Judges and their work

Nigel G. Fielding
Department of Sociology
University of Surrey
Guildford GU2 7XH
n.fielding@surrey.ac.uk
Tel 01483 686967 Fax 01483 689951

Abstract

The article discusses judicial activism in the light of research into the attitudes of English judges, and a comparator group of US judges, towards judicial selection, judicial training and sentencing practice. Noting commonalities and shared perspectives, it is argued that the findings indicate enduring features of occupational culture that originate in relations within the legal workgroup and the practical craft of judging. Against the context of highly conventional attitudes, a conservative form of judicial activism is found in respect of resistance to legislative and policy innovation.

Keywords: JUDGES; JUDICIAL ATTITUDES, JUDGE CRAFT

Selection, training, and sentencing have long featured in society's concerns about the judiciary. Efforts to make the selection process less obscure have given way to controversies over means to increase minority and female representation. Training is limited and intermittent. While judges see themselves as guardians of the public interest, the public often criticises sentences. Against what they may regard as ill-informed criticisms, judges have sincere if well-practised rebuttals, but research documenting them is sparse, as Genn's 2009 Hamlyn lectures highlighted (Genn 2009). This article examines judicial perspectives on preparation for, and practice of, the judicial role, drawing empirically on fieldwork with judges, and analytically on the literature on judgecraft and procedural justice, to identify a conservative form of judicial activism.

As Moorhead and Cowan (2007: 316) note, 'social scientific approaches to judges have often looked at macro issues'. Tata (2007: 427) observes that the principal analytic approaches under-represent practice on the ground, relying on official discourses for evidence: the legal-rational position on reported judgments, the new penology on policy pronouncements. The most-researched topic - sentencing - largely addresses outcomes, employing statistical analysis, simulations, and econometric modelling. Such research offers limited insight into the play of motivations and values. It cannot offer much sense of how entry to the judiciary is motivated and negotiated, how training does or does not address doubts and weaknesses, and how those tasked with interpreting law and making sentencing decisions respond to criticism and controversy. This article occupies that ground by applying judges' views to our understanding of 'judgecraft' (Moorhead and Cowan 2007:315) and the contemporary place of judicial activism.

Outsiders are apt to regard the judge's role as that of balanced, neutral arbitration. In the common law tradition, the criminal trial is regarded as a contest between parties, and the

judge, referee-like, holds the ring, seeking to ensure a 'level playing field' so the contest can be decided solely on the merits of the parties' respective cases. In legal theory, too, this is an important doctrine, extending the idea of neutral arbitration by laying down that the best guarantee of neutrality is for judges to exercise their role relatively passively. But the 'passive arbiter' (Fuller 1978) idea has increasingly fallen under empirical and conceptual critique. This article understands the judicial role as a craft embedded in the work of the legal profession. It will argue that judges are more active 'shapers' of the trial process than the passive arbiter idea suggests. It will demonstrate that, despite the highly conventional views of a sample of English and US judges about the judicial role and the best means of preparation for it, there is nevertheless an orientation to correcting the effects of what is seen as wrongheaded legislation and ill-informed public opinion.

Empirical grounds to question the passive arbiter idea are well-established. Galanter et al (1979:701) document trial court judges who 'played an active entrepreneurial role in the deployment process'. They 'mobilize[d] an agenda of cases' by orientation to non-precedent and non-legal decision making criteria, broadly, their sense of social good. Activist judges have a 'broad role orientation enabling the play of "non-legal" decision criteria' (Gibson 1978). Understanding the routes by which judges enter the profession, and their perspectives on the courts' social role, illuminates their role orientation, to which Galanter et al (1979: 702) add a central feature of the judgecraft perspective - 'situational variables and institutional context'. Whereas the 'prototypical common law trial judge ... applies preexisting general rules to the facts of a specific controversy in accordance with specified procedures' (ibid), disregarding any implications of outcomes for wider public policy, Galanter et al (1979: 706-8) highlight judges who are willing to determine matters of policy independently, engage in doctrinal innovation, and take an active role in case management.

Their posture is less the umpire with binding decisive authority than that of the fixer who arranges settlements the parties can agree, and who works according to the particularity of cases rather than the general rules. This article finds qualities of the ‘prototypical common law trial judge’ in combination with a form of judicial activism.

Galanter et al (1979: 729-30) demonstrated that taking a position in strict adherence to legal formalism, but that drastically differs from the wider court community and interested lay onlookers, can constitute unacceptable deviance, suggesting that situational context can trump legal formalism. This led them to recognise a local culture of legal actors and significant audiences sharing a set of understandings and concerns that define the appropriate style of playing judicial roles. Rather than negating legal formalism they treat it as a courtroom resource for advancing the ends about which an activist stance has been adopted.

Galanter et al (1979) attributed growing judicial activism to more policy-oriented legal education, concerns over increasing bureaucratization of court administration, and pressure from organised litigant groups. One of their judges tellingly remarked ‘I gave up a lucrative private practice to sit on the bench ... I’m not going to sit here and stick my head in the sand’. This sits well with the present study, where a sample of jurists who bear highly conventional attitudes nevertheless testified to activist perspectives that they squarely attributed to feeling obliged to resist a succession of ‘bad’ governments that had legislated ‘bad law’. This broader conception of judicial activism exists between the micro-level of ‘judgecraft’ and the macro-level of Galanter et al’s ‘campaigning’ judge as political figure. Thus located, it sees judges as self-aware role incumbents in a system that functions as a centrifugal mechanism not only propelling cases (and the wider social issues associated with them) into the courts but also projecting the courts’ work out to ‘the wider world of disputing and regulating’ (Galanter 1983: 118).

