

CONFERENCE

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Do sentencers reflect their communities?

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(Transcript of presentation)

Do sentencers reflect their communities?

Sentencing is a human process. Nothing very startling about that. This has been the case since Hogarth's very important study in Canada in 1971. Also we have known from at least the beginning of the century that one of the major things that a sentencer does is interpret information. Not startling, not unusual.

What I think might be a little startling is to talk about sentencing as something that is situated. In shorthand, not isolated, not solo, contextualised in the local community, localised, imbedded in certain circumstances and interacting with structural contextual factors like race, age, socio-economic status. It is incumbent on me as a developmental and cognitive psychologist to suggest to you that what we should be looking at now is inter-connectiveness. At the front end of what happens in sentencing as well as at the back end of what happens when sentencers try to communicate with their constituency in the world and with journalists.

Now, why do I want to say that? There is a very interesting paper by Craig Hainey who says 'Let's talk about modern law', and in order to talk about modern law let's talk about a modern psychology for it. He makes a very good case that law is still working with an outmoded psychology, and I suppose that's my biggest burden to present to you.

Currently we do not ever talk about people as isolated, in their cognitions, in their behaviour. The idea of the liberal person, or the rational man, on an island working alone is something which no credible psychologist would talk about. We need to look at the contextual factors. You say, right well when we are sentencing somebody, we need to look at the contextual factors for that offender or for that victim. I want to say that we need to look at the contextual factors for the sentencer.

The sentencer is situated in waves of context. Those waves of context are the law and its discourse, the judicial system in which they operate including the bureaucratic system which runs the courts, the kind of people that are available, the other players that are there, the kind of services at work and in the local community. It is very clear about what happens at this end because you are in a particular community. I want to say what happens at this end? much of the discourse that we have been engaging in about is what do we do about the media is an example of the kind of thing I'm saying. We are imbedded in this world in which this is how it goes and in order to deal with that we need to work how our minds work with the material.

I find it very interesting that the relationship between the courts and the community and how they link together has been largely neglected in much of the research that has gone on about the courts. Hooden Sparks talked about it in the 60's and 70's about sentencing drink drivers. There is some very elegant modern work in the United States of America about the local political situation and the values that will influence what happens in the court. In a place where the range of republican voters goes from 40 to 60%, your sentence is likely to be several months different if you are a black offender. I don't see that work being replicated very much at all here in Australia because I think we work very often from this outmoded view of the solo, isolated interpreter.

My next point then is, what does that mean? I want to argue that sentencing is also schema driven- that people work from mental models of how the world is and what they need to do. They have organised systems of knowledge. These things allow us to muddle along, they allow us to have shared meanings, for example, when we sing patriotic songs each of us has enough general shared meanings about what it is to sing Advance Australia Fair. For each of us, there is according to our own settled organised system of thought, different values for those things.

So if you take things like reasonable doubt, what does that mean to people ? or what the judge may say to an offender about 'I am obliged to deal with your crime' or something like that, you immediately resonate with the fact that lots of people are operating from slightly different meanings. We act and think from these consistent models which are part of how we have thought about things for years. Perhaps they are part of our educational background. It maybe that the liberal thinker becomes even more liberal thinking in a particular environment in response to the local situation, or that they adjust. But in that adjustment it becomes part of their own schemas, ideas, and settled systems of thought about how things operate.

When that person then comes to operate on particular things they are activated by environmental cues. Particular environmental cues work for different people in different ways. They allow them to then interact with the case details in ways that, for me explains completely what these newspaper men are doing with your sentences. They have already got their particular cues and they use them in a particular way.

The illustration I want to use is from our data on sentencing themes, nearly 1200 themes across four courts with multi-magistrate courts in the state of Queensland. We have a piece of information and each of those schemas interacts with that information in a particular way. For example, what does drug dependency mean for some of the magistrates in our studies ? Drug dependency meant that this person was not a person who was responsible for what they were doing. It wasn't one of the major things that they were thinking about in terms of culpability. If you did an analysis of the history of what people think about cannabis and what has been said about cannabis over the last 30 years in Australian courts, you would find an incredible history of how people's schemas of what a cannabis dependent person meant in the list courts on Monday has shifted incredibly.

