates which are explored in this thesis. I outline the principal insights and contributions made in respect of these aims under three headings as follows. Section 1 discusses the advantages of narrative research for the study of judicial lives and work. Section 2 considers the insights about judicial culture and penal change. Section 3 evaluates the potential of the reflexive judge and the judicial habitus. I conclude with some observations about judicial independence, the dissemination of this research and the possible direction of future research.

Section 1 Narrative research and the study of judicial lives

Using narrative research to study the judicial role in criminal justice represents a break with conventional qualitative sentencing research. In contrast to the usual structured or semi-structured format of interviews, conducted with the aim of obtaining perspectives on specific criminal justice issues, the narrative approach to interviewing adopted here entails an open-ended, conversational encounter. There is, to my knowledge, no existing narrative study of the judiciary in Scotland, or indeed elsewhere, and its contribution is underscored by the scarcity of social science and criminological research about judicial work and by the very limited range of judicial biographical or autobiographical work available. In this context, the accounts of retired judges about the experience of judging provide an important contribution to our understanding of this dimension of Scottish penal practice.

The narrative interviews produced deeply contextual accounts with insight about the changing conditions of judging in recent Scottish penal history. Narrative interviews are a way of mapping ‘local knowledge’ of a particular world or field of practice, but they also have the capacity to connect with societal narratives and allow broader understandings about social life (Andrews, 2008). As a means by which members of a group affirm their identity, the stories judges provide about their field of practice are constructed from the collective memory of the group and institution, taking us beyond the experience of the individual. Alongside the ‘legitimate stories’ in

circulation here were other stories told more hesitantly (such as about judicial independence and judicial conduct), the tellers being unsure if there was any ‘other support’ for their views. In this way, the narrative interview can be regarded not only as a site for the distribution of ‘legitimate’ organisational stories, but also as a space for the production of new understandings about some of the canonical narratives of the institution. This allows connections to be made with some of the broader imperatives and concerns of criminal justice.

Told from the perspective of retirement, and reflecting the autobiographical function which narratives serve, some of these stories carry a sense of the way in which narratives allow people to ‘tidy things up’ (Sandelowski, 1991) as they seek coherence in the process of life review (Freeman, 1993; Riessman, 2004). This dimension was evident throughout the research process, from the enthusiasm with which some ‘took up’ my project (and attempted to steer it), to the resolve which permeated many accounts – the sense of ‘getting things off their chest’. Several useful insights were gained from this sense of insistence, such as *Judge M’s* reflection about the need for some degree of judicial isolation – the importance of always having ‘a little bit of ice in your heart’. Other pressing issues included the enduring ‘deep attitude’ about crime – perceived as a form of disdain; frustration about the limited scope of criminal justice to achieve change; and about the challenges of sentencing.

A predisposition to tell stories at particular biographical and historical moments (Polanyi, 1983; Sandelowski, 1991) may also explain the candour which many displayed when reflecting on their former lives, colleagues and experiences and their sometimes spontaneous statements about their perceived shortcomings as judges, their lack of confidence and anxiety about sentencing.

‘Homologies of position’

The choice of a narrative interview approach was significantly influenced by my experience as a prosecutor. Most obviously, the existence of a network of former colleagues and friends eased access to an occupational group which some researchers find impenetrable. Inevitably, this ease of access was based on trust and on my

position as some kind of legal ‘insider’, though the complex dynamics implied in this relationship called for critical reflection on my part about the relations of distance and engagement between researcher and researched. As Bourdieu (1999) suggests, research relationships purposefully built around certain ‘homologies of position’ can be the basis of ‘real affinities’ in the relationship, and this social proximity and familiarity certainly facilitated the conversational and open-ended nature of the interviews. That said, there was some lingering ambiguity about the precise nature of my ‘insider’ status in view of other hierarchies of legal status and because of my new position as a researcher. I believe this uncertainty produced some valuable distance and tension in the research relationship. Whereas Bourdieu (1999) appears to privilege this research relationship, believing that it brings the relationship as close as possible to its ‘ideal limit’, I concluded that it brought with it another set of tensions and dilemmas relating to the particular degrees of trust and distance which were appropriate in the circumstances. These ethical quandaries require to be addressed in the specific context they arise.

Unavoidably, the interpretation of personal accounts always carries with it the risk of offence or misunderstanding (Josselson, 2004:20) and I conclude that Ricoeur’s ‘rule of sincerity’ (Ricoeur, 2000:6) provides an ethical basis for the conduct of the research relationship itself. This entails an obligation of *personal authenticity*, and amid the complexity of relationships built on trust, serves to remind the researcher of the need to be as straightforward as possible when explaining their research intentions.

Several qualifications should be made in this discussion about narrative research. Firstly, not all participants were comfortable with the open structure of the interviews, and it is therefore important for the narrative researcher to be aware of this possibility and to be responsive where it occurs. In several interviews where I sensed the participant’s unease, I adopted a more structured format in order to keep the conversation flowing. Secondly, narrative data tends to consist of long, extended stories and explanations and this produces the interpretive dilemma of whether to preserve the integrity of these lengthy accounts by keeping them whole or whether, in the interest of producing coherent themes for discussion, to segment them. This

problem is exacerbated if some of the interview data is in a more structured format, such as shorter responses to direct questions. The compromise I reached was to both thematise *and* keep whole certain stories and accounts as appeared to fit the topic under discussion.

The strength of the narrative approach for studying judicial lives

The strength of the narrative approach for exploring the judicial world can be summarised in two key elements. Firstly, the biographical orientation of interviews provided rich, contextual insight about this relatively unknown area of penal practice. The personal stories about early legal careers and their experiences as judges suggest some of the ways in which the individual judge's life history is entangled with the institutional narratives of their profession. In the case of the judiciary, these canonical narratives are primarily about independence and impartiality. This highlights the on-going function of narratives, even in retirement, in building and maintaining cultural identity. This demonstrates the work of the habitus, building and shaping the durable dispositions of the individual and of the collective group. Importantly, however, those dispositions suggest some capacity for reflexivity and hence for change.

The personal narrative accounts provided here thus draw on the collective memory of the judiciary as an institution to allow useful insight about experiential aspects of judicial culture often hidden from view – dimensions such as the 'emotional life' of the organisation (Gabriel, 2000) and the personal challenges of the role. However, neither the individual nor the organisational accounts are offered here in a 'totalizing' sense, as if suggesting a wholly coherent or integrated system of judicial behaviour and disposition. They are offered instead for their indicative and persuasive power. As Thiele (2006) argues, narratives make an important contribution to ethico-political life by serving as a key source of 'mediated experience': they are informative and heighten perceptions of other worlds. This, rather than any conclusiveness, is the strength of the narrative approach:

Unlike conceptual arguments, narratives do not wield deductive power. They exhibit and clarify rather than decisively demonstrate. But they are not, for that reason, any less effective.

The second key strength of the narrative approach for studying the occupational life of the judiciary is its natural affinity with the study of cultures. As Bruner (2004) observes, one important way of understanding a culture is through its repertoire of ‘legitimate stories’. One of the principal contributions of this thesis is to develop the concept of *judicial culture* as a distinct field of penal inquiry. I discuss some of the insights gained in this thesis about judicial culture in the section to follow.

Section 2 Judicial culture

In Chapter 2, I proposed that *judicial culture* could usefully be a distinct field of inquiry in penality. Drawing on insights from the sociology of punishment I outlined the key features of a more fully cultural approach to the judicial role in criminal justice. This approach recognises the judiciary as a complex organisation grounded in cultural values, whose practices reflect conflict and compromise as well as homogeneity of attitudes and settled practices. As with the study of other occupational penal cultures, the study of judicial culture is also interested in the *unsettling* of fields of practice that has occurred alongside recent transformational shifts and continuities in penality.

Bourdieu’s conceptual framework of *theory of practice* and *habitus, field and capital* provides an important adjunct to the study of judicial culture. In its broad challenge to inherited categories of thought, this framework renders the ‘taken-for-granted’ problematic’ (Reay, 2004:437) and challenges reified accounts of the judicial role. I introduced the concept of the *reflexive judge* as an important vector of penal change – an actor capable of reflecting on some of the conditions of their own possibility and on the taken for granted categories of thought and perception integral to the field of penality. I argued that reflexivity of this sort could be the genesis of change and transformation of the judicial habitus.

Conditions of judging

Narrative inquiry facilitates the exploration of *judicial culture*: the distinct occupational culture in the sense of judges’ routines, informal practices, and the

shared (or separately held) meanings and understandings which may be less visible or known to ‘outsiders’. In particular, the biographical orientation of the interviews helps to capture *changing* sensibilities over the course of their careers as well as more settled practices and dispositions. This ‘long view’ allows unique insight about sensibilities which may be in a state of flux or which may even have changed. This sense of contingency is central to questions of penal change and reform.

The narrative interviews conducted in this project provide important ‘local knowledge’ (Geertz, 1983) about the social and political conditions of judging in this recent period of Scottish penal history. The relevance of family background to later judicial careers was explored in the context of what the young lawyers ‘brought to the Bar’. Background and income appeared to play a role in the type of work which might be offered to new lawyers – ‘acted invariably for the NCB rather than the NUM’ was one wry distinction offered – but all the judges expressed the view that these social factors were not relevant to the ability of an individual ultimately to be a fair judge, even sometimes confounding their own expectations and assumptions about several individuals. These views are in line with the core institutional narrative about judicial diversity: the social legitimacy argument that the judiciary should reflect society but not represent particular groups or partisan values. Although many judges believed that significantly greater diversity had been achieved over the course of their careers, the limited evidence which is available does not appear to support this degree of optimism. The lack of research about the composition of the judiciary is a major obstacle to proper debate of this issue.

Changing sensibilities

The early career experiences of these young lawyers proved influential in other ways, shaping attitudes about appropriate judicial conduct and providing models of behaviour which they adopted or rejected when becoming judges themselves in due course. Among the key judicial virtues these judges identified were courtesy (though not exclusively); being even-tempered and good-natured, kind, sensitive and understanding, fair, even having a sense of humour so long as this was not directed at the offender. Even allowing for the ‘logic of representation’ in account giving

(Czarniawska, 2004:49), a striking feature of this study was the strong characteristic of some judges' sentencing sensibilities. This suggested an inclusionary and empathetic attitude towards offenders, a marked orientation towards rehabilitation rather than retribution, and perhaps paradoxically for a judge, an attempt to be *non-judgemental*. Comparisons of judicial sensibilities across time are not easily made, and as Nelken (2010: 49) observes, this general endeavour (the comparison of 'ideas, values, aspirations and mentalities') is already engaging at the extreme end of cultural enquiry. However, these accounts may provide some clue to the largely unexplored question about the role of the judiciary in the continuity of a penal welfare ethos in Scotland, particularly the social work model aimed at the re-integration of offenders in the community rather than the use of prison. The 'long view' which biographical accounts facilitate provided additional insight about changes in judicial conduct over the course of their careers: as Judge D observed, there was now 'no room for the eccentrics'.

An important factor in this transformation of the habitus over time appears to be the resolve of individuals not to follow a pattern of conduct which they had observed, and disparaged, in their early years. The adoption of a different set of values was particularly striking regarding the judge's relationship with the offender: in Judge M's telling phrase, it became important to talk *to* the offender rather than about him. In these accounts, it is possible to detect a profound questioning of conventions about the appropriate level of judicial distance from, and engagement with, the offender. The involvement of judges in new forms of justice such as Drug Courts, restorative justice and mediation raises similar core issues about the judicial role and about judicial independence in particular. Of central importance here is that there was evidence of openness to new forms of justice, confounding Bourdieu's (1987:831) assumption that the 'entry ticket' for judges into the juridical field is the acceptance of the 'universalizing attitude' that conflicts can only be resolved juridically.

Several other important insights were gained from these accounts of early experience. The importance of training for judges today was emphasised by stories about these judges having received no training before taking up appointment; indeed, for some, having had no experience of criminal practice at all. *Judge B's* story about

the seemingly prosaic ‘14 steps’ of judging was telling for what it revealed about the pre-occupations of the novice judge and about the routines of court practice. Stories about gaining experience of criminal work through the Poor’s Roll were important in several ways. Firstly, they heighten awareness about the potential for unfairness to the accused and other court users - candidly admitted by most. Secondly, the stories suggested some more of what *Judge B* called the ‘deep social attitude’ towards crime. Further, there is some prescient insight about public access to high quality, free legal representation at a time of severe curtailment of these services. Finally, the stories provide insight about the form which judicial training could take, raising questions about promoting consistency in judicial standards of conduct but allowing individualism, about allowing judges to observe colleagues at work, and providing support for mentoring arrangements.

Occupational culture

Insight was gained about some of the informal practices of the judiciary, including discussions between judges about sentencing tariffs and ascertaining the ‘going rate’. Although helping to reduce the chance of being ‘unlucky in your judge’ (Waldron, 1998) and thus promoting consistency, this practice also raises questions about the ways in which dispositions are shaped and influenced, the conflict between interdependence and independence, and practical questions about its *ad hoc* and situational nature. Accounts of isolation and anxiety raise questions about pastoral care of judges and the tension this creates for their public and self-image.

Judicial culture and penal reform

Understanding judicial culture is particularly important for penal change. The history of sentencing reform in the UK points to the use of adaptive strategies by the judiciary to legislation deemed by them to be unnecessary or undesirable (see Ashworth, 1995; also Hutton and Tata, 2010 regarding resistance to innovation and reform). Ashworth (1995) characterises this practice of resisting legislative change and slowing its implementation as a ‘drag co-efficient’ on the process. The necessary conditions for effective change in sentencing practice almost certainly, therefore, include changes not only at a statutory level but at the level of the judicial habitus.