The impetus felt by the judges in the present study to resist recent legislation is the more important against the context of Galanter's 'legal alchemy' (1983: 123). What happens at court sustains other kinds of 'ordering' far beyond its precincts. Thus, 'law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls. It affects us primarily through communication of symbols - by providing threats, promises, models, persuasion, legitimacy, stigma, and so on' (Galanter 1983: 127). In the gradual emergence of authoritative law from 'indigenous law' (Galanter 1983: 131), multiple sources of norms stand alongside each other, are loosely meshed and sometimes in conflict. As a system with centrifugal and centripetal flow, the effects of both are inflected in the other. Judges stand on the pivot point of indigenous and authoritative law. Passivity and activism can take both progressive and conservative forms in the practice of judgecraft.

Methods

This article draws on interviews with 25 English crown court judges, including 6 recorders, and on group discussions between a total of 10 American state judges and 9 English crown court judges facilitated by video conferencing. All but one of the judges individually interviewed was of white ethnicity, all but one was male, and most were age 50 or older. American judges had age profiles similar to those of English judges but were more diverse in gender and ethnicity.

The literature on interviewing elites (see Fielding 2002) indicates that respondents like judges and lawyers are alert to status and expect to be interviewed by individuals of similar standing who are knowledgeable about legal work. They are averse to standardised research instruments, preferring a conversational format. Accordingly, semi-standardised

interviews were conducted in ‘guided conversation’ mode, with topic lists pre-circulated. Respondents received transcripts for feedback.

Methodological research also indicates that elite respondents seldom participate in group discussions, due to busy schedules, legal/professional constraints, and reluctance to travel to participate alongside less-elevated respondents. To conduct group discussions between American and English judges, I used Access Grid, which does not suffer the lag of conventional teleconferencing and displays life-size images of participants (see Fielding and Macintyre 2005). I acted as moderator at the UK site; a research fellow moderated at US sites. Transcripts were fed back. Like several judgecraft studies with similar sample size (e.g. Moorhead 2007), the qualitative data presented here are indicative rather than representative.

Judgecraft at work

Analyses of the professions as a special case of employment have often emphasised ‘social closure’ (Macdonald 1995) - maximising autonomy and remuneration by controlling entry, fees and rates, and members’ discipline. This approach fixes on instrumentalities and little considers the sense of service many professionals bring to their vocation, nor their actual working practices (Kritzer 1990:5). This is not corrected by acknowledging the specialist knowledge prominent in classic conceptions of the professions (e.g. Parsons 1954).

Presaged by studies emphasising the role of group dynamics between judge and counsel (Rosett and Cressey 1976; Blumberg 1967), Kritzer’s early work-based perspective explained courtroom interaction and decision-making in terms of bargaining rather than formal legal knowledge. Researching civil litigation, he found that:

‘[S]kills and activities most specifically linked to the “legal profession” explain little

of the results achieved through the litigation process. The one variable that seems to have an impact ... is strategic bargaining ... [N]egotiation skills in the arena of litigation epitomize the ... informal, insider knowledge ... associated with the broker (in contrast to the professional's reliance on formal knowledge)' (Kritzer 1990: 5).

Kritzer's approach shares with Eisenstein and Jacob's (1977) 'workgroup' perspective a focus on the long-term cooperative working of legal professionals in the interests of efficiently processing a flow of cases. In criminal trial context, this implies that what matters is not the relationship between lawyer and client but the relationship between lawyer and lawyer. Research has pursued the effects of lawyers' and judges' need to maintain relationships sustaining the workgroup. Cowan and Hitchings' (2007) analysis of throughput management suggests that judgecraft involves 'training' lawyers in judicial expectations of efficient processing via routines and learning what to expect. Judges dispensed symbolic reassurance in the interests of a 'client processing mentality'. This performative element implies the need to understand judges not purely as bearers of decisive legal knowledge but as individuals whose decision-making is subject to the same influences of disposition, style, and mood as those appearing before them.

Kritzer (2007) conceptualises aspects of judgecraft beyond the instrumental and purely practical, drawing analogies from the 'elements' of craftwork. Craftwork: produces something that has utility; has an identifiable clientele; renders a consistent product; has an internal aesthetic ('subtle distinctions that few outside the community can see'; Kritzer 2007: 325-6); involves skills and techniques; and requires significant problem solving (to resolve non-routine contingencies). The elements focused on the product and/or client (utility, clientele, and consistency) are external to the craftsperson. Those focused on the producer (aesthetics, skills and techniques, problem solving) are internal.

Kritzer's perspective is largely appreciative. Others take the judgecraft position more critically. Tata (2007) shows judges using emotion strategically to pacify litigants; Moorhead (2007) notes the place in judgecraft of pragmatic rather than legal problem-solving; Cowan and Hitchings (2007) show the play of middlebrow morality upon judicial evaluations of litigants, evidence and counsels' applications; and Mack and Anleu (2007) report how judges exploit time to control proceedings .

Another critical perspective relates to judicial diversity. Rackley (2007) questions accepted understandings of judges and judging in order to critique official attempts to engender diversity solely by categorical means - selecting more individuals from underrepresented categories. True diversity would be a diversity of thought that freed judges from 'the imaginative hold of familiar yet particular images that infuse and distort current discourses on adjudication' (Rackley 2007: 74). Our understanding of judging has not gotten to grips with female (or minority) judges, whose 'inescapable deviance from the judicial norm disrupts the homogeneity of the bench, revealing the unavoidable, yet largely unacknowledged, gender dimension to traditional understandings of adjudication' (Rackley 2007: 76-7). Rackley (2007: 75) demonstrates the 'isolation, hostility and exclusion' faced by female judges, from several decades ago in the US up to Brenda Hale's appointment in 2004. Rackley's position speaks to our relative ignorance about judges' on-the-job thinking.