The other thing is what do you do about age? And so in our data we were most keen to look at the two things, what happened with the court and what happened with individual sentences. If you think about it these schemas are going to interact with case details. For example, when you are faced with a younger or older thieves. Sentencers whom we asked outside of court what they did with data, those who have culpability schema said "I'm looking for community attitudes and I'm not concerned about drug problems" - those people were 3 times more likely to send young thieves to prison.

For a sentencer who when they were talking about seriousness looked for signs of cooperation, if they didn't find it of course, they were twice as likely to send older thieves to prison. So what the point of this part of the data suggests is that it isn't just that people have schemas in their mind and it isn't just that they work in a particular

situation but that when these cognitive activities of the person look at the cues in front of them. There is an interpretative process going on and that that itself can show up in differences.

They were all cases reported in the courts and police files. Outside the courts we asked magistrates from four jurisdictions to rate on how they use these things like 'did it happen at night', 'was it solo', 'was the person drug-dependent at the time', 'did the person have a family background or not'. Thirty six details and then we did an ethnographic look at the courts as well.

The first court was a lower suburban court with a lot of poverty, lot of people living in families, lot of unemployment. The second was a wealthy tourist area, with which we are all familiar; a lot of people living in group housing and in all of them you can see there is unemployment. There was a city where many of the people who stole actually stole alone and lived alone and used pawn shops more often and sold luxury goods. The other was a far remote community with a lot of aboriginal people and where 76% of the cases were represented because the legal aid was scouting around looking for customers each morning. We were able, and of course I am giving you only a thumb sketch of this, to talk about the regular customers - the Aussie battlers or the well off transients or the anonymous urban or the regional poor and black. They tended to steal different things. For court A there was more break and entry, more stealing of clothes and in B it was sports and recreational goods and money from businesses. At the city court there was the pawn, the luxury goods stolen from strangers. In court D there was a lot more of regular customers so that the legal aid people knew their customers very well.

In court A, that's the local suburban court, you have got more use of probation. At court C the city court you have got more use of fines. In court D you have got a lot more nominal penalties. In other words, what you may want to say about this that it is pretty desperate for this amount of people with the absolute rigor of controlling all of these case details. You would not have been able to discern what was happening unless you were able to look at the magistrate's schema in relation to the interactive factors of case details. In court B the resort court, there was almost no use of probation. These are people who are transient, or people who were young and wealthy. There is very little stability there, so the sentences are usually fines. Similarly in the city courts that's happening too.

In each of these courts there was a different profile of the other players. In the urban poor area court, there was a much bigger probation service presence and they were active in recommending more use of probation. In the regional court the corrective service officer was really on the job all the time. He roamed the court early in the mornings. They instructed people was to what was possible and they were very active in informing the magistrates. In the city courts, court C, the corrective services took an observational role and commented to our researchers this is a real factory - get matters through as quick as you can - it's like a real sausage machine. In court B, the resort court, there were almost no probation service possibilities at all.

So, are we saying then that these sentences are just arbitrarily working on their own or are there something about where they were situated? I want to argue that they weren't working solo, but they were still being interpreters of what was going on. So, they

were following the Act, which in particular said that they had to look at the conditions and the state of the offender as well as anything else. They were responding to local conditions particularly in terms of local provisions, but they weren't just contextually determined.

Why are we not looking more often at how the local conditions are related to what the individual sentencers do? I'm saying that individual sentencers are making sense of case details from their schemas. If you take one of those courts and look at the patterns there, you can see how the interaction of the factors that were happening and the services that were available made a difference. My burden is that we need to understand more about the relationships of the court to the community.

If you want to talk about the media and its effect, what do you want to do about the media and its effect on the people who are the sentencers? Let's just not look at what they are doing but let's look at their effect. And let's look at the individualised schemas of people and see that what people do in their professional life. Their expertise is situated in many levels.