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Contact: sentencing@law.anu.edu.au

Psychological research on the sentencing process

A/Prof Jane Goodman-Delahunty
University of New South Wales

(Transcript of presentation)

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Psychological research on sentencing is probably an area that is even less accessible and less well read than even the vast amount of sentencing research that has been done in other topics. I am focusing on empirical research and a sub-section of that, dealing with psycho social kinds of responses. I am focusing somewhat on the different players in the sentencing process but mostly those who are actually involved in the sentencing decision process. In preparing this paper I drew a little bit on a chapter that I wrote providing an overview of the psycho social kind of research. I am quite daunted by the vast amount of work that there is there, and so I've had to streamline quite considerably to talk to you today.

One over-riding issue of the sentencing process is that it's usually done under immense pressure. This so whether it is done by judges or jurors or by lay participants in some countries. One of the key features is the pressure that comes often from time alone. We have heard judges here talk about the number of sentencing decisions that they make in a day, receiving the file literally before they are about to pronounce the sentence and having little opportunity to scan through it. There are pressures as well from the severity of the outcome of the decision itself. Sometimes deprivation of liberty and in other countries also deprivation of life, which imposes a specific kind of pressure on the decision. Jurors have to make those decisions while they're getting acquainted with each in a situation where they have very limited time to work on a lot of issues. The law makes assumptions about the criteria that should be considered, mitigating versus aggravating factors, taking into account doctrinal theories, guideline judgements and structured issues that judges are meant to follow. So the psychologists have become fascinated with just how people address those kinds of pressures and whether the law really has the best ways to go about implementing the decision task.

So part of what I am going to elaborate on is really the process issues - looking at some of the psychological factors as people are tasked with those pressures.

The four key issues that I drew in synthesising this body of research are what I call more of the psychological hooks or anchors that many of the decision makers seem to find more central or pivotal to the decision task. One of those has to do with consideration of the offender - the issue as to whether or not you have a career criminal, how much opportunity has somebody had to avoid the choice of a life of crime.

The other issues seem to be an immense set of questions that arise when we look at the public opinion issues. The process of rendering sentencing decisions and sometimes of course ruminations and thought processes by judges themselves applying these doctrines. There are issues about how well the entire justice system regarding sentencing is working. Is it something in which we can have confidence? what is its level of trustworthiness for all of us? So I'll try to unpack a few more of those questions too.

The third and fourth central kinds of questions were issues about safety in the future, risk of reoffending, risk of recidivism, dangerousness to the community. Then finally, areas about balancing notions of justice, fairness and whether mercy should play any role at all in this equation.

The sentencing process is very much the engine that seems to drive the legal system. That is perhaps why it has become such an area of focus for many researchers from many disciplines.

Starting with the offender feature. What I'm doing is drawing a little bit on what we call attribution theory in social psychology – that is a set of theories that have to do with how people attribute causation to what ever has transpired in the external world. In the sentencing area it would be questions about how the crime happened to be caused, or how it is that offender become caught up in a criminal career. Usually, in attribution theory, there are two major ways that we go about contributing causation. We focus either on the external causes or on the internal causes. Part of what we see reflected in the decision making analysis of sentencers is an effort to examine those and see whether perhaps, in a particular individual case, the offender is somebody to whom you can contribute more internal or external causation. Typically the more you weight things on the external side, the more those factors tend to align themselves with mitigating concerns. So if you think that it's just a situation where somebody is caught in the wrong place at the wrong time or perhaps this was an isolated opportunistic sort of criminal offence, you might attribute less responsibility and perhaps impose a lighter sentence. If on the other hand, you are focusing on the internal disposition (eg. the character logical features of somebody who is a real psychopath, who has no concern and empathy for any others, is pre-disposed just to exploit and manipulate) then you are going to be attributing more responsibility to that individual. Typically that aligns with a more severe sentence.