The present study suggests that judges take an 'activist' position on one thing - 'wrongheaded' legislation - but are otherwise conventional in outlook. The randomly-selected sample produced a group whose views are similar to Griffith's (1977: 7) classic, where a 'unifying attitude of mind ... is primarily concerned to protect and conserve certain values and institutions'. Over 25% of judges nationally may be female, but under 11% of full time judges and 5% of senior judges are, while non-whites are only 3% of the judiciary and

0.6% of the senior judiciary (2006 data cited in Rackley 2007: 84). As to the new Supreme Court, bar judges from Scotland and Northern Ireland, all are Oxbridge graduates, all but one attended public school, all are white and only one is female. If we look to minority judges to understand judgecraft differently, change is far off. The issue may not be who is in but what they do once they are in. Practical dynamics of the work - judgecraft - may trump 'category' - but fixating on judgecraft is too micro. Over time, judgecraft builds 'culture' - an amalgam of working practices and beliefs about working practices. It is that level into which fruitfully enters Rackley's concern with imagery, because workplace narratives are the stories a culture tells itself so that it may know what it is.

That story, told publicly in ceremonial occasions and less formally in professional discourse and to researchers, is that despite slow change towards categorical diversity, there remains 'a belief voiced by some of our most senior judges that we have one of the best judiciaries in the world, if not the best ... undoubtedly incorruptible; seriously intelligent; extraordinarily industrious; and fiercely independent' (Hale 2005: 282). Where found, these are obviously virtues, but the concern is that they may often be linked to unspoken beliefs that the best suited will be 'well bred, well spoken, well educated white males' (ibid). Against that, the sturdiest case for diversity is that people of minority backgrounds will bring underrepresented experience and perspectives to judicial office (Mallinson 2006b). But diversity's potential to 'transform understandings of the judge and judging' (Rackley 2006: 86) is little regarded. Established judges are apt to regard the promotion of diversity as spurred by policy rather than merit. Diversity profoundly challenges the fiction of judicial impartiality. Difference undermines the judge as 'neutral arbiter'. Attempts to discredit minority judges in cases relating to their particular minority tacitly point up the equivalence of 'impartiality' to 'mainstream status'.

This is not a perspective that lawyers or judges may find comfortable, nor one that victims, witnesses and defendants are likely to bring to their understanding of the trial or expectations about what will influence its outcome. They will assume that courtroom professionals bring high technical expertise to bear and that decisions are based on legal knowledge (Fielding 2006) rather than reflecting particular values, mainstream or otherwise. Nor will they expect matters to be determined by a refined version of the bargaining encountered in street markets, car dealerships and share dealing rooms. Still less will they expect that, for courtroom professionals, the proceedings are routine, even boring (Mack and Anleu 2007), with one of Cowan and Hitchings' (2007: 363) judges describing his work as 'largely instinctive rather than intellectual'. The courts are generally successful in not letting the veil drop, but this is not to deny that what may sound like arcane and sophisticated argument to outsiders may be known to insiders as routine and perfunctory. Nor need we worry much about this, except when workgroup practices generate their own imperatives beyond legal considerations. The point is that we cannot detect that such a line has been crossed without knowing more about how judges understand their role.

Motivations

One cannot aspire to judicial employment with any confidence of success. Judicial appointment may not be a career goal, but a number of judges spoke of longstanding attraction towards a legal career. This respondent offered a particularly rich account in terms of social concerns. 'I was born in [mining area] and I can remember age five going out on my bike with my father, seeing small children in the rain in a colliery village playing football without any shoes and socks on. In February. And this affronted me, and so I had a childhood

vision, which continues sometimes, that I was going to put the world to rights. The turning point really was ... seeing the film of the Archer-Shee case ... “The Winslow Boy” (J23).

It is long-documented that a factor in choosing law is having a close relative in the career (Blaustein and Porter 1954). The sole ethnic minority and female interviewees both had such connections. The former had ‘always been interested in the law’ as his father was a lawyer. His account combined the pragmatic, professional and moral elements we generally encountered. ‘The judicial appointment is really a logical progression of being a barrister ... [W]e do well financially but there is a public duty argument of giving something back ... [W]e all reach a stage where you want to do something slightly different ... And overall the job that judges are asked to do is fairly interesting’ (J3). As to the female judge, ‘my father’s wig and gown were in my dressing up box when I was a child ... [H]e always .. told funny stories about his time as a young criminal lawyer ... So that gave me the idea. And then didn’t do law at university, I wanted to act, professionally, and my father said “it would be a good idea to get some qualifications first”. I rather reluctantly went off and did the Bar exams ... Acting and law require some of the same qualities’ (J14).

In our respondents’ testimony ‘judging’ is seldom a motivating factor early in a legal career, with intentions often resulting from judges’ or other lawyers’ suggestions. ‘It was virtually offered ... I’d applied for silk and hadn’t got it and ... one could go and ...see the person involved in the Lord Chancellor’s Department to discuss future prospects ... “Well, why don’t you just apply for the bench instead”. And so I did. I didn’t want to carry on as I was ... An ordinary criminal hack. A rather declining profession as you get old’ (J18). Judges often described their career path as ‘unusual’, perhaps to signal that they were exceptions to the caricature of judges born to privilege and an easy path to elite status. ‘I’d got a scholarship to grammar school ... and so when I first got in [to the Bar], life was really

difficult ... I would teach every evening at polytechnics, I had an Indian student at weekends, I wrote for the solicitors' journal' (J2).

