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The magistrate and Mr Moore: story-telling, narrative forensics and a judge's experience of sentencing

Abstract:

This article tells the story of 'The magistrate and Mr Moore', a true account of an Australian magistrate's experience of sentencing a man for drink driving, and then considers the significance of this story to the fields of socio-legal studies and narrative inquiry. Firstly, it explores how an ethnographic research approach – a sort of immersion journalism – is a productive methodology to access the under-researched area of judges' experiences of sentencing people. Secondly, based on interviews with judges and magistrates in the criminal justice system in New South Wales, as well as, in some cases, observations of their working lives, the article explores the ways in which the judicial act of sentencing in part involves a curious (and vexed) approach to legal narrative.

Biographical note:

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Creative writing – Nonfiction – Judges – Sentencing – Narrative – Stories – Ethnography – Immersion journalism

Introduction: The magistrate and Mr Moore, a true story

The courtroom in the courthouse of the coastal town in New South Wales is a sweet, narrow box-shaped space painted pink, cream and federation green. With its lofty ceiling and wooden detail, it's the sort of place you'd imagine might feature in an early twentieth-century period drama.

On a Thursday afternoon, I creep in, remembering to bow towards the bench, and sit at the back of the public gallery.

Proceedings are underway. The magistrate dispenses with her paperwork from the previous case, and announces the matter of Mr Moore.

Moore stands, tight-jawed. A few months ago he was stopped by police, in the early evening, driving out of the underground car park at the local Coles supermarket. He was breathalysed. The police had been tipped off. They knew where he'd be and they knew he'd be drunk. Moore pleaded guilty to 'mid-range drink-driving' and 'driving while disqualified'.

The magistrate stares at him: 'Your behaviour presents an unacceptable risk to other people.' She says that his driving record is 'appalling', that this is the seventh time he's come before the court for drink-driving. She must impose a term of imprisonment, she says.

Moore looks lost. He's older than me, a decade maybe, and there's something of a furniture-store-manager about him. It's that suit, that neck. His lawyer asks Her Honour to consider an Intensive Corrections Order, a new sentencing option that includes home detention, curfews, random drug-and-alcohol screens, community service and rehabilitation. Moore has kids. He doesn't want to lose access to them.

On the magistrate's face is a flash of relief. She doesn't *want* to send him to jail. She disqualifies his licence for two years before adjourning the matter so that Mr Moore can be assessed as to his eligibility for an Intensive Corrections Order. The magistrate stands. We stand. She exits.

A court officer leads me around the back of the building to the office. Having interviewed Supreme Court judges in city skyscrapers, I expected Her Honour's chambers to be lined with spacious bookshelves and heavy books, but instead she sits at a usual-sized desk in a pokey room with tired carpet. You get the sense that, in the rainy season, it becomes mildewy.

She greets me all smiles and handshakes, and insists I call her by her first name. She throws off her black judicial robe, hanging it up, and asks me if I've had lunch. I have. Someone knocks on her door and puts a plate of hot chips on her desk.

'You don't mind if I eat?' she asks.

'Of course not,' I say.

As she takes a chip, I study her. She's in her fifties and has the sort of balanced face you see on people such as artists or doctors who might know something of the human condition. She's not been at the bench for long, she tells me. For the first two years, she came to court every day feeling like throwing up.

‘The job’s very fast,’ she explains. ‘I might see 100 matters a day, and sentence 20 or 30 people. The law is cut throat. If you’re not in control of the court, the lawyers will smell blood and they’ll be running it. They’ll be running *you*. I’ve got to at least *look* like I know what I’m doing. One day I had a shocking case of conjunctivitis. My eyes blew up – I looked Chinese – and I had to go into court facing ninety people.’

She must sentence Mr Moore. She takes a piece of paper from a neat stack at the corner of her desk. It’s a form she’s created to help her sentence people at speed. She shows me where she’ll jot down bald facts, and where she’ll scribble in boxes, noting the ‘aggravating’ factors of Moore’s case, any ‘mitigating’ factors, and ‘subjective’ details about him. At the bottom of the page are listed the seven official purposes of sentencing such as ‘*to ensure that the offender is adequately punished for the offence*’; and ‘*to denounce the conduct of the offender*’.