As analysts of courts and judges in authoritarian and transitional regimes observe, the mere empowerment of judges in formal or statutory terms (through appointment procedures and role designations which promote institutional independence) does not *by itself* produce judges who are defenders of democratic values. For this to occur, judges must *acquire* a range of occupational attributes including a measure of distance (the basis of judicial independence) and some connection to communitarian and societal values. Informal practices and broader cultural influences therefore have a determinative impact on the formation and shape of judicial qualities (Solomon, 2007). Knowledge and insight of these cultural practices and influences is therefore central to the task of imagining or promoting change, and requires understanding of the history and practice of the judiciary as an occupational group.

Section 3 The reflexive judge

Judicial narratives: 'Agent-based visions'

As I discussed in Chapter 4, using actors' subjective accounts to understand the penal world raises key questions about agency and structure, and the weight to be attached to judicial discourse about penal practice. Some criticism of subjectivism persists in the analyses of scholars such as Wacquant (2011) who are critical of 'agent-based visions' which lead only to 'internalist' solutions rather than structural visions and institutional remedies.¹ Wacquant asserts the analytical importance of 'organizational hardware' over 'mental software' to achieve solutions and employs a 'big-picture' view of penalty to remind us that criminal justice is 'a core capacity designed not to stem offending but to manage urban marginality, stage political sovereignty and achieve legitimacy in the eyes of citizens' (2011:446-7).

Wacquant's structural analysis of the function of criminal justice is important for its insistence on the material realities and effects of penal practices, and for the connections he makes between those practices and broad changes in the structure and politics of society. However, this critique ties judges almost exclusively to what Williams (1983) calls the 'state instrumentality' aspect of their role. This is a negative conception of law and judicial power and comes close to misunderstanding law's balancing role in society, politics, and government (Wickham, 2006).

The instrumental judge: faith and suspicion

I have argued in Chapters 2 and 3 that *suspicion* of the sentencing judge plays an important part in criminological scholarship, alerting us to the duality of the role in criminal justice and to some of the contradictions and ambiguity of the power to punish. This is reflected in the combined interpretive position which I adopted, based on the hermeneutics of faith and suspicion. This allows some of the complexity of the judicial role in criminal justice to be considered: questions about motivation, sensibilities and interests. There may, for example, be good reason to be sceptical about the inclusionary and empathetic attitudes towards offenders expressed by many of the judges in this research; this sits oddly with the awareness of judges that punishment practices represent a blunt form of social control, are largely ineffective and can cause harm. Yet, as Garland (1992) observes, the expression of humanitarian and compassionate sentiments by judges (or other penal actors) should not be too readily dismissed as mere rhetoric or ideology designed to legitimise the exercise of their power: sensibilities can produce real changes in penal practice which reduce suffering and lessen harm.

A similar observation can be made about judicial independence. A critical interpretation of this doctrine represents it, importantly, as a cultural practice which sustains legal institutions and which allows agents to control or deny the indeterminacy of its parameters and practices. These are practices which are ‘invented, defended and renewed’ in their routine performance (Wald, 1995: 137). Yet one of the tasks of scholarship is to explore those explanations and strategies of renewal and to keep open the questions of how actors frame the meanings and values they bring to bear in practice (Wald, 1995). It is relevant, therefore, to acknowledge that doctrines such as judicial independence may have important meanings and effects for practitioners which evade empirical evaluation (Berman, 2003). These meanings include the beliefs of some judges here that the ‘traditions’ of the institution (wigs, gowns and raised benches) can have a transformative effect on the judges themselves, strengthening their sense of independence. In this way, too, ethnographic studies which rely on subjective accounts of actors can be as relevant a mode of critical engagement as structural analyses.

Too much suspicion?

Discretionary power is distrusted partly because it is ‘instinctive’ and therefore considered irrational or even capricious. There is a broad debate about the nature of discretionary power in sentencing which I have only touched upon in this thesis, but which involves some of the questions about faith and suspicion of judgement that I have outlined in Chapter 7. I have drawn attention to some of the developments in cognitive science which challenge the basis of this suspicion in so far as it relates to its perceived irrationality. This research supports a more rounded conception of judgement which recognises the interconnectedness of rationality, intuition and emotions. Moreover, there is a cautionary tale in Tamanaha’s (2010) observation that the end-point of realist suspicion about judgement is often a retreat to legal formalism and a ‘ratcheting up’ of its demands towards mechanical and/or rule-bound sentencing frameworks.²

One further consequence of the focus on *suspicion* of judging is that quieter aspects of judgement are overlooked: questions about leniency, tolerance and moderation and about faith (or trust) in judgement. Liebling (2001: 47) questions this general oversight when she wonders:

Why are we not fascinated by the under-use as well as the over-use of power in real social practices? To what extent do we really understand the complexities of using authority [...]?

New visions: shifting boundaries of the judicial role

Glimpses of some shifting role boundaries are gained from the accounts of judges in this study, particularly in relation to the Sheriff Courts where the ‘social services’ function is greater than in the High Court. Some of the complexities of changing judicial authority have recently been questioned, beyond Cover’s general urging of judges to stop ‘circumscribing the nomos’ and to ‘invite new worlds’ (1983: 68). Stevens (2002) traces some practical and psychological transformations in the English judiciary, and Henham (2009) argues that the judiciary is now so distanced from the ‘arm of the state’ that its role in sentencing is open for re-negotiation. Henham speculates that if judges were able to operate beyond retributive justice practices, they could play a significant role in developing a new normative

framework. Dzur and Mirchandani (2007), looking at the development of different criminal justice models such as the Drug Court with their emphasis on debate and participation, point to the additional role the judiciary could play in fostering and being responsive to deliberations of this kind (though they question whether current configurations of the judicial role would allow this involvement). Sarat and Kearns (1995) are less optimistic about the place of judges in the building and maintenance of a tolerant society and alternative normative possibilities. The price to be paid for the judge's capacity to punish is, they believe, a disposition 'hostile to the visions of other normative orders' (1995: 249).

These critiques suggest that exclusive emphasis on the instrumental and negative power of the sentencing judge is increasingly in need of re-appraisal. Although judges cannot enter the sphere of political choices or directly express any opinion on the balances and compromises of the 'penal equation', this narrative study provides grounds for optimism that judicial dispositions may be more open to alternative visions and 'new worlds' than the hegemonic model of judging would imply.

The reflexive judge and the judicial habitus

This approach brings the 'reflexive judge' to the foreground of the discussion and brings into sharp relief Wacquant's (2011: 446) relegation of 'mental software' issues - 'textual' matters of sensibility and disposition - to secondary importance.³ The concept of *habitus* is still sometimes interpreted in a deterministic, structural way which allows little room for agency or change at the level of the habitus. This interpretation attaches more importance to position than disposition, and imagines practitioners to be caught in a continuous loop of unconscious and largely unreflexive practice. However, as I argued in Chapter 4, it is possible to observe in Bourdieu's later work *The Weight of the World* (1999) a clear resolution in favour of the reflexive participant who is capable of reflecting on the objective conditions of their practice. This is significant because it provides strong grounds for re-imagining the habitus as a locus for change.

Importantly, however, habitus carries the genesis of cultural change only if practitioners have the capacity to reflect on some of the conditions which structure

practice in a given field, and thus constrain them. In these accounts of their early years of legal training and judging, of models of judicial conduct and of their conceptions of crime, the criminal and criminal justice, we can begin to trace some of those conditions of practice as well as the formation and consolidation of judicial dispositions in response to the circumstances they encounter. We can also begin to see ways in which some judges recognise factors which operate to shape and constrain their practice.

Some of the factors which might limit judicial agency and thus the scope for change include relational patterns of gender and class, their role in punishment, the tendency to adopt reified concepts of law and the judicial role, the reluctance to signify, and the limited scope for pursuing any form of social justice. In the accounts given there was some evidence of capacity and willingness to reflect on those apparently ‘invisible relational patterns operating behind the backs of agents’ (Wacquant, 2007) and on some of the ‘unthought categories of thought’ in the field of penalty – such as the normative framework of criminal justice, judicial independence, the juridical monopoly on the resolution of disputes, and on the ‘social question’.

These are some of the ‘gains’ of subjective accounts of penalty – interpretive accounts of strategies, discourses and of actual activities in the field of practice. As Valverde (2010:120) observes, these are practices that need to be described in their specificity so that we know ‘enough about what is actually going on’. Enquiry of this type helps us distinguish ‘one battle from another’ (Valverde, 2010) - and to understand why, in *Judge B’s* words, it is thought necessary for the judge to be ‘above the battle’.⁴

The reflexive judge: some implications

I conclude this chapter with some brief observations about the implications of this research, and indications for future research. I have argued in this thesis for an understanding of the judicial habitus that does not imply a conceptual straightjacket but allows the possibility (though not inevitability) of judicial reflexivity, diversity of disposition and some openness to ‘new worlds’. I have also suggested that one precondition of cultural change at the level of the judicial habitus may be the

capacity of practitioners to engage in reflexivity about the social context of sentencing. Some passing recognition of this quality can be found in the criteria for judicial appointment in Scotland which include ‘understanding of people and society’ (Judicial Appointments Board for Scotland, 2013), and in judicial training programmes which include guidance and information about ‘social context’.⁵ Acknowledging the role of sentencing in the normative ordering of social life and the need for democratic deliberation about penalty, it may be thought important to facilitate the participation of the judiciary in this debate at some level which does not compromise their independence – or at least, for their training to provide multiple perspectives on that ordering. Providing alternative perspectives on social relations serves to challenge the partiality and relative blindness of dominant elites:

Those in structurally superior positions not only take their experience, preferences, and opinions to be general, uncontroversial, ordinary, and even an expression of suffering or disadvantage ... but also have the power to represent these as general norms.

(Young, 1996:116)

Judges and criminology

Keating (1993) has described the ‘closing off’ institutional response to social inquiry whereby elites in a given field operate in ways which limit access and circumscribe social research. Although this may reflect the recent history of sentencing research in other jurisdictions, this study suggests a different response in Scotland. Many of the judges spoke at length about what they gained from their attendance at conferences and involvement in penal reform organisations, and the usefulness of this information for their work in criminal justice. It may be, as I suggested in Chapter 6, that the judiciary’s use of research has a strategic element insofar as it allows them to explain and legitimate their authority to wider audiences, and it may also suggest the use of research to re-negotiate and re-legitimate practices that might otherwise be transformed by policy (McNeill, 2004; see also Tata, 2000; Tata and Hutton, 2003). The likely mix of motivations in play does not, however, detract from the persuasive case for fostering critical engagement with social science research.

Judicial independence constrains the extent to which judges can participate in the type of civic events or debates that might foster critical reflexivity, and this points to the need to provide a range of opportunities for them to engage with research and public deliberation about penal matters. The insight from several judges that attendance at conferences such as those of SASO allowed them to ‘absorb all sorts of ideas without saying you agree with them’ underscores the continuing importance of strong organisational capacity to provide forum of this sort. It also points to the importance of strong academic institutional capacity to provide input to judicial training programmes to allow the dissemination of research findings and new theoretical insights in settings where judges can actively debate and discuss.

Norrie (2005) notes the ‘iron grip’ of the penal equation on policy and debate throughout the 20th century, despite attempts of penal reformers to move the debate beyond these ‘tired rationales’ and notwithstanding recent incursions into more relational forms of justice such as restorative justice and drug courts, which remain on the periphery of criminal justice. The openness of judges in this study to consider alternative forms of resolving criminal justice disputes suggest that judges may be a source of untapped potential not only in seeking solutions to existing problems but also in re-imagining the future.

Judicial Independence

My final observation is that judicial independence is a troubled and misunderstood ‘master narrative’. This key organising principle is central to the legitimacy of the sentencing judge in both its ‘state instrumentality’ dimension and its ‘impartial adjudicator’ aspect. Notwithstanding the ‘Olympian’ (Lacey, 2008) version of judicial independence often invoked by judges in the UK to ward off perceived government interference in judicial discretion, this study highlights other uses of the concept in daily practice, ways which enable judges to perform their various routine functions. This role conception is still mindful of the need for judges to maintain ‘distance’ from their audiences but increasingly questions the nature and scope of that relationship, particularly in relation to the offender. This aspect of the doctrine is

little understood and there is scope for further research to explore the ways in which this master narrative, embodied deep in the habitus, is explained and enacted in practice, and adapts to new ways of performing justice.

Legislative reforms such as sentencing guidelines are inclined to push the judiciary into one of its ‘mythological hideouts’ (Stevens, 2002: 137): the strong, idealized ‘sovereign self’ version of judicial independence. The tendency of criminological scholarship to reproduce somewhat one-dimensional explanations and portrayals of judicial work in criminal justice increasingly runs the danger of making judges appear victims of their own mythology. The study of judicial culture offers potential for capturing some of the greater complexity and diversity of the role, thereby providing insight about change and adaptation.

¹ These remarks were made by way of response to questions raised by Loader and Sparks (2010) about the production and circulation of criminological knowledge.

² A similar observation can be made in the UK where several commentators who sought to expose the intrusion of the political in the judiciary concluded that a ‘return’ to formalism and ‘politics-free’ judging is the solution (Griffith, 1997; Rozenberg, 1997). The irony may be that the reader is already persuaded by their accounts that this is no longer a realistic prospect.

³ There is an important difference in emphasis here between Wacquant, who appears to be privileging structural accounts of penalty, and his mentor Bourdieu who understood the relationship between structure and agency as one of ‘mutual constitution and correspondence’ (Wacquant, 2007) and who insisted that neither account provides a sufficient explanation of social action in itself.

⁴ Indeed, Valverde (2010:118) uses the example of judicial independence as a governing practice that requires to be specified in its own right – not as a secondary, ‘on the surface’ issue, or as Wacquant (2011: 445) suggests, one of the ‘smaller, more technical issues’.