The judge who had 'always' been 'totally inspired' by the early experiences recounted above said it was 'only when people said ... "you jolly well ought to apply to be a Recorder"' that he considered judicial appointment. One might assume his account would inspire particular objectives. 'I had some "non-objectives". I didn't want to find myself engaged in the rat race ... I'd been Queen's Counsel for some years and done civil cases involving setting out at 5 o'clock in the morning and I felt "this isn't the life for me. I don't want to be some kind of senior advocate earning more than (inaudible) a year". I did want to bring a fresh view to the judiciary in the sense of outwardness' (J23). There was some orientation to advancing women's interests in the female English judge's account, if expressed ironically. Her objectives were 'just to try and do it well and ... I suppose one had a hope of dispelling the image of ... male middle class Oxbridge by being female middle class Oxbridge' (J14). One ethnic minority US judge cited wanting to address 'evidence of racial disparities in mandatory sentencing' (AG: J1). That it was only the female interviewee and ethnic minority respondents who commented at all in these terms suggests that advancing the interests of disadvantaged groups may indeed be more of a motivating factor amongst minority judges.

If improved service to underprivileged people flows from greater recruitment from such groups, numbers having suitable ability are critical. For instance, males and females do not have greatly different rates of non-renewal of practice certificates, but the age difference in non-renewal is dramatic: 52 for men, 40 for women. Progression is a definite factor; 'female progression into senior positions appears to be a slow trickle up, rather than a constant and widening stream' (Webley and Duff 2007: 375). A substantial impediment to

female (and other minority) advancement is professional culture, with women penalised for motherhood in a way that men are not for fatherhood. Webley and Duff (2007) argue that only 'a wider values-based approach to professional identity' would change females' position. They found pigeonholing that impeded progression to judicial office by denying female lawyers the same breadth of cases, and appearance before as many judges, as male lawyers, circumstances that ex-military advocates cited to us for their own delayed entry to judicial office.

Webley and Duff also report male lawyers' concerns relating to profit maximisation and the commodification not only of legal services but of the workforce. All our judges observed that judicial pay is inferior to that of senior partners. If there are concerns about over-emphasis on profit, the judicial path may appeal to those driven primarily by a sense of service or those who value work/life balance. The latter featured more in our judges' expressed motivations than the lofty ideals we naively expected - the only responses approaching such terms were quoted earlier. We had not anticipated so clear a focus on working conditions. Thus, 'having a regular life and very short hours compared to the Bar, shouldn't say that but it is, and you do get an awful lot of time, your own time, which is very nice' (J4). Several issues motivating our judges were also cited by Webley and Duff's respondents, including the long hours culture (2007: 384-92), limited sense of personal autonomy (ibid: 392-3), and not being made to feel their work was valued and brought status in the workplace and wider society (ibid: 393). Balancing our judges' instrumentality, all also testified to satisfaction in bearing a role that was important to social cohesion, a position consistent with an activism confined to opposing 'bad law'.

Judicial selection

Obscure grounds for judicial selection long raised concerns, and although those running the avowedly ‘transparent’ new system cite ‘merit’ as prime they are still working at defining it (current selection criteria appear at <http://www.judicialappointments.gov.uk>). Creating a Judicial Appointments Commission (JAC) has not resolved controversy over selection (Malleon 2006a, 2006b), particularly diversity issues. In 2005, the new Commissioner for Judicial Appointments accused the Lord Chancellor of acting ‘inappropriately’ in appointing a judge against a selection panel’s recommendation and criticised interference that allegedly increased the proportion of Oxbridge graduates in a competition for part-time judges. In 2006 judges involved in selection found that good candidates had been rejected because of poorly-completed applications. Commissioners reinstated 59 of 211 rejected applicants for interview after taking account of references. In 2007 the Commissioner declared that females and solicitors still stood to become circuit judges after an alleged ‘human error’ undermined efforts to boost diversity. Of 2,535 applications in JAC’s first full year (2007/2008), some 35% of applicants (N=891) were female, of whom 34% were selected; 13% were ethnic minority, of whom 8% were selected; and 8% were disabled, of whom 7% were selected.

Perspectives expressed by the present sample appear to reflect its composition - broadly consistent with the prevailing characteristics of the contemporary judiciary. The effects on judicial activism cannot be evidenced via this sample but Moran (2006: 566) argues that having acknowledged that female, ethnic minority and disabled judges bring perspectives that reveal the contingent nature of conventions that seem intuitive to those of mainstream backgrounds, the same applies to those having minority sexual orientations. Hard data on judicial sexuality is limited. To my knowledge our judges were heterosexual, inferred from gendered personal pronouns when responding to questions on the work’s impact on home life. References to non-heterosexuality were few and were peripheral aspects of

response (as in a US judge's comment later about a homosexual's petition for civil partnership rights). As Moran (2006: 577) remarks, 'silence is a device by which ... heterosexuality as the norm is (re)produced in society ... and in the institution of the judiciary'. Two of Moran's gay judicial respondents instanced the effect that openness about their own sexuality had on cases relating to sexuality. In one it undermined alarmist evidence from a reactionary organisation.

Minority perspectives help us recognise that what a mainstream sample finds an overly bureaucratic approach to selection is an important protection for minorities. Efforts to supplant the 'old boy's network' will take time, as the effect of restoring attention to references in the 2006 controversy suggests. Our English judges had mostly come through the system of 'taking soundings'. After seven years as an industrial tribunal chair, 'I was simply approached. That's how it happened then' (J17). In a relatively small pool the influence of social network factors can endure. 'I was ... in the first round to be interviewed [in] the new procedure and [among the first appointments] ... As it turned out, the judge who interviewed me was the fiancé of somebody I knew very very well, though I didn't know at the time who he was. Wish they'd told me' (J14).