‘I think of sentencing as a puzzle,’ she tells me. ‘I’ve got to make sure I have all the pieces, and that all the pieces are together. Then I have to arrive at a decision. It’s a huge task.’

She worries about her own inconsistency – which is why she drew up this form. She also worries about consistency between judges.

‘We judges have our own philosophies,’ she says. ‘For instance, I like Buddhism. This job gives me all day, every day, the opportunity to exercise compassion.’

An office person knocks: ‘Sorry to interrupt. Admin asked me to ask you did you want the microwave – the old microwave – because we’re getting a new one.’

‘Do I want the microwave?’ replies the magistrate. ‘No. Thanks.’

‘No?’ the woman says. ‘All right.’ She leaves.

The magistrate nibbles another chip. She asks me if I’ve seen the Judicial Information Research System. I haven’t.

‘Pull up a chair,’ she says.

I sit close, our forearms almost touching, and we study her computer screen. The system, she tells me, contains case law, legislation, principles of sentencing, sentencing statistics and other information.

‘Let’s say I’ve got Mr Moore, midrange Prescribed Concentration of Alcohol,’ she says. ‘He’s under the Road Transport Act, so I look at the offence he’s charged under.’

She wipes her oily fingers before using the mouse to click on a drop-down box.

‘I look at the Local Court statistics. Here are all the sentences in NSW from January 2008. Since then, a total of 41,600 people have been sentenced for midrange drink-driving’.

She continues: ‘But I’m thinking, “hang on a minute. What about my guy?” Well, who *is* my guy? I go to “Offender Type” – .’

She clicks on another drop-down box.

‘My guy’s got two offences. Okay, there’s 8,000 people.’

Another box.

‘My guy has a prior record of the same type. Okay, there’s 4500 of them.’

Another click.

‘My guy’s entered a plea of guilty, so we’re building in his discount. There’s 2,600 of them.’

Click.

‘Mr Moore is aged between 41 and 50. That brings it down to 390 people.’

On the screen are columns – a bell-curve – indicating how many of those 390 people received what sort of sentence: No recorded conviction? Suspended sentence? Good behaviour bond? Community service? Home detention? Jail?

She says: ‘I’m thinking *Well, only two people got no recorded conviction. I can’t give him that. I’d get appealed. And only 12 went to jail.* This is what I do in my head. I immediately go from the bottom to the top.’

She begins by pointing to the lightest sentence and working up.

‘I think *That’s 4, 8, 9, 10, 14-17 percent. So 83 percent of people got between a fine and a Community Service Order.* I might write that on a little sticker. I’m getting a range here now. And I’m thinking *Well how bad was my guy?* I’m not just going to fine him and disqualify his licence; this is his eighth time, so he’s going to be upwards towards this end,’ she says, pointing to the jail column.

Then she takes a breath, pushing her chair away from the desk, away from the computer and the form and the numbers.

‘In the end,’ she says slowly ‘the sentence I come up with will be the sentence that feels right.’

We talk of country life, of complex sentencing laws, and of the quality of wisdom. I thank Her Honour, we say goodbye and I drive south.

In one month the magistrate and Mr Moore will meet in the quaint, box courtroom. She’ll ask him to stand as she reads out her judgment. He will hear his lot, a punishment decided on messy legislation, statistics, puzzle sheets, bell-curves, button-clicks, calculators, the tabloid press, politics, philosophy, the history of God, the history of science, and on this woman’s visceral certainty that justice has been delivered.

Judicial research and phenomenological anthropology

A story such as ‘The magistrate and Mr Moore’ makes available more analyses than the scope of this article allows. It opens up, amongst other things, questions about sentencing theory, court management, judicial intuition, and the nature of judgment. However, the issues to which I want to turn concern: firstly, how a judge’s experience and practice of sentencing in part involves a curious approach to legal narrative; and, secondly, the sort of methodology that enables us to consider such things.

I shall first discuss this question of methodology.