⁵ This criteria of ‘understanding of people and society’ is found under the rubric ‘Personal and Judicial Qualities’. The other qualities include integrity, independence of mind and moral courage, fairness and impartiality, commonsense, responsible attitude and sound temperament, courtesy and consideration, and the ability to command respect.

Bibliography

- Anderson, A., and Spohn, C. (2010). 'Lawlessness in the federal sentencing process: A test for uniformity and consistency on sentencing practices.' *Justice Quarterly* 27(3); 362-393.
- Andrews, M., M.D. Sclater, C. Squire and A. Treacher (eds) (2000). *Lines of Narrative: Psychosocial perspectives*. London: Routledge
- Andrews, M. (2007) *Shaping History*. Cambridge: Cambridge University Press.
- Andrews, M., C. Squire and M. Tamboukou. (eds). (2008) *Doing Narrative Research* London: Sage.
- Anleu, S.R & K.Mack (2005). 'Magistrates' Everyday Work and Emotional Labour'. *Journal of Law and Society*, 32; 4; 590-614.
- Anthony, G., J. S. Bruner and A. G. Amsterdam. (2002) *Minding the Law*. Cambridge, MA: Harvard University Press.
- Armstrong, S. (2009) Review: Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*. *The Edinburgh Law Review* 13; 550-551.
- Armstrong, S. and McNeill, F. (2009) 'Choice versus crisis: how Scotland could transform thinking about prisons and punishment', *Criminal Justice Matters*, 75: 1, 2-4.
- Ashworth, A. (1995a) 'Reflections on the Role of the Sentencing Scholar' in Clarkson, C. and R. Morgan (eds). *The Politics of Sentencing Reform*. Clarendon Press: Oxford.
- Ashworth, A. (1995) *Sentencing and Criminal Justice* London: Butterworths
- Ashworth, A. (2000) *Sentencing and Criminal Justice*. London: Butterworths
- Ashworth, A. (2003) 'Sentencing and Sensitivity: A Challenge for Research'. In Ashworth, A. and Zedner, L. (eds) *The Criminological Foundations of Penal Policy*, Oxford University Press: Oxford.
- Ashworth, A. and Player, E. (2005). 'Criminal Justice Act 2003: The Sentencing Provisions' *The Modern Law Review* 68; 5; 822-838
- Ashworth, A. (2010). *Sentencing and Criminal Justice*. Cambridge University Press: Cambridge.
- Ashworth, A. (2011) 'Criminal Justice not Criminology?' In Bosworth, M. and C. Hoyle. *What is criminology?* Oxford University Press: Oxford.
- Atkinson, P. (1997). 'Narrative Turn Or Blind Alley?' *Qualitative Health Research*: 7; 325-344.
- Atkinson, P. and Delamont, S. (2006) 'Rescuing narrative from qualitative research'. *Narrative Inquiry* 16; 1; 164-172.
- Baldwin, J. (2000). 'Research on the Criminal Courts' in R.D.King and E. Wincup. (eds). *Doing research on Crime and Justice*. Oxford University Press: Oxford.
- Baron, J.B. and B. Epstein (1997) 'Is Law Narrative?' *Buffalo Law Review* 45; 141-187.
- Barthes, R. (1977). *Elements of Semiology* New York: Hill and Wang.
- Barton, A. (1999). 'Sentenced to treatment?: Criminal justice orders and the health service'. *Critical Social Policy* 19; 4; 463-483.
- Baum, L. (2006). *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton University Press: Princeton.
- Bauman, Z. (2000a). *Liquid modernity*. London: Polity Press.
- Bauman, Z. (2000b). 'Social Issues of Law and Order', *British Journal of Criminology* 40(2): 205-21.
- Baumgartner, M.P (1995) 'The Myth of Discretion' in Hawkins, K. (ed) *The Uses of*

- Discretion* Oxford: Oxford University Press.
- Beatson, The Hon. Sir Jack (2008) '*Judicial Independence and Accountability: Pressures and Opportunities*'. www.judiciary.gsi.gov.uk
- Becker, H. S. (1966) Whose Side Are We On? 14 *Social Problems*. 239-247.
- Beckett, K. (1997) *Making Crime Pay: The Politics of Law and Order in the Contemporary United States* Oxford: Oxford University Press.
- Bell, A. S. (2005). *Lord Cockburn: selected letters*. Edinburgh: John Donald.
- Berman, P. S. (2001) 'Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis.' *Yale JL & Human*. 13; 95-139.
- Berman, D.A. (2008). 'Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities'. *Harvard Law and Policy Review Online*; 3; 1-20.
- Berman, D.A and S.L.Chanenson, (2006). '*The Real (Sentencing) World: State Sentencing in the Post-Blakely Era*', *Ohio State Journal of Criminal Law*; 4; 27-35.
- Berns, S. (1999). '*To Speak as a Judge: Difference, Voice and Power*'. Dartmouth: Ashgate.
- Beyens, K. and V.Scheirs. (2010). 'Encounters of a different kind: Social enquiry and sentencing in Belgium'. *Punishment & Society*. 12: 309-328.
- Biernacki, P., and Waldorf, D. (1981). Snowball sampling: Problems and techniques of chain referral sampling. *Sociological Methods & Research*, 10 (2), 141-163.
- Black, D. (1976) *The Behavior of Law Mass*, US: Academic Press.
- Bosworth, M. and C. Hoyle (eds). (2011) *What is Criminology?* Oxford: Oxford University Press.
- Bottoms, A. (1998) 'Five Puzzles in von Hirsch' Theory of Punishment'. In Ashworth, Andrew, and Martin Wasik. *Fundamentals of Sentencing Theory: Essays in Honour of Andrew Von Hirsch*. Oxford: Oxford University Press.
- Bottoms, A. (2000) 'The Relationship Between Theory and Research in Criminology'. In King, R.D. and E. Wincup. *Doing Research on Crime and Justice* Oxford: Oxford University Press.
- Bouhours, B. and K. Daly (2007) Youth sex offenders in court: An analysis of judicial sentencing remarks. *Punishment & Society* 9; 4; 371-394.
- Bourdieu, P. (1972). *Esquisse d'une theorie de la pratique: precede de trois etudes d'ethnologie Kabyle*. Geneva: Editions Droz.
- Bourdieu, P. (1973) 'The three forms of theoretical knowledge'. *Social Science Information* 12 (1) 53-80.
- Bourdieu, P. (1977). *Towards a Theory of Practice*. Cambridge, UK: Cambridge University Press.
- Bourdieu, P. (1977). *Outline of a Theory of Practice*. Cambridge, UK: Cambridge University Press.
- Bourdieu, P. (1980). *The Logic of Practice*. Cambridge, UK: Polity Press.
- Bourdieu, P. (1987) 'The Force of Law: Towards a Sociology of the Juridical Field', *Hastings Law Journal* 38: 905-53.
- Bourdieu, P. (1987/1994). *In Other Words: Essays Towards a Reflexive Sociology*. Cambridge: Polity Press.
- Bourdieu, P. (1990a). *The Logic of Practice*. Cambridge: Polity Press.
- Bourdieu, P. (1990b). *In Other Words: essays towards a reflexive sociology*. Cambridge: Polity Press.
- Bourdieu, P, and L. J. Wacquant. (1992). *An invitation to reflexive sociology*. Chicago: University of Chicago Press.
- Bourdieu, P. (1993) *Sociology in Question* London: Sage.
- Bourdieu, P. (1996a). 'Understanding'. *Theory, Culture and Society*; 13; 17-37.
- Bourdieu, P. (1996b) *On Television*. London: Pluto.
- Bourdieu, P. (1998). *Practical Reason: on the theory of action*. Cambridge: Polity

- Press.
- Bourdieu, P. *et al.* (1999). *The Weight of the World: Social Suffering in Contemporary Society*. Cambridge: Polity Press.
- Bourdieu, P. (2000) *Pascalian Meditations*. Cambridge: Polity Press.
- Boyd, C., L. Epstein and A. D Martin. (2010) ‘Untangling the Causal Effects of Sex on Judging’. *American Journal of Political Science*, 54; 2;. 389–411.
- Box, S. and Hale, C.(1985). ‘Unemployment, Imprisonment and Prison Overcrowding’. *Contemporary Crises*, 9; 209-228.
- Braithwaite, J. (2003). ‘What’s wrong with the sociology of punishment?’ *Theoretical Criminology* 7(1): 5–28.
- Brand, D. W. R. (1995) *An Advocate's Tale: The Memoirs of Lord Brand*. Edinburgh: Scottish Cultural Press.
- ‘Breaking the Cycle’ Green Paper Ministry of Justice
<http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf>
- Bremer, C. F. (2003) ‘Reducing judicial stress through mentoring.’ *Judicature* 87; 244.
- Brown, D. (2008-2009). ‘Searching for a Social Democratic Narrative in Criminal Justice’, *Current Issues in Criminal Justice*; 20; 453-456
- Brown, D. (2007). ‘Popular Punitiveness, the Rise of the ‘Public Voice’ and Other Challenges to Judicial Legitimacy’. <http://law.anu.edu.au/nissl/Brown.pdf>.
- Brown, R. H. (1992) *Society as text: Essays on rhetoric, reason, and reality*. Chicago: University of Chicago Press.
- Brubaker, R. (1985) ‘Rethinking classical theory: The sociological vision of Pierre Bourdieu. *Theory and society* 14; 745-775.
- Bruner, J. (1990). *Acts of Meaning* Harvard University Press: Cambridge, MA.
- Bruner, J. (1991). The narrative construction of reality. *Critical Inquiry* 18; 1-21.
- Bruner, J. (1992) ‘A Psychologist and the Law’. *New York Law School Law Review* 37; 173-183.
- Bruner, J. (2004) ‘Life as Narrative’. *Social Research* 71; 3; 691-710.
- Burgess, S. R (1993). ‘Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, &Judicial Supremacy’ *Polity*; 25; 3; 445-459.
- Burnside, S. (2009) ‘Griffith, Isaacs and Australian Judicial Biography-An Evolutionary Development.’ *Griffith Law Review* 18; 151-184.
- Calhoun, C.(1993) ‘*Habitus, field, and capital: The question of historical specificity.*’ Cambridge: Polity Press.
- Campbell, E.(1999). ‘Towards a Sociological Theory of Discretion’. *International Journal of the Sociology of Law*, 27; 79- 101.
- Carlen, P. (1976) *Magistrates Justice* Martin Robertson: Oxford.
- Carlen, P. (2001). ‘Death and the Triumph of Governance? : Lessons from the Scottish Women’s Prison’. *Punishment and Society*, 3; 459-471.
- Carlen, P and J. Tombs. (2006) ‘Reconfigurations of penalty: The ongoing case of the women’s imprisonment and reintegration industries’. *Theoretical Criminology* 10; 337
- Cavadino, M. and J. Dignan. (2007). *The Penal System*. London: Sage.
- Center on Sentencing and Justice (2009), *The Fiscal Crisis in Corrections: Rethinking Policies and Practices*, New York: Vera Institute of Justice.
- Chamberlain, J. and M. K. Miller. (2009) Evidence of secondary traumatic stress, safety concerns, and burnout among a homogeneous group of judges in a single jurisdiction. *Journal of the American Academy of Psychiatry and the Law Online* 37; 2; 214-224.
- Chan, J. (1996). ‘Changing Police Culture’. *British Journal of Criminology* 36 (1): 109-134.

- Chase, D. and P.F. Hora. (2000) 'The implications of therapeutic jurisprudence for judicial satisfaction.' *Court Review* 37; 1; 12-20.
- Chase, O. and J.Thong. (2012) 'Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors.' *Yale Journal of Law and the Humanities* 24; 221-245.
- Clayton, C. (1998) *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press.
- Clear, T. R. (2005). 'Places not Cases?: Re-thinking the Probation Focus'. *The Howard Journal of Criminal Justice* 44; 2; 172-184.
- Cohen, A. K. (1955) 'Delinquent boys: The subculture of the gang.' *London, Colther-Macmillan* (1955).
- Cohen, S. (1985) *Visions of Social Control* Cambridge: Polity Press.
- Coleman, R. and J. Sim (2005). 'Contemporary statescraft and the 'punitive obsession': a critique of the new penology thesis' in Pratt, J. *The New Punitiveness* Cullompton: Willan.
- Couldry, N. (2005) 'The individual point of view: Learning from Bourdieu's the weight of the world.' *Cultural Studies↔ Critical Methodologies* 5; 3; 354-372.
- Cover, R. (1975). *Justice Accused: Antislavery and the Judicial Process*. New Haven, Conn.: Yale University Press.
- Cover, R. M. (1983) 'Foreword: Nomos and narrative.' *Harvard Law Review* 97: 4-34.
- Cover, R. (1986). 'Violence and the Word'. *Yale Law Journal* (95); 1601-1629.
- Cover, R. (1986). 'The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role.' *Georgia Law Review* (20); 815-834.
- Cowan, D. and E.Hitchings (2007) 'Pretty Boring Stuff': District Judges and Housing Possession Proceedings *Social & Legal Studies* 16; 3; 363-382.
- Crawley, E. M. (2002). 'Bringing It All Back Home? The Impact Of Prison Officers' Work On Their Families'. *Probation Journal*. 49; 4; 277-286.
- Crewe, B. (2006) 'Male prisoners' orientations towards female officers in an English prison' *Punishment & Society*. 8; 4; 395-421.
- Crewe, B. (2007) 'Power, Adaptation and Resistance in a Late-Modern Men's Prison'. *British Journal of Criminology* 47; (2): 256-275.
- Cross, F.B. (2003) ' Thoughts on Goldilocks and Judicial Independence'. *Ohio State Law Journal*, 64; 195.
- Craib, I. (2004). Narratives as bad faith. In M. Andrews, S.D Sclater, C. Squire and A. Treacher (eds). *Uses of Narrative*. New Jersey: Transition.
- Crawley, E. M. (2002). 'Bringing It All Back Home? The Impact Of Prison Officers' Work On Their Families'. *Probation Journal*. 49; 4; 277-286.
- Crewe, B. (2006) 'Male prisoners' orientations towards female officers in an English prison' *Punishment & Society*. 8; 4; 395-421.
- Crewe, B. (2007) 'Power, Adaptation and Resistance in a Late-Modern Men's Prison'. *British Journal of Criminology* 47; (2): 256-275.
- Croall, H.,G. Mooney and M. Munro. (2010) (eds). *Criminal Justice in Scotland*. Willan: Oxon.
- Cross, F. B. (2009) 'Collegial Ideology in the Courts.' *Nw. UL Rev.* 103; 1399-1426.
- Czarniawska, B. (2004) *Narratives in Social Science Research* London: Sage.
- Davis, D. M. (2000) 'Adjudication and Transformation: Out of the Heart of Darkness.' *Cardozo L. Rev.* 22; 817-835.
- Delgado, R.(1989), 'Storytelling for Oppositionists and Others: A Plea for Narrative, *Michigan Law Review*, 87; 8.
- Denzin, N.K. (1978) *The Research Act: A Theoretical Introduction to Sociological Methods*. McGraw-Hill: New York.