Those appointed under the former system generally saw the new as excessively administrative and formulaic.

'Most of my colleagues take the basic view that it was done better in the past ... [T]he great joy of a small Bar, everybody knew everybody, rather like a large school. You knew those who were the shits, those you couldn't trust ... those who were the firebrands, you'd seen them in other contexts. I've seen them furious, "they haven't got the right temper" ... Now the whole thing's got so bureaucratic ... There are times when the gut feeling is right about what makes judges. You see somebody who is

going to be remiss, you see somebody who's going to feel they must change witnesses' circumstances, you know it's very dangerous' (J23).

Such elaborated responses convey nuances including suspicion of government (contrasting with the unblushing dedication of US judges to their government), and strong belief in personal knowledge. The response closes with implied criticism of those who would use judicial office to seek social amelioration. Yet this is the respondent who represented his choice of career as a means of righting wrongs. It is as if the respondent let slip in his reminiscence a view that he knows challenges workgroup norms, and uses his answer here to effect repair.

Judicial training

Training for the judicial role is intermittent and limited. As a career progression rather than entry-level destination, there has been a presumption that much of what is necessary to judicial practice is absorbed during a legal career (Munro and Wasik 1992). The Judicial Studies Board (JSB) has been responsible for training judges in England and Wales since 1979, when the Bridge Report identified as prime training objective 'conveying in a condensed form the lessons which experienced judges have acquired from their experience'. The JSB's Director of Studies is a seconded judge. Formal provision remains limited, with modest (if intensive) induction training, and topical 'continuation seminars' providing periodic but brief in-service training (despite judges' perceptions: 'We meet very frequently now. Every year there's a training seminar, it's a full Saturday ... and a four-day seminar to discuss topic issues', J1). Cowan and Hitchings' (2007: 369) district judges received only 'the odd training hour or so as part of a refresher course'.

A JSB review concluded that judges need: training in judicial skills, not substantive law; training in skills applicable across jurisdictions; individually tailored training; training assisted by technology; and documentation providing reinforcement. It continues to be debated how many days/year should go on training, whether training should be compulsory, what should be delivered on a national/regional/ Distance Learning basis, whether there are cross-jurisdiction skills susceptible of training, and how interactive seminars should be. A flavour of training's content is given by the 2007/8 JSB Criminal Committee programme: one induction course, two conferences for new Recorders, and six continuation seminars, three on serious sexual offences and one each on 'long and complex trials', murder and manslaughter.

In Kritzer's 'skills and techniques' element, 'legal reasoning' is the central skill and therefore training's rightful focus. But while ability to weigh factors and reach reasoned decisions is an obvious epitome of 'judgment', it is only partly addressed by training. 'Experience' and 'innate personal qualities' are also required (Kritzer 2007: 385). The 'skills and techniques' involved in the getting of 'judgment' are little documented (Kritzer 2007: 335), nor those of 'problem solving' (ibid: 336). A systematic basis for training in judgment is lacking, leaving the way clear for personal resolutions of activism. Similarly, Kritzer's most art-like element, the 'aesthetic' (creativity, communication, and displaying that one cares), is particularly hard ground for formal pedagogy. 'Technical rationality' (Schon 1983) may be a major feature of professionalism but there remains expertise for which learning on the job is the principal preparation (Kritzer 1998, 2007).

Our English judges emphasised 'learning by doing', a position O'Brien (2004) found also featured amongst US judges. Existing judges and influential others recognised qualities and prompted efforts to develop relevant skills. There was reading of legal texts, but facets of temperament and disposition, and practical skills like preparing notes for summing-up, were

developed more idiosyncratically. In our respondents' accounts, the prime training was exposure in a legal career to a range of cases, courts, judges and sentencing considerations, thus subordinating what one judge pointedly called 'post-appointment training' (J24).

Moreover, training seemed largely a venue facilitating co-learning. 'We have very regular judicial training seminars and ... discuss cases and approaches. The idea ... is that we learn from each other. We discuss ... to a certain theme' (J1). With the emphasis on experiential learning and co-learning, one might expect a practice of sitting in on other judges' courtrooms. However, there is a convention against this. Discussing judicial activism a judge advised 'you'd be much better to ask barristers, because convention means that once we take this job we don't go and sit in the court of somebody else. And so we don't know how other people do it' (J6). The convention forms a compelling etiquette. 'I never sit in another judge's court ... [O]nce I was specifically directed to listen to a newly-appointed Assistant Recorder ... I don't like doing that because I think it unnerves them' (J7).

Thus an informal, experientially-oriented learning mode was preferred, one largely in the hands of the workgroup. Several judges emphasised dining conversation. 'There's a lot of discussion around the lunch table ... We all discuss, at lunch' (J13). Cowan and Hitchings' (2007: 369) district judges also '[sought] out their peers for informal meals and discussion' and used an intranet system 'as a source of training and solace'. Even judges with training roles, like this induction course tutor, did not accord training primacy in imparting norms for judicial style: '[Style] is a topic that's touched on ... but not to any great extent because there's so much that has to be got in' (J19).

Our concern to understand influences on how judges conduct trial interventions originated in its effect on lay participants' experiences and led to the concern with judicial activism. As well as Galanter's activists there is the view that 'neutrality may be promoted by

constructive intervention’ ((Moorhead 2007: 417), with procedural justice research suggesting fairness is not assured simply by formal process (Lind and Tyler 1988). ‘By the time a case reaches trial ... extraneous issues to law, but important to the parties, have been, at least partly, divorced from each other ... marginalising the parties’ (Moorhead and Cowan 2007: 315). Hood (1992) and Shute et al. (2005) highlight the particular difficulties of minority lay participants.