People come to the law with a lot of schema in place about how people work and how people behave. Very typically people start out thinking that crime is internally motivated and internally caused. This was highlighted to me recently by a student of mine who moved from a studying law and psychology out into her first few jobs and was interviewing juvenile offenders as part of a large NSW project to try to examine criminal careers. I asked how it was going and she came back to me, having herself grown up in quite a sheltered environment in the Southerland Shire, and said "I just can't believe it, they have no choices, no options out there". The overwhelming lesson that she was left with was that she had shifted in her attributions about what was the problem to giving much more credence to the external causation, the environmental rather than the internal factors. That is an on-going issue for many judges, but I think we need to realise that we start out often times with assumptions about these factors - research has taught us that.

The role of remorse is often interesting to consider because there are some studies that show that judges tend to use expressions of remorse by offenders as a way to confirm or disconfirm their own internal analysis about the internal versus external causes. It is worth reflecting on the fact that there is a double bind for many offenders as to whether they acknowledge what they have done (plead guilty) or not. You are forced into making that choice to deny any responsibility and then suddenly later on in the sentencing phase you are compelled by your lawyer to try to express remorse. How genuine is that expression ? or are we just training people to parrot things to us that we then later attach more significance to ? We need to look at the pressures that come from a constraint of the situation. It is terribly confusing for offenders looking at their own responses to the legal system to find that at times they are not supposed to

acknowledge something and at other times they are supposed to tell a story, be more responsive about what their own experiences are in the legal system. Reforms are worth while if they are making it a more direct opportunity for people not to be just responding to the restraints of the situation.

I want to move on to some of the issues about confidence in the legal system. The major questions are: is the punishment framework effective? what are we to do about all of these disparities that we see in sentencing? what seems to be causing them? There are a lot of psychological findings that bear on major goals or theories of punishment. People for example, are finding in studies that in order for deterrents to work well you have to have a very high risk of apprehension as well as a very high risk of being sentenced. So the focus then becomes in the mind of the offender how do you avoid detection? They are doing a cost-benefit analysis of the likelihood of apprehension and the likelihood of sentencing (if they know what the sentence is at all, which we understand most offenders don't). So psychologically you can see that there are many flaws in that sort of deterrents framework.

Similarly, people have noted that for retribution sentencing really to work it leaves the offender once incarcerated to discover, mostly for himself or herself, how to behave well. There isn't very much that is provided in terms of stimulating any change. So if there is very little done during the incarceration period to stimulate change we can't expect that when people are released they are going to behave differently than before. I don't have time to go into all of those theories as I want to move, for the balance of this presentation, to explore some of the psychological factors that have to do with disparities in sentences. It is important to note that although most members of the public tend to provide lip service to deterrent theories, but in fact, if you examine the content of what they say, there is much more endorsement at the public level for retribution. It's interesting if you look further at the studies to find that if you compare what people say to what they do when actually charged with the sentencing decision (simulations have been done in many labs getting jurors or citizens to look at the case facts and the case file) their behaviour is entirely different. They become less likely to be motivated at all by factors such as retribution and deterrence and to focus much more on possibilities of rehabilitation as a concern. So, once it is individualised, the attitudes change. We need to keep in mind that there is a big difference between what we say we will do, what we think our beliefs are and what we do in practice in a decision situation.

The most important psychological research is about what is the difference between an impact on an offender of a sentence that is six years versus ten years in length. Some research that has been done by psychologist Danny Conaman in collaboration with a law professor at Pennsylvania State University, Paul Robinson, and a social psychologist, John Darley, has examined the question in a little more depth by looking at the aversiveness of a long sentence.

What they have started out by saying is that there is a fundamental assumption in the beginning that the longer sentence is going to be more aversive -we think there is a multiplicative relationship between the amount of time in prison and the intensity of the pain that is associated. But in fact studies about how people experience pain and remember it shows something different. These have been very interesting studies done by asking people to put an arm in a bucket of ice water for a long time, or a short time,

and talk about the consequences. Studies that have looked at much more socially realistic events such as child birth and have come up with some explanation as to why it is that after experiencing a painful child birth women have more children. Part of that seems to be because of the way that we have developed mentally a heuristic system for remembering those experiences.