- Desmond, M. (2004). 'Methodological challenges posed in studying an elite in the field'. *Area*, 36; 3; 262-269.
- Dexter, L.A. (1970). *Elite and Specialized Interviewing*. Evanston: Northwestern University Press.
- Denzin, N.K. (1989) *Interpretive Interactionism*. Thousand Oaks, California: Sage.
- Denzin, N. K. (2000) Preface. In M. Andrews *et al.* (Eds). *Lines of Narrative: Psychosocial perspectives*. New York: Routledge.
- DiMaggio, P. (1979) 'On Pierre Bourdieu.' *The American Journal of Sociology* 84; 6; 1460-1474.
- Downes, D. (1988). *Contrasts in Tolerance: Post-War Penal Policy in The Netherlands and England and Wales*. Oxford University Press: Oxford.
- Downes, D. (2011) Review Symposium on Nicola Lacey's *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*. 'Against penal inflation: Comment on Nicola Lacey's *The Prisoners' Dilemma*' *Punishment & Society* 13: 114-120.
- Drakeford, M. and M. Vanstone (2000). 'Social Exclusion and the Politics of Criminal Justice: A Tale of Two Administrations'. *The Howard Journal of Criminal Justice* 39; 4; 369-381.
- Duff, R.A. and D. Garland. (1994) 'Introduction: Thinking about Punishment' in *A Reader on Punishment*, Duff, R.A. & D. Garland (eds). Oxford: Oxford University Press.
- Duff, R.A. (2005). 'Guidance and Guidelines'. *Columbia Law Review*; 105; 1162.
- During, S. (1989) 'After Death: Raymond Williams in the Modern Era.' *Critical inquiry* 15.4: 681-703.
- Durkheim, E. (1967). *The Division of Labour in Society* New York: Free Press
- Dworkin, R. (1986) *Law's Empire*. Cambridge, Mass.: Harvard University Press.
- Dyzenhaus, D. (1998). *Judging the Judges, Judging Ourselves*. Oxford: Hart.
- Dzur, A. W., and A. Wertheimer. (2002) 'Forgiveness and public deliberation: The practice of restorative justice.' *Criminal Justice Ethics* 21;1; 3-20.
- Dzur, A. W. and R. Mirchandani. (2007) 'Punishment and democracy: The role of public deliberation'. *Punishment and Society*; 9; 151-175.
- Easton, S. and C. Piper. (2005) *Sentencing and Punishment*. Oxford University Press: Oxford.
- Edwards, H.T. (1998) 'Collegiality and Decision Making on the DC Circuit.' *Virginia Law Review* 1335-1370.
- Eells, T. D., and C. R. Showalter. (1994) 'Work-related stress in American trial judges.' *Journal of the American Academy of Psychiatry and the Law Online* 22; 1; 71-83.
- Elias, S. (2005). The Rt. Hon. Dame, Chief Justice of New Zealand. '*Criminology in the Age of Talk-back*'. Available at <http://www.courtsofnz.govt.nz/from/speeches-and-papers>.
- Epstein, L. and Knight, J. (2008) 'Courts and Judges', in Sarat, A. (ed) *The Blackwell Companion to Law and Society* Blackwell: Oxford.
- Erds, D. (2009). 'Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand'. *Law & Social Inquiry* 1; 95-127.
- Erez, E, and L. Roeger. (1995) 'The effect of victim impact statements on sentencing patterns and outcomes: The Australian experience.' *Journal of Criminal Justice* 23; 4; 363-375.
- Erikson, K. (1966) *Wayward Puritans* New York: John Wiley and Sons.
- Ewick, P. and S. Silbey. (1995), 'Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative', *Law and Society Review*; 29; 2.

- Ezzy, D. (1998). 'Theorizing Narrative Identity: Symbolic Interactionism and Hermeneutics'. *The Sociological Quarterly*; 39; 2; 239-252.
- Farnell, B. (2000). 'Getting out of the Habitus: An Alternative Model of Dynamically Embodied Social Action'. *The Journal of the Royal Anthropological Institute*, 6; 3; 397-418.
- Fearn, N. E. (2005) 'A multilevel analysis of community effects on criminal sentencing.' *Justice Quarterly* 22; 4; 452-487.
- Feeley, M. M. and J. Simon. (1992) 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications.' *Criminology* 30; 449-74.
- Feeley, M.M. & E.L Rubin (1998). '*Judicial Policy Making and the Modern State: How the Courts reformed America's Prisons*'. Cambridge: Cambridge University Press.
- Feeley, M. M., and E. L. Rubin. (2000) *Judicial policy making and the modern state: How the courts reformed America's prisons*. Cambridge: Cambridge University Press.
- Feenan, D. (2008). 'Women Judges: Gendering Judging, Justifying Diversity'. *Journal of Law and Society*; 35; 4; 490-519.
- Fenno, R. F. (1986). 'Observation, Context, and Sequence in the Study of Politics'. *Political Science Review* 80; 3-15.
- Fielding, N. G. (2011). 'Judges and Their Work'. *Social and Legal Studies*, 20(1); 97-115.
- Fisher, L. (1992). 'Hermeneutics of Suspicion and Postmodern Paranoia: Psychologies of Interpretation'. *Philosophy and Literature*, 16:1; 106-114.
- Flyvbjerg, B. (2002) *Making social science matter: Why social inquiry fails and how it can succeed again*. Cambridge: Cambridge University Press.
- Flyvbjerg, B., T. Landman, and S.Schram, (eds) (2012) *Real social science: Applied phronesis*. Cambridge: Cambridge University Press.
- Foucault, M. (1977) *Discipline & Punish*. London: Penguin.
- Fowler, B. (1996). 'An Introduction to Pierre Bourdieu's Understanding'. *Theory Culture Society*; 13; 1-16.
- Frank, J. (1930) '*Law and the Modern Mind*' New York: Brentano.
- Frank, J. (1940) 'The cult of the robe.' *Saturday Review* 13; 12-13.
- Frank, A. W. (2000). 'The Standpoint of Storyteller'. *Qualitative Health Research* 10; 354- 365.
- Frank, A. W. (2002). Why study people's stories? The dialogical ethics of narrative analysis. *International Journal of Qualitative Methods*, 1 (1); 109-117.
- Frankel, M.E. (1973) *Criminal Sentences: Law Without Order*. New York: Hill and Wang.
- Franko Aas, K. (2005). *Sentencing in the Age of Information*. London: Glasshouse.
- Freeman, M.P. (1993) *Rewriting the self: History, memory, narrative* London and New York: Routledge.
- Freeman, M. (2002) The presence of what is missing: Memory, poetry and the ride home. In R. J. Pellegrini and T.R.Sabin (Eds), *Critical incident narratives in the development of men's lives*. New York: Haworth Clinical Practice Press.
- Gabriel, Y. (1991) 'On Organizational Stories and Myths: Why it is easier to slay a dragon than to kill a myth.' *International Sociology* 6; 4; 427-442.
- Gabriel, Y. (2000) *Storytelling in Organizations: Facts, Fictions and Fantasies*. Oxford: Oxford University Press
- Garland, D. (1990) *Punishment and Modern Society* Oxford University Press: Oxford
- Garland, D. (1991) 'Sociological Perspectives on Punishment'. *Crime and Justice*; 14; 115-165.

- Garland, D. (1992) 'Criminological Knowledge and Its Relation to Power-Foucault's Genealogy and Criminology Today.' *British Journal of Criminology* 32; 403-422.
- Garland, D. and R. Sparks. (2000). *Criminology and Social Theory*. Oxford: Oxford University Press.
- Garland, D. (ed) (2001a). *The Culture of Control*. Oxford: Oxford University Press.
- Garland, D. (2001b). *Mass imprisonment: social causes and consequences*. Thousand Oaks, CA: Sage.
- Garland, D. (2002). 'The cultural uses of capital punishment'. *Punishment and Society*; 4; 459-487.
- Garland, D. (2005). 'Beyond the Culture of Control'. in Matravers, M. (ed) *Managing Modernity: Politics and the Culture of Control*. Abingdon: Routledge.
- Garland, D. (2006). 'Concepts of Culture in the Sociology of Punishment'. *Theoretical Criminology*; 10(4); 419-447.
- Garland, D. (2009). 'A culturalist theory of punishment?' *Punishment & Society* 11: 259-268.
- Garland, D. (2010) *Peculiar Institution: America's Death Penalty in an Age of Abolition*. Oxford: Oxford University Press.
- Garland, D. (2012) Criminology, Culture, Critique. A Review of Jock Young, The Criminological Imagination. *British Journal of Criminology* 52; 417-425.
- Garver, E. (2004) *For the sake of argument: Practical reasoning, character, and the ethics of belief*. Chicago: University of Chicago Press.
- Gaudet, F.J, G.S.Harris & C.W.St John. (1933) 'Individual Differences in the Sentencing Tendencies of Judges'. *Journal of Criminal Law and Criminology*, 23; 5; 811-818.
- Geertz, C. (1983) *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.
- Geertz, C. (1988) *Works and Lives. The Anthropologist as Author*. Stanford, CA: Stanford University Press.
- Gelb, K. (2006) *Myths and misconceptions: Public opinion versus public judgment about sentencing*. Available at: https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/myths_and_misconceptions_public_opinion_versus_public_judgment_about_sentencing.pdf
- Gelsthorpe, L. and N. Padfield. (Eds). (2003) *Exercising Discretion: Decision-making in the criminal justice system and beyond*. Cullompton: Willan.
- Gertner, N. (2005) 'Sentencing Reform: When Everyone Behaves Badly'. *Maine Law Review*; 57; 569-584.
- Gertner, N. (2007). 'Alternatives to the Carceral State: The Judge's Role'. *Social Research*, Vol 74; 2; 663-667.
- Girard, P. (2003) 'Judging Lives: Judicial Biography from Hale to Holmes.' *Austl. J. Legal Hist.* 7; 87-106.
- Girling, E., I. Loader and R.Sparks. (1999) *Crime and social change in Middle England: Questions of order in an English town*. Oxon: Routledge.
- Glaser D. (1964) *Effectiveness of a Prison and Parole System*. Indianapolis, IN: Bobbs -Merrill,
- Goffman, E. (1990) [1957] *The Presentation of Self in Everyday Life*. Harmondsworth: Penguin Books.
- Gottschalk, M. (2006) *The prison and the gallows: The politics of mass incarceration in America*. Cambridge: Cambridge University Press.
- Grant, C. (2004). *Crime and Punishment in Contemporary Culture*. Oxon: Routledge
- Gray, W.F.(2005) *Some Old Scots Judges: Anecdotes and Impressions*, E.P. Dutton: New York.
- Green, D. A. (2008). *When Children Kill Children: Penal Populism and Political*

- Culture*. Oxford University Press: Oxford.
- Griffiths, P, Gossop, M, Powis, B. and Strang, J. (1993) Reaching hidden populations of drug users by privileged access interviewers: methodological and practical issues, *Addiction* 88 ; 1617-1626.
- Griffith, J.A.G. (1997) *The Politics of the Judiciary*. London: Fontana.
- Gromet, D.M. and Darley, J.M.(2009) 'Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals'. *Law and Society Review*; 43; 1; 1-38.
- Grossman, J. B. and A. Sarat. (1971). 'Political Culture and Judicial Research'. *Washington University Law Quarterly*; 177-209.
- Guardian (2013) 'Britain's most senior judge takes aim at gender imbalance'. Available at: <http://www.guardian.co.uk/law/2013/mar/05/lord-neuberger-> Accessed 5.3.13.
- Haan, W. De and Loader, I. (2002) 'On the emotions of crime, punishment and social control'. *Theoretical Criminology* 6: 243-253.
- Hale, B. (2005). Making a difference? Why we need a more diverse judiciary. *Northern Ireland Law Quarterly* 56(3); 281-292.
- Hall, S. et al. (1978). *Policing the Crisis: Mugging, the State, and Law and Order*. Hampshire: Palgrave Macmillan.
- Halliday, T.C. and L.Karpik. (1997) '*Lawyers and the Rise of Western Political Liberalism*'. Oxford : OUP.
- Halliday, S., et al. (2009) 'Street-Level Bureaucracy, Interprofessional Relations, and Coping Mechanisms: A Study of Criminal Justice Social Workers in the Sentencing Process.' *Law & Policy* 31; 4; 405-428.
- Hammerslev, O. (2005). 'How to Study Danish Judges', in Banaker, R. & M.Travers, (eds) *Theory and Method in Socio-Legal Research*, Hart: Portland.
- Hanlon, G., Hanlon, G., Jackson, J., and Jackson, J. D. (1999). 'Last orders at the bar? Competition, choice and justice for all - the impact of solicitor-advocacy'. *Oxford Journal Of Legal Studies*, 19(4), 555-582.
- Harker, R. (2000) 'On Reproduction, Habitus and Education.' *Pierre Bourdieu* 2 London: Sage.
- Harrington, C. B., and Yngvesson, B. (1990). 'Interpretive Sociolegal Research'. *Law & Social Inquiry* 15; 135-148.
- Hart, H.L.A.(1961). *The Concept of Law*. Oxford: Oxford University Press.
- Harvey, W.S. (2010). 'Methodological Approaches for Interviewing Elites'. *Geography Compass* 4/3; 193-205.
- Hawkins, K. (1995) *The uses of discretion*. Oxford: Oxford University Press.
- Hay, D. et al. (1975). *Albion's Fatal Tree*. New York: Pantheon.
- Helms, R. (2009) '*Modeling the politics of punishment: A conceptual and empirical analysis of 'law in action' in criminal sentencing*'. *Journal of Criminal Justice*; 37; 10-20.
- Henham, R. (1998) 'Human rights, due process and sentencing.' *British journal of criminology* 38; 4; 592-610.
- Henham, R.(1999). 'Theory, Rights and Sentencing Policy'. *International Journal of the Sociology of Law*, 27; 167-183.
- Henham, R. (2000) 'Problems of Theorizing Sentencing Research', *International Journal of the Sociology of Law*, 28; 15-32.
- Henham, R. (2000a) 'Sentencing Theory, Proportionality and Pragmatism', *International Journal of the Sociology of Law*, 28; 239-263.
- Henham, R. (2000b). 'On the Philosophical and Theoretical Implications of Judicial Decision Support Systems'. *International Review of Law Computers and Technology* ; 14; 3; 283 – 296.
- Henham, R. (2001). 'Theory and Contextual Analysis in Sentencing'. *International*