International criminal justice also suggests that the ‘detached and disengaged “blank slate”’ (Rackley 2006: 90) is not impartial. Having no ‘position’ is a position. Rackley quotes a judge involved in Rwandan genocide cases as recognising impartiality not as ‘some stance above the fray but [rather] the characteristic of judgements made by taking into account the perspective of others in the judging community’. Diversity raises awareness that ‘who the judge is matters’ (Rackley 2006: 91), a theme of judgecraft research too. The contingent nature of the ‘neutral arbiter’ idea is apparent when we consider the continental European tradition, where accuracy of procedural outcome is core, not ‘neutrality’ (Dmaska 2005).

Because the continental prosecutor ‘became an important official with hierarchical links to the centre of state power’ (Dmaska 2004: 1020) such legal systems are less open to inter-party negotiations than those where proceedings are conceived as a conflict-resolving device. Dmaska (2004: 1022) also notes the continental system’s presumption that evidence will be developed before the court with ‘the active participation of the judge’, and that charge bargaining is more acceptable in common law jurisdictions because it need not implicate the bench in the transaction ‘and is thus easier to reconcile with the Anglo-American image of the judge as being “above the fray”’. Impartial arbitration is not the bedrock of judgecraft that it is made to seem in common law jurisdictions.

Despite the discourse around passive or committed approaches, style features only

haphazardly in judicial education. Intervention style may or may not emerge in training sessions. 'I have [seen other judges operate] ... in role play. And there is a variety of styles. But there's no specific instruction on how to [intervene] ... It is something you can discuss ... in the course of the mock trial' (J14). Moorhead (2007: 410) reports judges varying in passivity or intervention due to role uncertainty. We asked judges if training made recorders sufficiently aware of varying styles. 'They will have seen different judges and they will hopefully ... emulate the people they admire'; style was built 'from experience' (J14). Nor were style issues regarded as suitable for seminars, with only three interviewees and no group discussion judges dissenting. 'A great Lord Chief Justice said that it takes 25 to 30 years to train a judge ... The whole time you're [a barrister] you are building understanding of that role. You see how judges do it, you see how not to do it, you obviously see some bad ones. Whilst you're a Recorder you'll be concentrating on your performance ... But these sorts of intervention ... are really as in-built as the way in which you lecture. You don't talk to your colleagues about the process of lecturing, you'll talk about content but not the process. We're like that' (J13).

Judges described the need to intervene in terms of 'conduct' rather than technical matters (law, procedure) - 'if things are going badly awry or counsel's delaying or being irritating' (J11). Mack and Anleu (2007) found that judges exercised craft skills to enable greater engagement with lay participants. Describing herself as 'very interventionist', this judge would identify the key point and tell counsel. Asked if counsel cooperated she said 'they have to', but emphasised negotiation. 'Some of them do resent it but ... as counsel I used to find it helpful if the judge did indicate the way they were thinking ... Of course on a very difficult point ... you listen to everything before you say anything' (J14). Nearly all respondents explained law or procedure only when counsel failed to, exceptions being

recorders. Despite official encouragement to be more interventionist, judges wish to leave it to counsel wherever possible. Workgroup relations better explain this than a model where discretion only governs areas not covered by rules. In this context, note that all of Kritzer's elements most relevant to preparation for the judicial role - skills and techniques, problem-solving, aesthetic - belong to the 'internal' dimension. Training may have a role in 'allow(ing) the innate elements of judgment to be realised' (Kritzer 2007: 335) but is not judgment's main progenitor. Personal qualities and experiential learning predominated. Balancing active intervention and judicial neutrality remains for individuals to resolve. If the passive arbiter position has conceded ground to perceived procedural fairness or judicial activism, new conventions are needed that recognise contemporary understandings of balance between the parties - in Kritzer's (2007) terms, the need for a more refined 'aesthetic'.

The judicial system

All respondents felt theirs was rewarding work, performing a necessary service on the public's behalf. '[T]he academic stimulus you receive all the time is very satisfying, and the fact that you never know what is happening from one day to the next. And there is no other job so important in quite the same way' (J21). There was also playing a part in binding a democratic polity. 'Firstly, the power is an aphrodisiac. I continue to get a charge [that] it's very easy to be seduced by ... You're pulling your weight, having an influence in the way that society is going. This is the very great joy. If you look at Srebrenica or the other parts of Yugoslavia where the real war was in play then you see rapidly what happens when the rule of law is not present' (J10). Similarly a US judge took pride from his State Department missions advising on judicial reform. '[W]hen I see what I see when I go to China ... I really

am grateful for what we have. I am most definitely a creature of the American and [his state's] legal system. I have a great love of this system and the quality of justice it offers ... [M]ost of my colleagues ... have, perhaps it's an arrogance about the quality of justice we believe it provides, even in comparison to other states ... states [that] have elected judiciaries' (AG: J7). Threaded through pride is close workgroup collegiality.

Beyond service, judges cited protecting the public from bad law. English judges proved more likely than American counterparts to raise this. 'Parliament ... have the ability to legislate before they consider whether it's a really good idea ... They're continually fudging around, and some home secretaries ... have initiatives they've just gotten excited about that morning without even thinking about it ... In the last stages of the [John Major] Conservative administration the effective "Opposition" to the government ... was not the ... Labour Opposition but the judges ... Judges were ... the last safeguard against some of the policies. They had to look after ... the individual, individual rights' (J22). Ill-coordinated policy was also criticised. 'It's all very well to ... have a street robbery initiative. We've got one ... and lots of robberies are coming in. That side of it is working, the police are doing their job. We seek to do our job, we pot them, and then what does the government do? Start releasing them earlier than the halfway stage because they haven't built enough prisons' (J5).