Once you apply that to the psychology of sentencing, what you can see is that longer sentences may be reduced in terms of their recalled negative character. This is because of the adaptation that inmates experience to the prison after they have been there for a while. So the argument being made now is that shorter sentences are probably just as effective in terms of adverse deterrent effect and that longer one may be not only less cost effective financially but less cost effective psychologically (Kahnemann, Robinson & Darley).

I'll now move on to the core issue of accounting for disparities or variations in sentencing outcomes. These have puzzled many scholars and led to many kinds of empirical studies. What most researchers are looking for here is indications that there are systematic biases, systematic distortions that happen that we should be concerned about in the administration of justice. There have been some studies looking at demographic kinds of factors associated with offenders or associated just with judges that show that there are some trends to support that sort bias. For example, it happens that women and white offenders tend to be less severely punished in terms of sentence length than do male or minority or black offenders. There are also some interesting factors relating to the characteristics of the judge and the offender. The studies show that some of the variations have to do with how similar one is to the individual is being judged (Ulmer, 1997). Some of that has to do with that attribution theory that I mentioned earlier. Females are typically more lenient on female offenders, not always but on average. Black judges in the United States have been shown to be more severe in dealing with black offenders. Sometimes there is an effort in attribution theory to try to distinguish ones self - you either identify or want to distinguish yourself from individuals who might be similar in some way and respond this way.

What some of the early research, for example by Hogarth, showed is that less than 10% of the variability in sentencing decisions is accounted for by what we could call the objectively defined facts of the case. A lot of the variance is accounted for by other factors. So that has led psychologists in particular to try to see what some of those other factors are. There has been a considerable amount of variation just on the individualised strategies that judges use and this research has been done in different kinds of communities and with different kinds of sentencing decisions (some looking at bail studies and some looking at incarceration or other options). What you find is that, because the task is complex, people use mental strategies that we call technically heuristics, often to try to streamline the task. In some literature this is called the 'fast and frugal decision making style' because you have a wealth of information and you have to try to pull out the most salient points in your estimation.

The problem is that different judges rely on different factors and sometimes many of them tend to have a favourite cue that they rely upon. Some research shows that a huge number of the decision makers rely on the prosecutor's request. In one Spanish study they found that 64% of the outcomes could be predicted just by looking at the prosecutor's request (Farina, Arce & Novo 2003). Parole officers' recommendations

in other contexts have also emerged as very powerful cues for judges to rely upon. So there has been some concern that these individualised strategies represented departure from the form legal doctrinal categories of consideration and some concern about what we should do about these inconsistencies.

I want to move onto some other social psychological theories that account for some of the disparities by giving you a little insight into a judging study that was done. It attracted a lot of attention because they actually used municipal judges as participants. They were given a bail task - to set a bail for an alleged prostitute. So they carefully picked a case scenario where there were no heinous facts associated with the victim that might sway the decision making and they gave everybody the same case file and a bail bond assessment form to fill out. However, there was an intervening task - I would like you to just to spend a minute putting yourself in the shoes of the participants as if you are going to engage in this task which is to write down, before you render the sentence, what will happen to you as you physically die - what emotions at the thought of your own death causes in you. The question for the psychologist is 'does thinking about something irrelevant to the task at hand but something that might be spontaneously generated in the course of a case influence the amount of bail set? The irrelevancy might arise from the case facts by themselves, perhaps by the fact that the judge had a medical appointment earlier in the day, perhaps by the fact that the judge just learned about the unfortunate passing of a friend or a colleague, or any sort of external event. And I can ask you: do you think that there would be a difference between the half of the participants in that study (who got this intervening instruction) in terms of the bail bond amount and those who did not? The results were quite dramatic. There was an average amount of \$50 for those who did not think about their own mortality and \$450 was the average among the group that did.