- Journal of the Sociology of Law*, 29; 253-276.
- Henham, R. (2003) 'Some issues for sentencing in the International Criminal Court. *International and Comparative law quarterly* 52; 1; 81-114.
- Henham, R. (2009) 'Exploring the relationship between sentencing and the legitimacy of trial justice'. *International Journal of Law, Crime and Justice* 37; 65-82.
- Henham, R. (2012) 'Penal ideology, sentencing and the legitimacy of trial justice.' *Crime, law and social change* 57; 1; 77-98.
- Herber, E. D. (2009) 'Japanese Sentencing Practices: Creating an Opportunity for "Formal" Paternalism.' *International Journal of Criminology and Sociological Theory* 2; 2.
- Hillier, J. and E. Rooksby. (2005) *Habitus: A Sense of Place*. Aldershot: Ashgate.
- Hirschl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.
- Hollway, W. and T. Jefferson. (2000). *Doing Qualitative Research Differently: Free Association, Narrative and the Interview Method*. London: Sage.
- Hough, M. and J.V. Roberts. (1999) 'Sentencing trends in Britain Public knowledge and public opinion. *Punishment & Society* 1; 1; 11-26.
- Hudson, B. (1995). 'Beyond proportionate punishment: Difficult cases and the 1991 Criminal Justice Act'. *Crime, Law and Social Change*; 22; 59-78.
- Hudson, B. (2005). 'The Culture of Control: Choosing the Future' in Matravers, M. (ed) *Managing Modernity*, Oxon: Routledge.
- Hughes, G. (2000) 'Understanding the Politics of Criminological Research' in V.Jupp, P.Davies and P.Francis (eds), *Doing Criminological Research*, London: Sage.
- Hughes, R. and N. Anthony. (2006) 'Drugs, crime and criminal justice.' *Drugs: Policy and Politics* 75-91.
- Hunt, M. (1997) *Using Human Rights Law in English Courts*. Oxford: Hart.
- Hunter, C., J. Nixon & S. Blandy. (2008). 'Researching the Judiciary: Exploring the Invisible in Judicial Decision Making'. *Journal of Law and Society*, 35; 1; 76- 90.
- Hunter, R. C. McGlynn and E. Rackley. (2010) *Feminist Judgments: From Theory to Practice*. Oxford: Hart.
- Hutton, N. (1995) 'Sentencing, Rationality and Computer Technology'. *Journal of Law and Society* 22;4; 549-570.
- Hutton, N. (1997) 'Sentencing in the New South Africa: The Prospects for Reform'. *International Journal of the Sociology of Law*; 25; 315-335.
- Hutton, N. (1999) 'Sentencing, Inequality and Justice'. *Social Legal Studies*; 8; 571.
- Hutton, N. (2003) 'Towards a Sentencing Policy for the Use of Short Prison Sentences in Scotland'. *Juridical Review*; 4; 313-329.
- Hutton, N. (2003) 'Beyond the Technology of Quick Fixes. Will the Judiciary Act to Protect Itself and Short Up Judicial Independence? Recent Experience from Scotland.' *Federal Sentencing Reporter* 16; 1; 67-75.
- Hutton, N. (2006), 'Sentencing as a Social Practice', in S. Armstrong and McAra, L. (eds), *Perspectives on Punishment*, Oxford: Oxford University Press.
- Hutton, N. (2013) 'From intuition to database: Translating justice.' *Theoretical Criminology* 17; 1; 109-128.
- Hutton, N. and C. Tata. (2010) 'A sentencing exception? Changing sentencing policy in Scotland.' *Federal Sentencing Reporter* 22; 4; 272-278.
- Innes, M. (2002). Organizational communication and the symbolic construction of police murder investigations. *The British Journal of sociology* 53; 1; 67-87.
- Jefferson, G. (1979). Sequential aspects of storytelling in conversation. In J. Schenkein (ed), *Studies in the organization of conversational interaction*. New York, NY: Academic Press.

- Jeffries, S. and C.E.W Bond. (2010) 'Narratives of mitigation Sentencing Indigenous criminal defendants in South Australia's higher courts.' *Journal of Sociology* 46; 3; 219-237.
- Jenkins, R. (1982) 'Pierre Bourdieu and the reproduction of determinism.' *Sociology* 16; 2; 270-281.
- Johnson, C.A. (1989). 'Strategies for judicial research: soaking and poking in the judiciary'. *Judicature*; 73; 4; 192-193.
- Johnson, B. D. (2006). 'The multilevel context of criminal sentencing: Integrating judge and county level influences in the study of courtroom decision making.' *Criminology* 44; 259-298.
- Jonsson, H., & Andersson, L. (1999). Attitudes to work and retirement: Generalization or diversity? *Scandinavian Journal of Occupational Therapy*, 6; 29-35.
- Jonsson, H., Josephsson, S., and G. Kielhofner, G. (2000) 'Evolving Narratives in the Course of Retirement: A Longitudinal Study'. *American Journal of Occupational Therapy*. 54; 5; 463-470.
- Jonsson, H. (2011) 'The first steps into the third age: the retirement process from a Swedish perspective'. *Occupational Therapy International* 18; 1; 32-38.
- Josselson, R. (1995) 'Imagining the Real: Empathy, Narrative and the Dialogic Self' in R. Josselson and A. Lieblich (eds), *Interpreting Experience: The Narrative Study of Lives*. Thousand Oaks, California: Sage.
- Josselson, R. (2004). 'The Hermeneutics of Faith and the Hermeneutics of Suspicion'. *Narrative Inquiry*; 14(1), 1-28.
- Josselson, R. (2007) 'The Ethical Attitude in Narrative Research: Principles and Practicalities' In Clandinin, D.J. *Handbook of Narrative Inquiry*. Thousand Oaks, Ca: Sage.
- Josselson, R. (2011) "Bet you think this song is about you": Whose Narrative Is It in Narrative Research? *Narrative Works* 1(1), 33-51.
- Judicial Appointments Board for Scotland (2013) 'Sheriff Judicial Qualities'. http://www.judicialappointmentscotland.org.uk/Guide_to_Appointment_Process/Judicial_Qualities
- Judiciary of England and Wales. (2010) 'The Report of the Advisory Panel on Judicial Diversity 2010: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity>
- Judiciary of Scotland website: <http://www.scotland-judiciary.org.uk/1/0/Home>
- Judiciary of Scotland: Senators of the College of Justice: available at <http://www.scotland-judiciary.org.uk/34/0/Senators-of-the-College-of-Justice>
- Kahn, P. W. (2000) *The Cultural Study of Law: reconstructing legal scholarship*. Chicago: University of Chicago Press.
- Kahn, P.W.(2003) 'Freedom, Autonomy, and the Cultural Study of Law' in Sarat, A. and J. Simon (2003) (eds). *Cultural Analysis, Cultural Studies, and the Law*. Durham and London: Duke University Press.
- Kahn, P.W. (2006a) 'Legal Performance and the Imagination of Sovereignty.' Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1320&context=fss_papers
- Kahn, P. W. (2006b) 'Judicial Ethos and the Autonomy of Law'. *Penn St. L. Rev.* 110 933-1047.
- Kane Jr, J. J. (1997). 'Unless Required by Justice'. *Denv. UL Rev* 75; 685.
- Karstedt, S. (2002). 'Emotions and criminal justice'. *Theoretical Criminology* 6: 299-317.
- Keating M. (1993) 'The politics of local economic development'. *Urban Affairs*

- Quarterly 28; 373–96.
- Keijser, de.J.W. (2000). *Punishment and Purpose: From Moral Theory to Punishment in Action*. Thela:Thesis. Amsterdam.
- Kendall, A. (1996). Preparation for retirement: The occupational perspective. *Journal of Occupational Science: Australia*, 3, 35–38.
- Kennedy, D. (1997) *A Critique of Adjudication (fin de siecle)* Cambridge, Mass: Harvard University Press.
- Kennedy, J. (2000) ‘Monstrous offenders and the search for solidarity through punishment’ *Hastings Law Review* 51(5): 829–908.
- Kenway, J., and J. McLeod (2004) . ‘Bourdieu's reflexive sociology and ‘spaces of points of view’: whose reflexivity, which perspective? *British Journal of Sociology of Education* 25; 4; 525-544.
- Kezar, A. (2003). ‘Transformational Elite Interviews: Principles and Problems’ . *Qualitative Inquiry* 9; 395-415.
- Kibble, N. (2008). ‘Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offences Cases’ . *Journal of Law and Society*, 35;1; 91-107.
- King, A. (2000) ‘Thinking with Bourdieu against Bourdieu: a ‘practical’ critique of the habitus.’ *Sociological Theory* 18; 3; 417-433.
- Kirby, M., The Hon. Justice.(2004). ‘Judicial Activism’?. A Riposte to the Counter- Reformation’ . 24:3 *Australian Bar Review* 219.
- Kirby, M. (2004a). *Judicial Activism*. London: Sweet and Maxwell.
- Kirchheimer, O. (1961). *Political Justice*. Princeton Press: Princeton.
- Klein, D. and G. Mitchell. (2010). *The Psychology of Judicial Decision Making*. Oxford: Oxford University Press.
- Kozinski, A. (1992). ‘What I Ate for Breakfast and other Mysteries of Judicial Decision Making’ , 26 *Loy.L.A.Rev.* 993.
- Kramer, J. H., and J. T. Ulmer. (2009) *Sentencing guidelines: Lessons from Pennsylvania*. Boulder: Lynne Rienner Publishers.
- Krygier, M. (2008). ‘The Rule of Law: Legality, Teleology, Sociology’ in Palombella, G. and N.Walker (Eds) *Re-locating the Rule of Law* Oxford: Hart.
- Kvale, S. (2006) ‘Dominance Through Interviews and Dialogues’ . *Qualitative Inquiry* 12: 480-500.
- Lacey, N. (1987) *Discretion and due process at the post-conviction stage*. London: Sweet and Maxwell.
- Lacey, N. (2007). ‘Legal constructions of crime’ . In Maguire, M. et al. *The Oxford Handbook of Criminology*. Oxford: Oxford University Press.
- Lacey, N. (2008). *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies*. Cambridge: Cambridge University Press.
- Lane, J. F. (2000) *Pierre Bourdieu*. London: Pluto Press.
- Lax, J.R. (2003). ‘Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four’ . *Journal of Theoretical Politics*. 15; 1; 61-86.
- Legal Aid Board for Scotland: *The History of Legal Aid in Scotland*. http://www.slab.org.uk/about_us/what_we_do/history.htm
- Levine, J. M., and R. L. Moreland. (1994) ‘Group socialization: Theory and research.’ *European review of social psychology* 5; 1; 305-336.
- Liebling, A. (2001) ‘Whose Side Are We On? Theory, Practice and Allegiances in Prisons Research’ . *British Journal of Criminology* 41; 472-484.
- Liebling, A. (2011) ‘Distinctions and distinctiveness in the work of prison officers: Legitimacy and authority revisited’ . *European Journal of Criminology*. 8; 6; 484-499