Between August 2010 and October 2012, I conducted ethnographic fieldwork in the NSW criminal justice system in Australia.¹ I interviewed judges, magistrates, lawyers, forensic psychologists and psychiatrists, court chaplains, parole board members, victims and offenders. I also attended court hearings, parole hearings and private meetings of the NSW State Parole Authority. I have no law background. I came to it as a curious writer-anthropologist interested in people, social performance and emotion. My central, guiding question concerned remorse: how judges and the parole board assess an offender's remorse and, for an offender, what it is to have your remorse evaluated. However, as is so often the case during fieldwork, other themes emerged such as judges' lived experiences of sentencing people.

An ethnographic research approach, with an emphasis on phenomenological anthropology, is a productive methodology to access the under-researched area of judges' experiences of sentencing. Despite the central role of judges and magistrates in the justice system, the judiciary is rarely approached to provide in-depth qualitative data. Researchers recognise this, and there have been calls for more ethnographic approaches to sentencing research (see for example, Ashworth 2002) and to examining the working practices of judges (see for example, Darbyshire 2011).

At the moment, however, there is a paucity of interview-based research with the judiciary – exceptions include, for instance, the important work of Jacqueline Tombs (2008) – and only a handful of such studies have been conducted in Australia. As Geraldine MacKenzie pointed out in *How judges sentence*, her study based on interviews with Australian Queensland judges: 'What judges think about sentencing and how they approach this task are largely missing links in sentencing research' (2005: 5). In 2006, Bellows, Kleck and Tark conducted a worldwide study examining the types of research methods most frequently used within the fields of criminology and criminal justice. Their results revealed the dominance of surveys, with such survey research sometimes 'supplemented' with a few interviews by judges. There are, however, very few interview-based studies.²

In my own interviews with the NSW judiciary, one judge was curious why more researchers do not seek out magistrates and judges for in-depth interviews. He offered an explanation: 'I think researchers believe that our only relevant thinking is in our judgments.'

Max Travers's 2007 ethnographic-based study is a departure from survey approaches (see also Lorana Bartels's 2008 interview-based study with the Tasmanian judiciary). He observed hearings and interviewed practitioners in the Youth Justice Division of the Magistrates' Court in Hobart, Tasmania. He points out that there are two academic approaches to sentencing research: firstly, 'a jurisprudential interest in the philosophical principles' which 'makes it possible for commentators to criticize judges for not being consistent in how they understand or follow these principles, or for not sufficiently explaining their judgments'; the second involves 'political concerns about judicial bias', and the subsequent research methodology uses statistical methods to identify 'causal factors' between sentences and the social background of judges (2007: 23). However, as Travers points out,

measuring inputs and outputs, in so far as this is possible, cannot explain how any particular decision gets made. To put this differently, what happens in court, or what matters to the judge and other professionals involved in a particular legal case disappears or becomes irrelevant when the researcher tries to explain this using statistical methods, or even when interviews are employed to explore general sentencing principles.

He continues: ‘The difficulty for a social scientist is that it seems unsatisfactory having to describe professional work as involving an exercise of “intuition”’ (2007: 24).

In other words, research focusing on the judiciary is often preoccupied with abstract sentencing principles rather than on-the-ground experience of judicial practice and experience (a point made by Cyrus Tata when he calls for an examination of judicial ‘craftwork’ [2007]). When scholars *have* turned to ‘experience’, they use biology and psychology. In late 2012, for instance, *The economist* published an article citing studies showing that sentencing decisions are influenced by such variables as whether or not judges are hungry; and, when the offender is a so-called ‘psychopath’, whether or not a judge is given the biological factors causing psychopathy.

Phenomenological anthropology as a methodology is especially useful to access the judiciary’s lived experience of sentencing. For more than two decades, scholars such as Robert Desjarlais (1992) and Michael Jackson (1989, 1996) have developed, and demonstrated the productiveness of, a particular approach to anthropological fieldwork that seeks to explore the day-to-day lived experience of people’s lives. They build on the work of Edmund Husserl, Martin Heidegger, Maurice Merleau-Ponty and Clifford Geertz, as well as contemporaries like Edward Casey, to foreground people’s *being-in-the-world* rather than ‘the intellectualist fallacy of speaking as if life were at the service of ideas’ (Jackson 1996: 2). As Jackson writes: ‘human beings live their lives independently of the intellectual schemes dreamed up in the academe, and [...] the domain of knowledge is inseparable from the world in which people actually live and act’ (1996: 4).