This provoked a lot of future study. At least another 100 or so studies have been published on this topic since (Rosenblatt, Greenberg, Solomon, Pyszczynski & Lyon 1989). It seems to be bolstered by the fact that mortality salients in the mind of the decision maker, focusing on one's vulnerability. It makes you then start to identify more powerfully with your in-group and try to create a sort of buffer against those unpleasant thoughts of your mortality by taking more severe action against those who seem to fit into the out-group - those who don't share the same moral and cultural values, or who aren't aligned with your in-group. So in this case, even the alleged prostitute was sufficiently in that out-group that she was punished by a factor of nine more after that stimulation. People who have high self esteem are usually a little more impervious to terror management theory - managing the terror of one's own death. But as I have shown, the judges in the study were still susceptible to the phenomenon.

Seriousness of the offence motivates more severe sentences, which one might expect given the way the sentences are structured in light of the penalties. But more concern has been raised about the extent which factors associated with the victims might bias decision making (Erez, 1991). I know there has been some discussion about victim impact statements and there has been some research by social psychologists on those too. We certainly have learned that if you have an innocent as the victim, not as the offender, that the sentences are more severe (Alicke & Davis, 1989). Similarly, slight variations in the presentation of information about the victim, such as describing him

as a very loyal husband or as a loner (Greene, 1999), a social outcast, led to differences in the penalty that was awarded. Strangely, too, factors of course not known by the offender at the time of the commission of the offence make a difference, such as the amount of social support that the victim has afterwards. Do they cope well with the crime or do they cope poorly? If you cope poorly far more punitive sentences are awarded (Hills & Thompson, 1999). If there is a mild emotional injury versus a severe psychological injury in a victim after the crime then feelings of sympathy towards that victim generated far more severe sentences (Nadler & Rose, 2003). So the psychology of victim impact statements seems to draw on a lot of research on the impact of emotion on decision making.

I know that judges often take pride in being able to separate the impact of emotions from decision making, but it seems very clear that in most of this research judges and juries alike are responding, sometimes with anger, or disgust to some of the facts, and that that influences the depth with which we process facts. There is a lot of research showing that when you are motivated by anger, as opposed to say depression, you do less systematic analysis of the information and you rely more on stereotypical thinking. Depression produced an opposite kind of effect - much more systematic, in-depth careful factor analysis. So we need to be careful about some very subtle variations just in the moods that can be generated by the facts.

I'll finish up with just a little concern about the future dangerousness assessments. There is immense controversy in the psychological field about the methodology in the science underlying future dangerousness assessments. Most of all, it has been boiled down to a competition between what is called the actuarial approach (that relies on static factors that you can extract from a file such as the age of the offender, their families marital status and so forth) versus a method that is more clinical, that looks at more dynamic factors. There have been some studies now on the impact of the difference of those kinds of testimonial presentations by experts on the fact finders. They show that in fact the actuarial approach produced far higher ratings of dangerousness in the fact finders (Krauss & Sales). So simply varying the form of that expert evidence can produce some different outcomes. I need to say that there is a lot of concern about the reliability of those methods that has led a lot of lawyers, and certainly now, many psychologists to be very sceptical about that data base.

Whenever a psychologist or a psychiatrist testifies during a defendant's competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall. The surface of the hat shall be imprinted with stars and lightning bolts. Additionally, the psychologist or psychiatrist shall be required to don a white beard that is not less than 18 inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding the defendant's competency, that bailiff shall dim the courtroom lights and administer two strikes to a Chinese gong.

This actually comes from some legislation that was obviously, humorously placed in the state of New Mexico, causing us to question more deeply the reliability of some of this evidence. I don't mean to say that those aren't clever, but I think that the concerns about the role of the psychologist and particularly the future dangerousness assessments need to be addressed very cautiously.

The assumption that many people come into the legal system is about the extent to which people can change, and the extent to which the system is fostering change. If we believe that people are perpetually going to behave the same way then you respond in terms of selecting a punishment system very differently than if you think people are amenable to change. I think that out of at least some of the drug court analyses and data we've seen that people, given a managed change environment and an opportunity to change, do start to respond very differently. And so perhaps the greatest message out of some of the psychological research for us to reflect on, is the hope that there is now a evidence based premise starting to be generated that will lead to some reforms that focus on more rehabilitative and restorative processes. We will be surprised about how much people change if there is less incarceration and less lengthy sentencing.

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