- Linde, C. (1993) *Life Stories: The Creation of Coherence*. New York: Ablex.
- Liska, L. E., Markowitz, F.E., Whaley, R. B. and Bellair, P. (1999). Modeling the Relationship between the Criminal Justice and Mental Health Systems. *American Journal of Sociology* 104; 6; 1744-75.
- Llewellyn, K. N. (1951) *The bramble bush: on our law and its study*. USA: Oxford University Press.
- Loader, I. and A. Mulcahy. (2001) 'The Power of Legitimate Naming'. Parts 1&2. *British Journal of Criminology* 41; 252-265.
- Loader, I. and R. Sparks.(2004) 'For an Historical Sociology of Crime Policy in England and Wales since 1968'. *Critical Review of International Social and Political Philosophy*. 7; 2; 5-32.
- Loader, I. (2006). 'Fall of the Platonic Guardians: Liberalism, Criminology and Political Responses to Crime in England and Wales'. *British Journal of Criminology*; 46; 561-586.
- Loader, I., and R.Sparks. (2010) *Public criminology?* Abingdon: Routledge.
- Lord President Hamilton (2012) *Keynote Address by the Lord President, The Right Hon Lord Hamilton*. Accessed 13.3.13 Available at: <http://www.scotland-judiciary.org.uk/Upload/Documents/LordPresidentSpeechEdinburghCastle.pdf>
- Lucien, A. (2010). 'Staging and the Imaginary Institution of the Judge'. *International Journal for the Semiotics of Law*; 23; 185-206.
- MacCormick, N. (ed). (1976) *Lawyers in Their Social Setting: Wilson Memorial Lectures, University of Edinburgh*. Edinburgh: Green.
- MacCormick, N. (1992). 'Further Thoughts on Institutional Facts'. *International Journal for the Semiotics of Law* (13); 3-15.
- MacCormick, D.N. (2006). 'Judicial Independence: Who Cares?' British Academy Law Lecture. Available at <http://www.britac.ac.uk/pub/src/law06/index.cfm>. Last accessed 7/4/09.
- MacIntyre, A. (1981/90). *After Virtue*. London: Duckworth.
- MacKenzie, G. (2005) *How Judges Sentence*. Federation Press: Sydney.
- McAra, L. (2005). 'Modelling Penal Transformation'. *Punishment and Society*, 7; 277-302.
- McBarnet, D. (1981) *Conviction* London: MacMillan.
- McCarthy, T. (1995) 'Battered Woman Syndrome: Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on R v. Raby.' *Austl. Feminist LJ* 4;141.
- McIvor, G. (2009) 'Therapeutic jurisprudence and procedural justice in Scottish Drug Courts'. *Criminology and Criminal Justice* 1; 29-49.
- McIvor, G. (2011) 'Beyond supervision: judicial involvement in offender management.' In *Offender Supervision: New Directions in Theory, Research and Practice* McNeill, F. , P. Raynor and C. Trotter (eds).
- McLennan, R.(2001) 'The new penal state: globalization, history, and American criminal justice, c.2000'
- McNeill, F. (2000). 'Defining Effective Probation: Frontline Perspectives'. *The Howard Journal of Criminal Justice* 39; 4; 382-39.
- McNeill, F. (2004) 'Desistance, rehabilitation and correctionalism: Developments and prospects in Scotland.' *The Howard Journal of Criminal Justice* 43; 4; 420-436.
- McNeill, F. and S. Batchelor. (2004) *Persistent Offending by Young People: Developing Practice. Issues in Community and Criminal Justice* No. 3. London: National Association of Probation Officers.
- McNeill, F. and Whyte, B. (2007) *Reducing Reoffending: Social Work and Community Justice in Scotland*. Cullompton: Willan.

- McNeill, F., N.Burns, N.Halliday, N.Hutton, and C.Tata. (2009). Risk, responsibility and reconfiguration: Penal adaptation and misadaptation. *Punishment and Society*. 11(4): 419–42.
- Mack, K. and S. R. Anleu. (2007) Getting Through the List': Judgecraft and Legitimacy in the Lower Courts. *Social & Legal Studies* 16; 3; 341-361.
- Maguire, M. (2000). 'Researching 'Street Criminals': A Neglected Art. In King, R. and E Wincup. (Eds) *Doing Research on Crime and Justice*. Oxford University Press: Oxford.
- Mahar, C. (1990). Pierre Bourdieu: the intellectual project. In R.Harkar, C. Mahar & C. Wilkes (eds) *An introduction to the work of Pierre Bourdieu: the practice of theory*. London: MacMillan.
- Malleson, K. (1997) 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence'. *Modern Law Review*; 60; 5; 655-667.
- Malleson, K. (1999). *The New Judiciary: the effects of expansion and activism*. Ashgate: Aldershot.
- Malleson, K. (2002). 'Safeguarding judicial impartiality'. *Legal Studies*; 22; 53-70.
- Malleson, K. (2006). Re-thinking the merit principle in judicial selection. *Journal of Law and Society*. 33;126-135.
- Malloch, M. and McIvor, G. (2012). 'Criminal justice responses to drug related crime in Scotland'. *International Journal of Drug Policy* 24; 1; 69-77.
- Maltzman, F., J.F. Spriggs and P.J.Wahlbeck. (2000). *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge University Press: Cambridge.
- Marshall, C. and G.B.Rossman. (1995). *Designing Qualitative Research*. Thousand Oaks: Sage.
- Maruna, S. (1997). 'Going Straight: Desistance from Crime and Life Narratives of Reform' in A. Lieblich. and R. Josselson (eds). *The Narrative Study of Lives*. Thousand Oaks, California: Sage.
- Mathiesen, T. (1994) 'General prevention as communication'. In Duff, R.A. and D.Garland. *A Reader on Punishment* (eds). Oxford: Oxford University Press.
- Matravers, M. (1999) *Punishment and Political Theory*. Oxford and Portland, Oregon: Hart.
- Matravers, M. (ed) (2005) *Managing Modernity: Politics and the Culture of Control*. Abingdon: Routledge.
- Matthews, B. and D. Hubbard. (2007). 'The Helping Alliance in Juvenile Probation The Missing Element in the "What Works" Literature'. *Journal of Offender Rehabilitation* 45; 1-2; 105-122.
- Matza, D. (1964). *Delinquency and Drift*. New York: Wiley.
- Maynard, M. and Purvis.(eds)(1994). *Researching Women's Lives from a Feminist Perspective*. London: Taylor and Francis.
- Melossi, D. (1993). 'Gazette of Morality and Social Whip: Punishment, Hegemony, and the Case of the USA, 1970-92'. *Social and Legal Studies* 2; 259-79.
- Melossi, D. (2000) 'Changing Representations of the Criminal'. *British Journal of Criminology* 40; 2; 296-320.
- Melossi, D. (2008) *Controlling Crime, Controlling Society* Cambridge: Polity Press.
- Melossi, D., M. Sozzo and R. Sparks (eds). (2011). *Travels of the Criminal Question : Cultural Embeddedness and Diffusion*. Oxford: Hart.
- Melville, A. L. and F.H. Stephens (2011) 'The more things change, the more they stay the same: explaining stratification within the Faculty of Advocates, Scotland.' *International Journal of the Legal Profession*. 18; 3; 211-235.
- Menkel-Meadow, C. (1989) 'Feminization of the legal profession. The comparative sociology of women lawyers. In Abel, R.L and P.S.C Lewis *Lawyers in Society: Comparative Theories* Frederick, US: Beard Books

- Merry, S. E. (1990). *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans*. Chicago: Chicago University Press.
- Merry, S. E. (1992). 'Culture, Power, and the Discourse of Law.' *New York School of Law Review*. (37); 209-225.
- Merton, R. (1972) Insiders and outsiders: a chapter in the sociology of knowledge, *American Journal of Sociology*, 78; 9; 47.
- Mezey, N. (2003). 'Law as Culture' In Sarat, A. and J. Simon (2003) (eds). *Cultural Analysis, Cultural Studies, and the Law*. Durham and London: Duke University Press.
- Miceli, T. J., and M. M. Coşgel. (1994) 'Reputation and judicial decision-making.' *Journal of Economic Behavior & Organization* 23; 1; 31-51.
- Michie, M. (1997) *Enlightenment Tory in Victorian Scotland: The Career of Sir Archibald Alison*. Montreal: MQUP.
- Mill, J.S.(1953). 'The structure of power in American society'. *British Journal of Sociology*; 9; 29-41.
- Miller, M.L. (2005) 'Sentencing Equality Pathology', *Emory Law Journal*; 54; 271-290.
- Milliband, R. (1994) *Socialism for a Sceptical Age*. London: Verso.
- Millie, A., J. Jacobson and M. Hough. (2003). 'Understanding the growth in the prison population in England and Wales'. *Criminal Justice*; 3; 369-387.
- Mills, C. W. (1959). *The sociological imagination*. New York: Oxford University Press.
- Mishler, E. (1986) *Research interviewing. Context and narrative* Cambridge, MA: Harvard.
- Mishler, E.G. (1996). Missing persons: Recovering developmental stories/histories. In R. Jessor, A. Colby, and R.A Shweder (Eds), *Ethnography and human Development: Context and meaning in social inquiry*. Chicago: University of Chicago Press.
- Mishler, E.G.(1999) *Storylines*. Cambridge, Mass: Harvard University Press.
- Mooney, G and Poole, L (2004). "A Land of Milk and Honey"? Social Policy in Scotland after Devolution', *Critical Social Policy*; 24; 458.
- Mootz, F.J. (1994). 'The Paranoid Style in Contemporary Legal Scholarship'. *Houston Law Review*; 31; 873-888.
- Moran, L.J. (2012) 'Book Review: Rosemary Hunter, Claire McGlynn and Erica Rackley (eds), *Feminist Judgments: From Theory to Practice*'. *The Modern Law Review* 75; 2; 287-290.
- Mungham, G. and P.A.Thomas. (1989). 'Studying Lawyers: Aspects of the Theory, Method and Politics of Social Research'. *British Journal of Law and Society*; 8(1); 79-96.
- Munro, I. and Huber, C. (2012) 'Kafka's mythology: Organization, bureaucracy and the limits of sensemaking' *Human Relations* 65: 523-543.
- Nader, (1974). 'Up the Anthropologist – Perspectives Gained from Studying Up'. In D. Hymes (ed) *Reinventing Anthropology*. New York: Pantheon Books.
- Nash, R. (2003). 'Pierre Bourdieu: The Craft of Sociology', in *Futures of Critical Theory*, Maryland: Rowman and Littlefield.
- Nelken, D. (2010). *Comparative Criminal Justice* London: Sage.
- Newburn, T. and T. Jones. (2005). 'Symbolic politics and penal populism: The long shadow of Willie Horton'. *Crime Media Culture*. 1; 1; 72-87.
- Newburn, T. (2007). 'Tough on crime: penal policy in England and Wales' *Crime and Justice* 36; 1; 425-470.
- Nicholson, C.G.B. (1981). *The Law and Practice of Sentencing in Scotland*, Edinburgh: Green & Son.

- Norrie, A. (1993) *Crime, reason and history: A critical introduction to criminal law*. London: Weidenfield and Nicolson.
- Norrie, A. (2000). *Punishment, Responsibility and Justice*. Oxford: Oxford University Press.
- Norrie, A. (2002). 'Intention, Responsibility and the 'Hermeneutics of Suspicion''. *Adelaide Law Review*. 23; 329-344.
- Norrie, A. (2005). *Law and the Beautiful Soul*. London: Glasshouse Press.
- O'Dea, J. W. (1994). 'Pursuing Truth in Narrative Research'. *Journal of Philosophy of Education* 28(2); 161-171.
- O'Malley, P. (2000) 'Criminologies of Catastrophe? Understanding Criminal Justice on the Edge of the New Millennium'. *Australian & New Zealand Journal of Criminology*. 33; 2; 153-167.
- O'Malley, P. (2008). 'Experiments in risk and criminal justice', *Theoretical Criminology*; 12; 451-470.
- O'Neill, A. (2000). 'The European Convention and the Independence of the Judiciary The Scottish Experience'. *Modern Law Review*, 63; 429.
- O'Neill, A. (2004). 'Judging Democracy: the Devolutionary Settlement and the Scottish Constitution'. *Edinburgh Law Review*; 8; 177-205.
- Oakley, A. (1981) 'Interviewing Women: A Contradiction in Terms?' in H. Roberts (ed) *Doing Feminist Research*. London: Routledge.
- Obrdlik, A. J. (1942). 'Gallows Humor"-A Sociological Phenomenon'. *American Journal of Sociology* 709-716.
- Ochberg, R. (1996). Interpreting life stories. In R. Josselson (Ed), *The narrative study of lives: Vol. 4. Ethics and process in the narrative study of lives*. Thousand Oaks CA: Sage
- Odendahl, T. and A. Shaw. (2002). Interviewing Elites. In J. Gubrium and J. Holstein (Eds). *Handbook of interview research: Context and methodology*. Thousand Oaks, CA: Sage.
- Oinas, P. (1999). 'Voices and silences: the problem of access to embeddedness'. *Geoforum*, 30; 351-361.
- Osborne, B. D. (1997) '*Braxfield: the hanging judge?: the life and times of Lord Justice-Clerk Robert McQueen of Braxfield.*' Argyll.
- Ostrow, J.M. (2000) 'Culture as a Fundamental Dimension of Experience: a Discussion of Pierre Bourdieu's theory of Human Habitus.' In Robbins (Ed) *Pierre Bourdieu*. London, Thousand Oak and New Delhi, Sage.
- Pakes, F. J. (2010) *Comparative criminal justice*. Cullompton: Willan.
- Parry, R. (2010) 'Is legal biography really legal scholarship?' *Legal Studies* 30; 2; 208-229.
- Paterson, A. (1982). *The Law Lords*. Toronto: University of Toronto Press.
- Paterson, A. (1997): 'Legal ethics in Scotland'. *International Journal of the Legal Profession*, 4:1-2, 25-53.
- Paterson, L. (1994). '*The Autonomy of Modern Scotland*'. Edinburgh: Edinburgh University Press.
- Peresie, J. L. (2005) 'Female judges matter: Gender and collegial decisionmaking in the federal appellate courts.' *Yale Law Journal* 1759-1790.
- Phillips, Lord. (2011). '*Judicial Independence & Accountability: A View from the Supreme Court*'. http://www.supremecourt.gov.uk/docs/speech_110208.pdf
- Philips, S.U.(1998). *Ideology in the Language of Judges*. Oxford: Oxford University Press.
- Phoenix, A. (2008). 'Analysing narrative contexts' in M. Andrews *et al* (eds). *Doing Narrative Research*. London: Sage.
- Pierce, J.L. (2002). 'Research Note: Interviewing Australia's Senior Judiciary'.