The sort of fieldwork such thinkers advocate is one where, like all good ethnography, the fieldworker spends sustained time with people, documenting what they say and do, and discerning what is meaningful to the lives of those people. This involves finding out people’s worldview, as well as documenting their everyday practices. ‘The knowledge whereby one lives is not necessarily identical with the knowledge whereby one explains life’ (Jackson 1996: 2), and it is therefore of limited value to pose to judges, for example, abstract questions about sentencing principles *without* also sitting with them as they reflect on what they do, and as they fiddle around with numbers to arrive at a person’s jail sentence. As I have written elsewhere, there is a distinction between a discourse *about* a practice (in this case, sentencing), and a discourse *within* a practice (Rossmanith 2008); that is, people’s talk while caught up in a practice is usually distinct from the ways in which they explain that practice later on. The point here is that, as ethnographers, you want to get at the full spectrum of a person’s lifeworld and experience.

Stories, key incidents and immersion journalism

I have referred to ‘The magistrate and Mr Moore’ as a story, but ethnographers might also call it a ‘key incident’. Robert Emerson uses the term ‘key incident’ to describe ‘particular in-the-field events or observations’ out of which a field researcher’s analyses grows (2004: 457). There is, in this, an implicit chronology, with the fieldworker going out and meeting an unfolding scene.

Publications such as James Clifford and George Marcus’s edited collection, *Writing culture: the poetics and politics of ethnography* (1986), and the burgeoning of autoethnography (the beginnings of which are introduced by Hayano 1979), reflect how, for at least the last three or four decades, ethnographers have recognised the centrality of storytelling to their project – so much so that, nowadays, a scholarly journal, *Anthropology and humanism*, is devoted to publishing anthropological writing that plays with written forms.

When I first began sifting through my fieldnote diary, I started thinking about the written research I could produce from it, and my mind immediately turned to genres: I can write academic articles, I thought to myself, and I can also write literary nonfiction. Indeed, the first piece to be published from my research was a 5,000-word literary essay in *The monthly* magazine (see, Rossmanith 2012).

What I am only now recognising is that the fieldwork I undertook seemed to demand this nonfiction form. It sought it out. For example, in the legal world, narrative is central (a point to which I shall return). During trials and sentencing hearings, I heard prosecutors and defenders compete to transform brute facts and smoggy conjecture into compelling story. In parole meetings, I watched how Correctional Services and parole authorities turned (or ‘disciplined’, we might say in this post-Foucauldian era) an inmate’s prison notes into his life story – including writing a future he had not yet lived.

Nonfiction writing is, of course, also about narrative. I sat in courtrooms and observed events imprint themselves on me. These animated happenings heavy with affect often flew at me as nonfiction sentences and paragraphs appearing in my mind and onto my notebook. (The trick then of course, as any good ethnographer knows, is to find out whether your hermeneutics relate at all to the interpretive experience of the other courtroom participants. And when I say that sentences and paragraphs flew at me, this was only made possible because of the vast amount of research and knowledge I had accrued these past few years. When I first stepped into this world, I couldn’t make sense of anything, let alone write about it, and I felt very stupid, which is how all good ethnographers should feel at the start of their projects.) In other words, when I wrote the story ‘The magistrate and Mr Moore’ it was partly because I sensed that literary nonfiction might be the best form in which to unfold the dense experience of what it might be like to sentence a person.

In this way, my project is ethnographic, but at the same time it is also a sort of immersion journalism. As I have mentioned, the writing to come out of my research not only involves academic articles, but also investigative reportage – and, crucially, story-telling is at its heart.