Judges highlighted a lack of 'joined up thinking'. Several referred to the 1991 CJA as epitome of legislation that had the opposite results to what was intended. 'A complete volte face. Now we're not going to put people in prison anymore, next year we've got to put more people in prison ... [J]udges just carry on doing what they always did as best they can in the face of this ludicrous approach' (J9). Respondents tended to depict the judiciary as embattled but wily protectors of society's best interests who could not expect public, only professional, appreciation. The female judge's example highlighted sexual offence legislation. 'It's

frustrating but it's also ... rather nice being able to find ways around it. As the Court of Appeal and House of Lords did with mandatory sentences, second serious offences and that ludicrous stuff about rape, previous sexual experience of the complainant, completely unjust, which the House of Lords happily found their way around with the help of the European Convention' (J14). Wisdom residing in the workgroup peeks through here as a corrective to ill-considered law. '[T]hey ... don't want to hear there are problems attached to what they want to do ... So there is a reluctance to involve the judiciary ... [I]f only they took the time to come to the coalface and see what went on they'd understand an awful lot more ... In the early 1990s Michael Howard [home secretary] passed a bill which said in sentencing, judges shouldn't take account of previous convictions. Absolute rubbish - reversed the very next year ... Anyone could have told him that was a pointless, stupid exercise' (J21).

While most English respondents touched on such issues, recorders were less likely to. Instead, they emphasised lay participants understanding the court process, seeing it as the judge's duty to sum up in accessible terms (J8), and, where things were complicated, to give jurors specific, written descriptions of 'what the offence is and what questions [the jury] should be asking themselves' (J3). This more modest role concept reflects part-time status and inexperience: 'being a part-timer one is more reluctant to [intervene] ... in case one gets it wrong' (ibid). Rather than saving the public from bad law, recorders were preoccupied with getting law right by adhering to guidance. A yearning for combat rather than refereeing may lie behind judges' accounts of battling philistine governments, but for recorders there was satisfaction in stepping outside the adversarial process. 'At the bar all one does is focus on how to win your case ... The judge's function is fundamentally different' (ibid). Thomas' (2010) analysis of 68,000 crown court verdicts and a series of mock trials found that two-thirds of jurors admitted to not fully understanding the judge's legal directions. The

recorders' approach may better address the needs of lay participants in the trial process but the established judges' gaze is on government.

Belief in mending the failings of bad law is an important counterweight to the threat of change. For several judges, increased attention to judicial management (Moorhead and Cowan 2007: 318) was to be cheerfully dismissed. 'We all suffer from KPIs these days ... No doubt there'll come a time when we shall lose some, the boot will go in, but the judges are used to being the scapegoats and it's water off a duck's back' (J25). So it may be, when there are no performance indicators beyond clearing the day's list and the main sanction for bad performance - appeal - is a rare event (Cowan and Hitchings (2007: 379). Hostility to mandatory sentencing, actuarial approaches to risk assessment, or other prescriptive frameworks (Tata 2007) can be seen as a countervailing force against moves from occupational to organizational control of the profession.

Like any group adapted to its workplace, judges establish practices that reflect and protect workgroup interests. Such practices do not necessarily infringe lay participants' interests. However, workgroups are apt to elide their members' interests with those of their clients. Resistance to changes aiming to shift the fulcrum more in favour of lay participants often stems from conviction that conventions represent a 'natural' balance of interests, such as the complaint that video-link testimony denies defendants sight of their accuser. Moorhead's (2007) 'ideologies of judging' are more than 'convention' and 'workgroup interests'. Perhaps obstructing wrong-headed parliamentarians and philistine bureaucrats tapped a little into these ideologies, counteracting a purely instrumental account of 'interests'.

Certainty that judges knew best how to balance interests prompted adamant views on whether sentencing should reflect public opinion, with more than one judge referring to Pontius Pilate's pandering to public opinion in the trial of Jesus, and scathing references to

‘pressure groups’. ‘There’s a volatility about the views of the public and although judges must stay in touch with public opinion ... they need to be careful that they don’t move with every whim ... We’re all members of this society, we do have our fingers largely on the pulse, but it would be a very poor sentencing practice to reflect the views of the general public’ (AG: J13). Informing this view is hostility to infringements of judicial independence that marks the conservative activist’s resistance to government interference.

For the impartial arbiter, discretion is necessitated only by ‘occasional aberrant cases’ that challenge standard rules (Tata 2007). It is defined negatively, like the hole in Dworkin’s doughnut (1977) where rule does not run. This reflects a ‘juridical paradigm’ seeing rules and discretion as opposites (Franko Aas 2005: 15), whereas understanding judging as craft reveals constant interplay between rules and discretion. ‘Sentencing is ordered, and predictable, but not by rules and policies alone’ (Tata 2007: 428). This is far removed from arguing that if sentencing is not rule-bound it is susceptible to judicial whim (legal-rational theory) or individualized welfare justice (new penology). Instead, rules and discretion are ‘exercised simultaneously’ (Tata 2007: 429). Moreover “‘rules” are inherently malleable, indeterminate and discretionary, while “discretion” is inherently patterned, ordered and rule-governed’ (Tata 2007: 430, following Hawkins 1992). Discretionary decision makers can decide the scope of their discretion, defining it permissively or restrictively according to circumstances. This closely accords with the emphasis on balance of interest in our judges’ accounts of sentencing, a key instance of principled self-restriction of discretion being about taking account of criminal convictions under section 29 of the 1991 Criminal Justice Act, a position adopted by several respondents.