- Australian Journal of Political Science*, 37; 1; 131-142.
- Pillow, W. (2003). Confession, catharsis or cure? Rethinking the uses of reflexivity as methodological power in qualitative research. *Qualitative Studies in Education*, 16(2), 175-196.
- Platt, J. (1981). 'On Interviewing One's Peers'. *The British Journal of Sociology*, 32; 1; 75-91.
- Plummer, K. (2001). *Documents of Life 2: An Invitation to a Critical Humanism*. London: Sage.
- Polanyi, L. (1983). *Telling the American story: A structural and cultural analysis of conversational storytelling*. Norwood, NJ: Ablex.
- Pond, R. & M. Morgan, (2008). 'Excusing themselves: Judges' judgments of qualitative/ quality research'. *Qualitative Methods in Psychology*, 6; 7-11.
- Popovic, J. (2003). 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary'. *Law in Context*. 20; 2; 121-136.
- Pratt, J. (2007). *Penal Populism* Oxon: Routledge.
- Pratt, J. (2008) 'When Penal Populism Stops: Legitimacy, Scandal and the Power to Punish in New Zealand'. *The Australian and New Zealand Journal of Criminology*; 41; 3; 364-383.
- Presser, L. (2009) 'The Narratives of Offenders'. *Theoretical Criminology*; 13: 177-2000.
- Rackley, E. (2007). Judicial diversity, the woman judge, and fairy tale endings. *Legal Studies* 27(1); 74-94.
- Rackley, E. (2009). 'Detailing Judicial Difference'. *Feminist Legal Studies*. 17; 11-26.
- Radzinowicz, L. & Hood, R. (1978) 'A Dangerous Direction for Sentencing Reform'. *Criminal Law Review* 713-724.
- Reay, D. (2004) 'It's all becoming a habitus': beyond the habitual use of habitus in educational research.' *British journal of sociology of education* 25; 4; 431-444.
- Reiner, R. (1999) 'Cop culture'. In R.Reiner. *The politics of the police* Oxford: Oxford University Press.
- Report of the Advisory Panel on Judicial Diversity (2010)
<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf> (Accessed 6.3.13)
- Rice, G. (2010). 'Reflections on Interviewing Elites'. *Area*; 42(1); 70-75.
- Richards, D. (1996). 'Elite Interviewing: Approaches and Pitfalls'. *Politics* 16;3;199-204.
- Richardson, L. (1995). 'Narrative and Sociology', in John van Maanen (ed.) *Representation in Ethnography*, pp. 198-221. Los Angeles, CA: Sage.
- Ricoeur, P. (1970). *Freud and Philosophy: An Essay On Interpretation*. New Haven and London: Yale University Press.
- Ricoeur, P. (1991). *Lectures autour du Politique*. Paris: Seuil.
- Ricoeur, P. (1992) *One Self as Another* (1992) Kathleen Blamey, trans., Chicago: The University of Chicago Press.
- Ricoeur, P. (2000) *The Just*. Chicago: The University of Chicago Press.
- Rieke, R.D. (1991) 'The Judicial Dialogue'. *Argumentation*, 5; 39-55.
- Riessman, C.K. (1993) *Narrative Analysis*. London: Sage.
- Riessman, C. K. (2001) 'Analysis of Interview Research' in Gubrium, J.F. and J.A Holstein. (eds) *Handbook of Interview Research*. Thousand Oaks, Ca: Sage.
- Riessman, C.K. (2004) 'Accidental cases: Extending the concept of positioning in narrative studies'. In Bamberg.M and M.Andrews (eds), *Considering Counter-Narratives*. Amsterdam: John Benjamins.
- Riessman, C. K. (2008) *Narrative Methods for the Social Sciences*. Thousand Oaks, CA: Sage.

- Riessman, C. K. (2012) 'Analysis of Personal Narratives' in Gubrium, J.F. et al (eds) *The Sage Handbook of Interview Research*. Thousand Oaks, Ca: Sage.
- Ristoph, A. (2009) How (Not) to Think Like a Punisher. *Florida Law Review* 61; 727-750.
- Roberts, J.V. (2002) 'Public opinion and the nature of community penalties: international findings.' In J. Roberts and M. Hough (eds) *Changing attitudes to punishment: Public opinion, crime and justice* Oxon: Routledge.
- Roberts, J.V., S.Rex, and M.Tonry. (2002) 'Public opinion and sentencing policy.' *Reform and Punishment: The Future of Sentencing* Cullompton: Willan.
- Roberts, J.V. (2003a) 'Evaluating the Pluses and Minuses of Custody: Sentencing Reform in England and Wales'. *Howard Journal*; 42; 3; 229-247.
- Roberts, J. V. (2003b) *Penal populism and public opinion: Lessons from five countries*. Oxford: Oxford University Press.
- Roberts, J. V. (2004) 'Public opinion and youth justice.' *Crime and justice* 495-542.
- Roberts, J. V., et al. (2009) 'Public attitudes to sentencing purposes and sentencing factors: An empirical analysis.' *Criminal Law Review* 11: 771-782.
- Roberts, J. V., M. Hough, and A. Ashworth. (2011) 'Personal mitigation, public opinion and sentencing guidelines in England and Wales.' *Criminal Law Review* 7; 524-530.
- Robertshaw, P. (2004). 'Logos and Pathos in Sentencing Dr William Parry'. *International Journal for the Semiotics of Law*; 17; 27-51.
- Robinson, G. (1999). 'Management and rehabilitation in the probation service: Collision and collusion'. *The Howard Journal of Criminal Justice*. 38; 4; 421-433.
- Robinson, G. and F. McNeill (2004) 'Purposes Matter: The Ends of Probation.' In G. Mair (ed) *What Matters in Probation* Cullompton, UK: Willan.
- Robinson, G. (2008). 'Late-modern rehabilitation: The evolution of a penal strategy'. *Punishment and Society*, 10(4); 429-445.
- Rock, P. (1993). *The social world of an English Crown Court*. Oxford: Clarendon Press.
- Rock, P. (1998) 'Rules, boundaries and the courts: some problems in the neo-Durkheimian sociology of deviance.' *British Journal of Sociology* 586-601.
- Rodriguez, L.J. (2009). 'Regulatory decision- making: structure and agency in the development of the organizational sentencing guidelines'. *Crime, Law and Social Change*; 51; 109-125.
- Rorty, R. (1992). 'The pragmatist's progress', in Umberto Eco, *Interpretation and Overinterpretation*. Cambridge: Cambridge University Press.
- Rozenberg, J. (1997). *Trial of Strength*. London: Richard Cohen Books.
- Rubin, E. L. (1996) Discretion and its Discontents. *Chicago-Kent L. Rev.* 72; 1299-1336.
- Rubin, E.L. (1997). 'Law and the Methodology of Law'. *Wisconsin Law Review*; 521-565.
- Rudman, D. L., Cook, J. V., & Polatajko, H. (1997). Understanding the potential of occupation: A qualitative exploration of seniors' perspectives on activity. *American Journal of Occupational Therapy*, 51, 640-650.
- Ryan, M. (1999) 'Penal Policy making towards the Millennium: elites and populists; Labour and the new criminology'. *International Journal of the Sociology of Law*'; 27(1); 1-22.
- Salzberger, E. & P. Fenn (1999). 'Judicial Independence: Some Evidence from the English Court of Appeal'. *Journal of Law and Economics*, Vol XL11; 831-847.
- Sandelowski, M. (1991) 'Telling Stories: Narrative Approaches in Qualitative Research'. *Image: Journal of Nursing Scholarship*. 23; 3; 161-166.

- Sarat, A. and T. R. Kearns. (1995). *Law's Violence*. Michigan: Michigan University Press.
- Sarat, A. (1997). 'Vengeance, Victims and the Identities of Law'. *Social & Legal Studies*. 6: 163-189.
- Sarat, A. and J. Simon (2003) (eds). *Cultural Analysis, Cultural Studies, and the Law*. Durham and London: Duke University Press.
- Savelsberg, J. (1992) 'Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law'. *American Journal of Sociology*; 97; 5; 1346-1381.
- Savelsberg, J. (1999) Knowledge, Domination and Criminal Punishment Revisited: Incorporating State Socialism. *Punishment and Society*; 1; 45-70.
- Savelsberg, J.J. and R.D. King (2005) 'Institutionalizing collective memories of hate: Law and law enforcement in Germany and the United States' *American Journal of Sociology* 111(2): 579-616.
- Savelsberg, J. (2010) *Crime and Human Rights*. London: Sage.
- Scarduzio, J. A. (2011) Maintaining order through deviance? The emotional deviance, power, and professional work of municipal court judges. *Management Communication Quarterly* 25; 2; 283-310.
- Scheppelle, K.L. (1989) 'Foreword: Telling Stories'. *Michigan Law Review* 87; 8; 2073-2098.
- Scheurich, J.J. (1995) 'A postmodernist critique of research interviewing'. *International Journal of Qualitative Studies in Education*, 8: 3, 239 — 252.
- Scottish Government (2006) 'Evaluation of the 218 Centre'. Available at: <http://www.scotland.gov.uk/Publications/2006/04/24161157/2>
- Scottish Government (2006) 'Sentencing Guidelines and a Sentencing Council: Consultations and Proposals'. Available at <http://www.scotland.gov.uk/Resource/Doc/236809/0064977> Last accessed 7/5/09
- Scottish Government (2009) 'Sentencing Guidelines and a Sentencing Council: Responses to Consultation'. Available at <http://www.scotland.gov.uk/Publications/2009/01/26131348/0> Last accessed 26/2/09
- Scottish Government (2009) 'Sentencing Guidelines and a Sentencing Council: Responses to Consultation'. Response of High Court of Justiciary. Available at <http://www.scotland.gov.uk/Publications/2009/01/26131348/34> Last accessed 6/5/09
- Shapland, J. (1987) 'Who Controls Sentencing?' in Donald Pennington and Sally Lloyd-Bostock (eds) *The Psychology of Sentencing: Approaches to Consistency and Disparity*. Oxford: Centre for Socio-legal Studies.
- Shaw, C.R. (1930) *The Jack-Roller: A Delinquent Boy's Own Story*. Chicago: The University of Chicago Press.
- Shearing, C. D. and P.C. Stenning (1985). 'Private Security: Implications for Social Control'. *Social Problems* 30(5); 493-506.
- Shearing, C. D. and P.C. Stenning (1996). 'From the Panopticon to Disneyworld: The Development of Discipline.' in J. Muncie, E. Mclaughlin. and M. Langan. (eds) *Criminological Perspectives : A Reader*. London: Sage.
- Simon, J. and M.M. Feeley (1995) 'True crime: The new penology and public discourse on crime', in T.G. Blomberg and S. Cohen (eds) *Punishment and social control*, pp. 147-80. New York: Aldine de Gruyter.
- Simon, J. (2001) 'Fear and Loathing in Late Modernity Reflections on the Cultural Sources of Mass Imprisonment in the United States.' *Punishment & Society* 3; 1; 21-33.
- Simon, J. (2007). *Governing Through Crime*. Oxford University Press: Oxford.
- Sisk, G. C., Heise, M., Morriss, A. P. 'Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning'. *73 New York University Law Review*

- 1377.
- Smith, I. (2011) *Law, Life and Laughter: A Personal Verdict* Edinburgh: Black and White.
- Smith, K. B. (2004) 'The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates'. *The Journal of Politics*; 66; 925-938.
- Smith, K. E. (2006). 'Problematising power relations in 'elite' interviews'. *Geoforum*, 37; 4; 643-653.
- Smith, P. (2008). 'Durkheim and Criminology: Reconstructing the Legacy'. *The Australian and New Zealand Journal of Criminology*; 41; 3; 333-344.
- Smith, P. (2008). *Punishment and Culture*. Chicago: Chicago University Press.
- Solomon, P.H. (2007). Courts and Judges in Authoritarian Regimes. *World Politics* 60; 1; 122-145.
- Sontag, S. (1982). *A Barthes Reader*. London: Jonathan Cape.
- Sparks, R. (1997). 'Social Theory and Crime and Punishment' in Maguire, M., R. Morgan and R. Reiner (eds). (1997) *The Oxford Handbook of Criminology*. Oxford: Oxford University Press:.
- Sparks, R. (2003). 'States of Insecurity: Punishment, Populism and Contemporary Political Culture'. In S. McConville (ed) *The Use of Imprisonment* Cullompton: Willan.
- Spencer, M. (2008). 'Excavating Official Archives: The Separation of Powers and Policy Advice from Judges'. *Journal of Law and Society*, 35; 1; 167-182.
- Spigelman, J. (2008) Consistency and Sentencing. *Australian Law Journal* 82; 7; 450-460.
- Spohn, C.C. (2002) 'How do Judges Decide? The Search for Fairness and Justice in Punishment'. Thousand Oaks, California: Sage.
- Squire, C. (2008). 'Experience-centred and culturally-oriented approaches to narrative' in M. Andrews *et al* (eds). *Doing Narrative Research*. London: Sage.
- Stalans, L. J. (2002) 'Measuring attitudes to sentencing.' In J. Roberts and M. Hough (eds) *Changing attitudes to punishment: Public opinion, crime and justice* Oxon: Routledge.
- Steffensmeier, D., J. Kramer, and C. Streifel. (1993) 'Gender and imprisonment decisions.' *Criminology* 31; 411-446.
- Steffensmeier, D. J. Ulmer, and J. Kramer. (1998) 'The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male.' *Criminology* 36; 4; 763-798.
- Steffensmier, D. and Herbert, C. (1999) 'Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?' *Social Forces* 77; 1163-1196.
- Stevens, R.B. (1988). 'The Independence of the Judiciary: The View from the Lord Chancellor's Office'. *Oxford Journal of Legal Studies*, 8; 2; 222-248.
- Stevens, R.B. (1999). 'A Loss of Innocence? Judicial Independence and the Separation of Powers'. *Oxford Journal of Legal Studies*. 19; 365-402.
- Stevens, R. (2002) *The English Judges: Their Role in the Changing Constitution* Oxford: Hart.
- Stewart, A.L. (1997) *The Scottish Criminal Courts in Action*. Edinburgh: Butterworths.
- Stith, K. and J.A. Cabranes. (1998). *Fear of judging: Sentencing Guidelines in the Federal Courts*. Chicago: Chicago University Press.
- Stott, G. (1991). *Lord Advocate's Diary*. Aberdeen: Aberdeen University Press
- Stott, G. (1995). *Judge's Diary 1967-1973*. Edinburgh: Mercat Press.
- Stranieri, A., J. Yearwood and T. Meikle. (2000) The Dependency of Discretion and Consistency on Knowledge Representation. *International Review of Law*