In his book *A field guide For immersion writing*, Robin Hemley describes immersion journalism as an infiltrating writing (2012: 83), or ‘participatory journalism’ (55). He explains: ‘In the immersion memoir, the writer writes about the world in order to examine the self. In immersion journalism, the writer includes the self in order to write about the world’ (9). The examples he uses include writer Nelly Bly (real name, Elizabeth Jane Cochrane) who, at the turn of the twentieth-century, ‘feigned insanity to have herself committed to the women’s lunatic asylum on Blackwell’s Island’ (56), and, more recently, Barbara Ehrenreich’s *Nickel and dimed* ‘in which the author took a series of minimum-wage jobs to demonstrate just how difficult it is for many working-class Americans to get by’ (59).

Such work involves writers immersing or embedding themselves in a community or an experience or a place and writing from a participatory viewpoint, as well as through observation. (George Plimpton (1966), for instance, played professional football and wrote of what it is like to be in that world.)

While I am certainly not inserting myself in the justice system in any practical sense (neither by breaking the law to experience first-hand in-court processes, nor by becoming a criminal lawyer), my work is ‘infiltrating’ and ‘immersive’ firstly in the sense that the access I have been granted is rare and hard-won and, secondly, because of the lengthy time I am spending with people. I have sat with judges who cried as they recounted to me particular cases over which they’ve presided; I have shadowed a caseworker as she visited ex-prisoners on parole; I have attended a meeting of the family members of murder victims; I have sat in on dozens of hours of private parole meetings. Like all immersion journalists (and ethnographers), I have had to earn the trust of people with whom I am spending time with and writing about.

This is as good a time as any to mention the ethics of my work. After submitting a 55-page ethics application to my university’s Human Research Ethics Committee, I was given permission to conduct this research. Prior to writing the ethics application, I had established contact with various authorities and heads of organisations (which included meeting people in person); then, in order to interview people, and to observe and document their working lives, I had to establish and develop a relationship of mutual positive regard. The people I spent time with in the justice system were aware that I would be publishing research in scholarly journals *and* in the mainstream press. They knew I was crossing genres.

My (immersive) fieldwork in part involved conducting 20 in-depth interviews with judges and magistrates, as well as, in some cases, observing them in their working lives. A dimension of the judicial experience of sentencing emerging from my research concerns the centrality of narrative-analysis, and it is to a discussion of this I shall now turn.

Narrative forensics

Imagine you are a magistrate.³ You have 50 matters to preside over between 10am and 4pm, and 30 of those involve sentencing people. You will send some of these people to prison for the first time. In arriving at fast decisions, you will rely heavily

on submissions made by the police prosecutor and the offender's legal representative. You will rely on them to provide you with the necessary information – information that, in part, comes in the form of a story.

The centrality of narrative in court proceedings has long been recognised, with writers such as Shakespeare (*The merchant of Venice*) and Robert Browning (*The ring and the book*) aware of the presence, and power, of rhetoric in the courts. Scholars acknowledge it too, for 'both law and literature attempt to shape reality through language' (Gewirtz 1996: 4), and 'law uses literature to carry out its aims' (Biet 2008: 405). In the adversarial trial, lawyers typically compete to present to the court the more compelling, convincing story. But the same can be said for police, lawyers in sentencing hearings, parole hearings, and other court matters. McConville et al (1991) point out that police facts are versions of events that are constructed to present a narrative most favourable to a finding of guilt (see also Hall 2013 forthcoming); and Richard Weisman, for instance, has studied what he refers to as narratives of acknowledgment, suffering and personal transformation (2009: 64) that are enlisted by offenders and their defence teams when making submissions of remorse. In other words, narrative forms a core element of the courtroom genre.

Legal practitioners also recognise their own practice of weaving together a story. One defence lawyer I interviewed told me that, when he represents inmates at parole hearings before the parole board, he 'gives a narrative'. With his finger, he pointed to imaginary dots on an imaginary timeline and he told me:

I locate the point in time when the offence was committed, then the point in time when the offender felt sorry for the offence, and the point in time when I can say 'Now looking back'. These are the points you want to find in order to construct a narrative around.