For US judges, too, the responsiveness question elicited assertions of judicial independence. ‘I agree with everything that [English judge] has said ... [W]e are in this State

appointed for life, until mandatory retirement at 70 ... I know a high ranking judge who says that he, for the reason of not being influenced by public opinion, does not read newspapers. I don't know if he's really being honest but that tells you something about it. We really cannot consider public opinion. Not that we should have our heads buried in the sand either but public opinion is not a consideration' (AG: J15). Reporting of legal opinions is a significant reinforcer of Kritzer's 'consistency' element, taking judges back to the rationale underlying their decisions - and its audience. A female US judge observed 'nearly all our opinions now are published ... [I]n that opinion I'm writing [on] a sexually dangerous person's civil commitment petition ... I have to be very cautious of what I write because it will be electronically published and available worldwide' (AG: J6). Discretion must be used in favour of 'a just consistency' (Kritzer 2007: 332-3; emphasis added). Achieving a sophisticated 'just' outcome based on elegant argument is intrinsically satisfying but also earns esteem (Baum 2006).

Judges generally felt responsiveness to public pressure threatened just sentencing. Mandatory sentences were the worst consequence. A US judge said, 'there are circumstances where it is too severe ... [T]here are drug mandatory sentences which at least as to the larger amounts are too heavy ... If you are convicted of possession with intent to distribute of 200 grams of cocaine it carries a 15 year minimum mandatory sentence with no parole, no early release, no reduction in sentence of any kind ... Many many judges view that as an excessive sentence' (AG: J3). English participants agreed, seeing this as further evidence of centralising power (i.e. infringing judicial authority). 'The growth in mandatory sentences has made parallel with a new concept of a "dangerous offender" ... [I]f somebody's a dangerous offender there is an indeterminate sentence. It is determined in the end by the Home Office' (J20). Threshold judgements balancing seriousness, record and mitigation were increasingly

circumscribed. ‘Take section 109 [of the CJA 2000], your “three strikes and you’re out”. That is absurd’ (J16). Other examples were offered. ‘[I]n riots the only custodial option is a Detention and Training Order. It’s a gridiron, 24 months, 18 months, then 12. Ten, eight, six for good behaviour ... One man pleads guilty at trial ... The only credit you can give, it’s one step down the ladder, is 18 months. The second man pleaded guilty long before, and he’d played a lesser part. So he gets twelve months Whereas [ideally] I can say to the man who pleaded guilty at the first opportunity that the general tariff would be a third, eight months, and the man who pleads that only on the day of trial might only have three months’ credit. You can’t give them sentences that reflect guilt, you can’t balance’ (ibid). There is a rationale here beyond sociology’s primordial suspicion of judicial discretion (‘many judges resent the straitjacket that codes and legislation seek to impose on their wish to maintain an easy or “muddling through” fluidity’; Riesman 1957: 458-9) . Discretion is not so much self-serving as attentive to logics alternative to those informing mandatory sentencing, an ‘aesthetic’ attending to the judiciary’s several ‘audiences’ (Baum 2006), from immediate parties to other professionals and wider society.

Seeking conceptual tidiness, the legal-rational and new penological approaches condense the empirical complexity of actual working practices around artificially stark distinctions, treating as polar opposites things that are mutually inflected. In practice, binaries like rules versus discretion, and consistency versus individualisation ‘co-exist dynamically [and] are synergistic’ (Tata 2007: 427). However, weakening the rules/discretion binary does not mean ignoring dysfunctions of bad law or self-serving discretion. Rather, it demands closer scrutiny of craftwork logic in particular cases. ‘What we call “rules” and “discretion” contribute to a reservoir of account-giving resources to be used as a legitimating justification for different courses of action’ (Tata 2007: 430). This is a crucial point both in sentencing

(giving reasons being a critical control on judges; Thomas 1963) and for analysing judgecraft (by problematising naive ‘naturalism’ in interpreting field data; Scott and Lyman 1968).

Tata (2007: 432) remarks that ‘anyone who interviews judges about their decision making will have been frustrated by [an] inability of judges to explain clearly how they came to the judgment they did’. Rationales based on penological theories are elusive. The beacon in this landscape is Hogarth (1971), but as Tata demonstrated, Hogarth leapt from the finding that sentencers frame their judgments selectively to the assumption that this relates to penological preferences. Moreover, Hogarth construes sentencing as the work of individual sentencers in isolation from peers. Activism tells us of local legal cultures, and judgecraft highlights collaborative shaping in workgroups. In the interests of treating each case as ‘uniquely individual, and dealt with by a unique individual craftworker’, but also attentive to their standing in the judicial community, judges seek to inscribe a personal signature on the ‘product’ of their craft. The idea of individual sentencers as attentive to multiple audiences is promising in identifying sources of sentencing disparity. This is the ground of judgecraft and its workgroup-based domain is threatened only by public and governmental interference, eliciting a conservative activism directed to preserving the status quo.

Our fieldwork with judges suggests they feel obliged to be vigilant against: attempts to constrain discretion in the name of a public convinced the judiciary generally gets sentences wrong, poorly-drafted law requiring over-interpretation to be workable, and an executive that cuts necessary resources. This is a judicial activism concerned to protect the trial process from influence by conflicts other than those between opposing parties. Such judicial perspectives suggest an occupational culture bearing values supporting resistance to outside influence. The implication is not only that judgecraft as well as formal legal factors affects procedures and outcomes but that the workgroup is marked by values directly

inhibiting prospects for change in accommodating lay participants' interests.

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