- Computers*. 14; 3; 325-340.
- Stuntz, W.J. (2001). 'The Pathological Politics of Criminal Law'. *Mich. L. Rev*; 100; 505.
- Suchman, M.C. and L.B Edelman (1996) 'Legal Rational Myths: The New Institutionalism and the Law and Society Tradition'. *Law & Social Inquiry* 21; 903- 966.
- Sullivan, E. (2000). 'Gallows humour in social work practice: an issue for supervision and reflexivity'. *Practice: Social Work in Action* 12; 2; 45-54.
- Sutherland, E. (1937) *The Professional Thief* Chicago: The University of Chicago Press.
- Sweetman, P. (2003) 'Twenty-first century dis-ease? Habitual reflexivity or the reflexive habitus.' *The sociological review* 51; 4; 528-549.
- Tamanaha, B.Z. (2010) *Beyond the Formalist-Realist Divide* Princeton: Princeton University Press.
- Tata, C. (1997) Conceptions and Representations of the Sentencing Decision Process. *Journal of Law and Society*; 24; 3; 395-420.
- Tata, C. (1998) The application of judicial intelligence and rules to systems supporting discretionary judicial decision-making'. *Artificial Intelligence and Law: an International Journal* 6; 2-4; 199-225.
- Tata, C. and N. Hutton. (1998) 'What 'Rules' in Sentencing? Consistency and Disparity in the Absence of 'Rules''. *International Journal of the Sociology of Law*; 26; 339-364.
- Tata, C. (2000). Resolute Ambivalence: Why Judiciaries Do Not Institutionalize Their Decision Support Systems. *International Review of Law, Computers and Technology*; 14; 3; 297-316.
- Tata, C. and Hutton, N. (2003) 'Beyond the Technology of Quick Fixes'. *Federal Sentencing Reporter*; 16; 1; 67-75.
- Tata, C. (2007) 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process', *Social and Legal Studies*; 16; 425.
- Tata, C., N. Burns, S. Halliday, N. Hutton and F. McNeill. (2008). 'Assisting and Advising the Sentencing Decision Process: the Pursuit of 'Quality' in Pre-Sentence Reports'. *British Journal of Criminology* 48(6); 835-855.
- Tata, C. (2010) 'Sentencing and penal decision-making in Scotland' in Croall, H. *et al* (eds) *Criminal Justice in Scotland* Oxon: Willan.
- Tate, C.N. (1983). 'The Methodology of Judicial Behavior Research: A Review and Critique'. *Political Behavior*; 5; 1; 51-82.
- Taylor, C. (1991). *The malaise of modernity*. Concord, Canada: Anansi.
- Tiede, L. B. (2006) 'Judicial Independence: Often Cited, Rarely Understood.' *Journal of Contemporary Legal Issues* 15; 129 – 162.
- Thiele, L.P. (2006) *The Heart of Judgement: Practical Wisdom, Neuroscience, and Narrative*. Cambridge: Cambridge University Press.
- Thomas, C. (2005). *Judicial Diversity in the United Kingdom and other jurisdictions: A review of research, policies and practices*. Accessed 9.8.2012 http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Diversity
- Thomas, D. (2003). 'Judicial Discretion in Sentencing' in Gelsthorpe, L. and N. Padfield. (Eds). (2003) *Exercising Discretion: Decision-making in the criminal justice system and beyond*. Cullompton: Willan.
- Thomas, J. (2006). 'Doing Prison Work: The Public and Private Lives of Prison Officers'. *Contemporary Sociology: A Journal of Reviews* 35; 2 178-179.
- Thompson, E.P. (1975). *Whigs and Hunters: The Origins of the Black Act* London: Harmondsworth.
- Thompson, J.B. (1984) *Studies in the Theory of Ideology*. Cambridge: Polity Press

- Throop, J.C. & K.M. Murphy. (2002). 'Bourdieu and phenomenology: A critical assessment'. *Anthropological Theory* 2002 2: 185-207.
- Tierney, S. (2001) 'Constitutionalising the Role of the Judge: Scotland and the New Order'. *Edinburgh Law Review* 5; 49-72.
- Tombs, J. (2004) *A unique punishment: sentencing and the prison population in Scotland*. Edinburgh: Scottish Consortium on Crime & Criminal Justice.
- Tombs, J. and E. Jagger. (2006) 'Denying Responsibility', *British Journal of Criminology*; 46; 803-821.
- Tombs, J. (2008) 'Telling sentencing stories', in P. Carlen (ed) *Imaginary Penalties*. Cullompton: Willan Publishing.
- Tombs and Piacentini (2010) Prisons and imprisonment in Scotland, in Croall, H., G. Mooney and M. Munro (eds). *Criminal Justice in Scotland*. Willan: Oxon.
- Tomlins, C. (2000). 'Framing the Field of Law's Disciplinary Encounters: A Historical Narrative'. *Law and Society Review*, 34; 4; 911- 972.
- Tonry, M. & R.S. Frase (eds) (2001). *Sentencing and Sanctions in Western Countries* Oxford: OUP
- Tonry, M. (2001). 'Unthought Thoughts: The Influence of Changing Sensibilities on Penal Policies'. *Punishment and Society*, 3; 167-181.
- Tonry, M. (2002) 'Setting sentencing policy through guidelines' in *Reform and Punishment*. Rex, S and Tonry, M.H (eds.) Cullompton, Devon: Willan.
- Tonry, M. (2004). *Thinking about Crime: Sense and Sensibility in American Penal Culture*. New York: Oxford University Press.
- Tonry, M. (2004a). *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy*. Cullompton, Devon: Willan.
- Tonry, M. (2005). 'Obsolescence and Immanence in Penal Theory and Policy'. *Columbia Law Review*; 105; 1233.
- Trevaskes, S. (2004) Propaganda Work in Chinese Courts Public Trials and Sentencing Rallies as Sites of Expressive Punishment and Public Education in the People's Republic of China. *Punishment & Society* 6; 1; 5-21.
- Tufts, J, and J. V. Roberts. (2002) 'Sentencing juvenile offenders: Comparing public preferences and judicial practice.' *Criminal Justice Policy Review* 13; 1: 46-64.
- Ulmer, J.T. (1997). *Social Worlds of Sentencing* Albany: State University of New York Press.
- Ulmer, J. T., M. C. Kurlychek, and J. H. Kramer. (2007) 'Prosecutorial discretion and the imposition of mandatory minimum sentences.' *Journal of Research in Crime and Delinquency* 44; 4; 427-458.
- Ulmer, J. T. (2012): 'Recent Developments and New Directions in Sentencing Research'. *Justice Quarterly*, 29:1, 1-40.
- Valverde, M. (2006). 'The Sociology of Law as a 'Means against Struggle Itself''. *Social Legal Studies*. 15; 591-597.
- Valverde, M. (2010) 'Comment on Loïc Wacquant's 'Theoretical Coda' to Punishing the Poor.' *Theoretical Criminology* 14; 1; 117-120.
- Van Epps, D. A. (2001) 'The Impact of Mediation on State Courts'. 17 *Ohio State Journal of Dispute Resolution* 627.
- Van Swaaningen, R. (1997). *Critical criminology: Visions from Europe*. London: Sage.
- Villegas, G. M. (2004). On Pierre Bourdieu's Legal Thought, *Droit et société*; 1; 56-70.
- Von Hirsch, A. (1993) *Censure and sanctions*. Oxford: Clarendon Press.
- Wacquant, L.J.D. (1989). Towards a Reflexive Sociology: A Workshop with Pierre Bourdieu. *Sociological Theory*; 7; 1; 26-63.
- Wacquant, L.J.D. (1992). *An Invitation to Reflexive Sociology*. Chicago: University

- of Chicago Press.
- Wacquant, L. (2008). 'Pierre Bourdieu', in R. Stones (ed). *Key Sociological Thinkers*. London and New York: Palgrave Macmillan.
- Wacquant, L. (2011) 'From 'Public Criminology' To The Reflexive Sociology of Criminological Production and Consumption: A Review of Public Criminology?' by Ian Loader and Richard Sparks (London: Routledge, 2010). *British Journal of Criminology* 51; 2; 438-448.
- Wahlbeck, P.J. (1997). 'The life of the Law: Judicial Politics and Legal Change', *The Journal of Politics*, 59; 3; 778-802.
- Wald, P.M. (1995). 'Violence Under the Law: A Judge's Perspective'. in Sarat, A. and T.R. Kearns. *Law's Violence*. Michigan: Michigan University Press.
- Waldron, J. (2008) 'Lucky in Your Judge.' *Theoretical Inquiries in Law* 9; 1; 185-216.
- Wandall, R.H. (2005). *'Equality and Sentencing Guidelines: A Comparative Study of Sentencing Law in Minnesota and Denmark'*. Available at: http://www.nyulawglobal.com/workingpapers/GLWP0205Wandall_000.rtf
- Wandall, R. (2008). *Decisions to Imprison*. Hampshire: Ashgate.
- Ward, T. and S. Maruna. (2007) *Rehabilitation*. Routledge.
- Warner, K. (2006). 'Sentencing Scholarship in Australia'. *Current Issues in Criminal Justice* 18; 241-265.
- Weaver, B., et al. (2012) The Failure of Recall to Prison: Early Release, Front-Door and Back-Door Sentencing and the Revolving Prison Door in Scotland. *European Journal of Probation* 4; 1; 85-98.
- Weidner, R. R., R. Frase, and I. Pardoe. (2004) 'Explaining sentence severity in large urban counties: a multilevel analysis of contextual and case-level factors.' *The Prison Journal* 84; 2; 184-207.
- Wengraf, T. (2001). *Qualitative research interviewing* Thousand Oaks, CA: Sage.
- Western, B. (2006) *Punishment and inequality in America*. New York: Russell Sage.
- Wexler, D.B. (2004). 'Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer'. *St.Thomas Law Review*; 17; 743-774.
- Wheatley, J. (1987). *'One Man's Judgement'*. London: Butterworth
- Whitman, J.Q. (2007). 'What happened to Tocqueville's America?' *Social Research*; 74; 2; 251-268.
- Wickham, G. (2006). 'Foucault, Awe and Power: A Re-Assessment'. *Journal of Law and Society*; 33; 4; 596-614.
- Widdershoven, G. (1993). *The narrative study of lives* CA: Sage.
- Williams, G. *Textbook of Criminal Law*. London: Stevens & Sons.
- Williams, K. (1989). 'Researching the powerful: Problems and possibilities of social research'. *Contemporary Crises*; 13:3; 253-274.
- Williams, R. (1963) *Culture and Society 1780-1950* Harmondsworth: Penguin.
- Williams, R. (1977) *Marxism and Literature* Oxford: Oxford University Press.
- Williams, R. (1981) *Culture* Glasgow: Fontana.
- Wilson, D. & J. Ashton. (2001). *What everyone in Britain should know about crime and punishment* Oxford: Oxford University Press.
- Wilson, N. (1965) 'The Faculty of Advocates today'. *Acta Juridica*, 227-242.
- Wilton, G.W 'The Scottish Judiciary' (1923) 35 *Juridical Review* 73-81.
- Woods, M. (1998). 'Re-thinking elites: networks, space, and local politics'. *Environment and Planning A*, 30; 2101-2119.
- Wooldredge, J. and A. Thistlethwaite. (2004) 'Bi-level disparities in court dispositions for intimate assault'. *Criminology* 42; 2; 417-456.
- Young, I.M. (1996) 'Communication and the Other: Beyond Deliberative Democracy'. In Benhabib, S. (Ed) *Democracy and Difference* NJ: Princeton

- University Press.
- Young, A. (2012) 'Criminal images: The affective judgment of graffiti and street art.' *Crime, Media, Culture* 8; 297-314.
- Yuval-Davis, N. (2006). 'Belonging and the Politics of Belonging'. *Patterns of Prejudice* 40/3; 196-213.
- Zapf, P., A. Roesch, and S.D. Hart. (1996) 'An Examination of the Relationship of Homelessness to Mental Disorder, Criminal Behaviour, and Health Care in a Pretrial Jail Population'. *Canadian Journal of Psychiatry* 41:435-440.
- Zatz, M. (2000). 'The convergence of race, ethnicity, gender and class on court decision-making: looking toward the 21st century.' *Criminal Justice: The National Institute of Justice Journal* 3; 503-522.
- Zdenkowski, G. (2000). 'Limiting Sentencing Discretion: Has there been a paradigm shift?'. *Current Issues in Criminal Justice* ; 12; 58-78.
- Zedner, L. (1998). 'Sentencing Young Offenders'. In Ashworth, A. and Wasik, M. (eds) *Fundamentals of Sentencing Theory*. Oxford: Clarendon Press.
- Zedner, L. (2002) 'Dangers of Dystopias in Penal Theory'. *Oxford Journal of Legal Studies*. 22;2; 341-366.
- Zedner, L. (2004). *Criminal Justice*. Oxford: Oxford University Press.
- Zimring, F. E., and D. T. Johnson. (2006) 'Public opinion and the governance of punishment in democratic political systems.' *The Annals of the American Academy of Political and Social Science* 605; 1; 265-280.