Storytelling can also be used by lawyers to expose the absurdities of the opposing side's case. A senior public prosecutor explained to me his process of cross-examining a witness. He told me that he asks the person specific questions 'so as to elicit the absurd position' he or she has taken: 'What you're doing is you're breaking it up into bits and setting it out in a logical way and then presenting it to the person and saying "*Well, okay, this is what you're saying happened. That's absurd.*"'

Judges too acknowledge the role of narrative in the courts. For instance, when I interviewed judges about offenders' sworn remorse testimonies in the witness box, many of them enacted for me what a 'genuine' (as opposed to a 'superficial' or 'insincere') remorse statement might look and sound like. In doing so, these judges and magistrates began telling me the story of the offence and the story of their (the offender's) remorse. One Supreme Court judge pretended to be a male offender in the witness box. She said:

Look, to be honest with you, up until six weeks ago I hadn't really thought about what I'd done. Then I suddenly thought 'Wow! What if someone had hit *my* sister? What if it was *my* mother who was robbed and knocked over and her handbag was snatched?' And I thought to myself: 'What have I *done*'?

A magistrate I spoke with went so far as to say that, when an offender gets into the witness box and tells his story, he ceases to be ‘other’ and instead becomes ‘like us’. The offender’s self-narrative allows the magistrate to identify with that offender.

Judges are, of course, also aware of the careful craft required to write their judgments, the ‘skill in devising rhetoric to capture appropriate moral outcomes or to craft fair legal results’ (Weisberg 1996: 66). In sentencing, judges ‘aim to “tell a story” that is meaningful’ (Tombs 2008: 85). (That said, one North American judge has written that the ‘deliberate adoption of rhetorical devices to strengthen the persuasive power of a [judicial] opinion very likely conceals either a failure to perform the analysis or a failure to clarify the resulting results’ (Leval 1996: 207-8).)

Less discussed, however, is the deconstruction of narrative that takes place backstage. While this is common work for a jury who behind closed-doors must decide a person’s guilt or innocence, juries study narrative for truth and viability. (*If the defendant was seen leaving the pub at 10pm, would he have had time to get to the house and murder the woman by 10.45pm? Can we believe the testimony of the woman’s sister who stammered through her evidence?*) A judge, however, turns to legal narrative with an altogether different end in mind. He or she must take apart the narrative and select relevant bits that relate to the objective seriousness of the offence, as well as the subjective features. This exercise in narrative forensics – especially in the NSW criminal justice system – is, for the judiciary, bitsy, vexed and often frustrating.

Take, for example, the key incident with which I opened this article. When the magistrate sat in court, she would have had in front of her the police fact-sheet, as well as submissions from the prosecutor and the defence council. She also listened to the defence lawyer’s oral submission. As she read and listened, she took in the stories being told to her – and, within seconds, she was, in her mind, deconstructing them for the purposes of sentencing. She was plucking out relevant bits and suturing them to possible sentencing options.

Minutes later in her office, she officially began to work out Mr Moore’s sentence. She literally singled out bits from the submission made by the man’s lawyer, making sure she ‘had all the pieces of the puzzle’. She noted the number and type of offences he’d pleaded guilty to, his prior record, his age. She would have also noted, for example, evidence of remorse, his obligation to and relationship with his family, and other subjective features. In doing all this, she was taking apart the police-fact-sheet narrative and the defence-council narrative, and then punching bits of data into a software system, and scribbling other bits onto a form.

If, for magistrates, the deconstruction of narrative is a ‘puzzle’, the exercise for judges in the higher courts is more akin to a glass bead game. This is how one judicial officer described it to me: ‘The sentencing process has become unnecessarily complex and intellectually turgid, overladen with all sorts of rules and guidelines. It has become an abstract, Byzantine dance of words. It is Hesse’s *The glass bead game*’.⁴

For judges and magistrates in the NSW criminal justice system, the number of prescribed matters that they must take into account when sentencing someone, and the accompanying algorithms applying to discounts and aggravation, have grown so vast

that many of them feel that the process has become increasingly esoteric. As I have written:

In the late 1990s, the [NSW State Government] introduced ‘guideline judgments’: guideline cases that suggest a sentencing scale in one or more commonly encountered factual situations. Judges were told that if they departed from the guideline case when arriving at a sentence they were required to give a reason. In 2002, ‘standard non-parole periods’ for some offences were introduced (40 percent of the maximum sentence for some offences, 80 percent for others), and a mandate to judicial officers that, should they wish to depart from these standard minimums, they were required to give one or more reasons from a formal list of factors. Alongside this are ‘sentencing discounts’, where offenders are eligible for a 10-25 percent discount off their sentence if they plead guilty at an early stage, and a discount if they assist police. The thinking is that guilty pleas save the court time and money, and save victims from having to give evidence. In what sounds like sale-pricing, an offender who pleads guilty before being committed to sentence is eligible for a 25 percent reduction; an offender who pleads guilty after being committed to trial gets up to 12.5 percent off (Rossmanith 2012: 40).

The upshot is that judges perform a fine, anatomical dissection of legal narrative and attempt to suture tiny parts of it to numerous bits of sentencing legislation – often with a calculator by their side. The exercise is painstaking. One judge told me that this intense labour does not result in a better sentence; it is simply that judges must undertake this process if they do not want their decisions overturned on appeal. (In 2011, the NSW Attorney General acknowledged the ‘ridiculous complexity’ of NSW sentencing legislation, and ordered a review of it. The report is due out in 2013.) As Tombs has observed in her interviews with the Scottish judiciary: ‘the managerialist project embedded in late modern attempts to structure judicial discretion in terms of new forms of accountability within the context of punitive populism’ (2008: 108) make it increasingly difficult for judges to write meaningful ‘sentencing stories’.

Conclusion

On that Thursday afternoon, as I sat with the magistrate in her office that smelt of fried potato chips and of the sea, several things went through my mind, but two were foremost: firstly, that I liked this woman, that she was warm and decent and even wise; secondly, that her daily work process was so *human*. She ate chips. She was interrupted and asked about a microwave. She scribbled on a piece of paper. She fiddled with computer software. She relied on her gut instinct. Her sentencing process was profoundly embodied.

It is this aspect of phenomenological ethnography (and, immersion journalism) that I most enjoy: the capacity to access a usually hidden world such as judges’ experiences of sentencing people. Such a research approach gives us a way into something private and shadowy – and, importantly, the tools then with which to write stories about these worlds. It has, in this case, allowed me to see and understand – and write about – the forensic narrative deconstruction undertaken by NSW judges and magistrates as they arrive at people’s criminal sentences.

Judges and magistrates are human decision-makers. They do not wait for sentencing decisions to ‘beam down’ to them, as one interviewee put it. Their work is just that: *work*. The more we find ways to get at the embodied labour of people’s professional lives, the more we are able to, firstly, comment on those people’s lived experiences, and secondly, to critique institutional and legislative structures and practices.

Endnotes

1. I conducted 50 formal interviews and dozens more informal ones. I attended at least 30 court hearings, 50 parole hearings, and 21 hours of private parole board meetings. This research was approved on 19 August 2010 by the Macquarie University Human Research Ethics Committee (reference number: 5201000889). This research was made possible because of a Macquarie University internal grant.
2. Currently in Australia there are two large, important research projects underway: *The magistrates research project*, and the *Judicial research project*, both of which are being run out of Flinders University, Adelaide, and both of which study the working practices of the Australian judiciary. These projects rely heavily on survey data. Information about these projects can be found at <http://www.flinders.edu.au/ehl/law/research-activities/current-projects/magistrates-research-project>
3. For a clearer picture of the time pressure faced by magistrates, see Mack et al. (2011). As one magistrate has noted: ‘Whatever metaphor is used to describe the activities in magistrates’ courts the unifying image is the perceived imperative to manage a very large caseload as efficiently as possible consistently with the dictates of justice’ (Zdenkowski 2007: 404).
4. In Herman Hesse’s novel, *The glass bead game*, intellectuals play the glass bead game, the rules of which are elusive. Players perform an abstract fusion of all arts and sciences, but the rules are never made clear and the exercise makes little sense.

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