

## Book section: ESSAYS AND REVIEWS

**The Psychology of Judicial Sentencing**, by Catherine Fitzmaurice and Ken Pease (Manchester, England: The Manchester University Press, 1988), 174 pp., \$17.95 (paperback).

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In Sophocles' *Oedipus Rex*, Laius goads his son Oedipus into killing him. He both fears and envies the strength and sexuality of his heir; and while trying to injure Oedipus with his two-pronged weapon, he is stabbed to death.

Despite the paternal envy and fear that dominate this story, Freud<sup>1</sup> used it to emphasize the son's desire to kill the father; and we have followed this conventional interpretation ever since. Would our perspective be different if we focused in our writings on the problem of paternal envy and fear of the son in this myth?

This striking illustration is used by British psychologists Catherine Fitzmaurice and Ken Pease to open *The Psychology of Judicial Sentencing*, in which they emphasize the role of power in determining psychological interpretations and maintaining the status quo. They stress that unconscious envy and wishes of homicide are more comfortably located in the psyches of sons than of fathers; and for this reason, they believe, the psychology of judicial sentencing has focused on juries rather than on judges. They contend that "it will be a long and slow process to establish the relevance of the work with judges, who are perhaps not always appropriately modest in their estimation of their capacity to sentence correctly" (p. 8).

This heuristic book, directed to the judiciary, offers a review of psychological research applicable to judicial sentencing, a description of a way of thinking about sentencing derived from psychological theory, and a psychological approach to some recognizable criminal justice system problems.

Cognitive psychology literature reveals that most persons lack sufficient access to their own thinking for us to take the reasons for their decisions seriously. In chapters 1 and 2, Fitzmaurice and Pease assert that judges are no different, and they list a number of empirically demonstrable cognitive errors that appear to influence judicial performance.

1. *The fundamental attribution error:* We underestimate the impact of situational forces and overestimate the role of individual factors in controlling behavior. This cognitive error is manifest in the courtroom behavior of judges who sentence criminals without accounting for situational pressures when they so act.<sup>2</sup>

2. *The false consensus bias:* We tend to exaggerate the normalcy of our own behavior and exaggerate the abnormalcy of those who behave differently from us. This bias is found in the judge's propensity to view his sentencing and dispositional behavior as widely acceptable to others in the absence of evidence that supports, or refutes, his belief.

3. *Anchoring effects:* Our perceptual anchors limit the range of our judgment. Tversky and Kahneman<sup>3</sup> offer us an elegant experiment to demonstrate this cognitive error. They have one group estimate the product of  $8 \times 7 \times 6 \times 5 \times 4 \times 3 \times 2 \times 1$  in five seconds, and a second group estimates the product of  $1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8$  in the same five seconds. The first group estimates the product to be 2,250, and the second, 512. Sentencing guidelines determine anchoring points and have a marked impact on dispositional decisions.

4. *Insensitivity to prior probabilities:* We ignore base rates and unduly emphasize individual data when making decisions. Judges favor information about individual cases rather than about base rates; and this is so even if the individual information is demonstrably worthless, as is often true in determining the risk of recidivism.

5. *A misconception of regression:* This statistical phenomenon accurately predicts that extreme measures will become less extreme (“regression to the mean”) over time. This leads to the common mistake of interpreting such regressive effects as real change. For instance, once a “crime wave” becomes apparent, it is likely to decrease over time rather than increase. Hence, it would be an error to assume that legislation to punish criminals more severely, passed when the crime wave became apparent, led to the subsequent decrease in crime.

6. *Illusory correlations:* When we believe that variables relate to one another, we will perceive them as related, even when they are not. Judges tend to determine the strength of a correlational relationship by looking only at the number of “positive hits” (true positives) while ignoring three other categories (false positives, true negatives, false negatives) that must be used to determine the actual strength of the relationship. This becomes apparent when predicting dangerousness. Mental health professionals, for instance, overestimate the risk of violence and thereby reduce the chance that they will be held accountable for a “false negative” (an individual whom they predicted would not be violent, but who was). This strategy, though protective of the professional, eliminates feedback possibilities. That is, the individual, now incarcerated, could have been a true positive (he would have been violent if released) or a false positive (he would not have been violent if released). We will never know! The same absence of feedback possibilities applies to the sentencing behavior of judges.

7. *The “knew it all along” effect:* We exaggerate with hindsight what we could have predicted with foresight. Fitzmaurice and Pease speculate that this cognitive error, along with the fundamental attribution error noted above, will result in judicial decisions that are systematically biased against the defendant. What is knowable to a “reasonable man” will be overstated, along with his assumed independence from situational pressures (the fundamental attribution error).

The book continues to be interesting in subsequent chapters. Chapter three reviews the empirical psychological literature that supports the assertion that people lack access to their mental processes in ways that would make them capable of accurately reporting these processes verbally.

Chapter four reviews the two types of justification for punishment—retributive and utilitarian—but notes that regardless of the rationalization used for sentencing, two factors are consistently predictive of the length of sentencing by judges: the seriousness of the offense and the offender’s prior criminal record. Subsequent chapters explore such matters as the substantial agreement among countries in judging “offense seriousness,” a mathematical scaling of what the authors call “penal pain,” and the legal concepts of responsibility, mitigation, and aggravation.

The authors urge psychologists to pay attention to the decision-making of judges and express the hope that good empirical research will inspire a much-needed dialogue between psychologists and the judiciary. This stimulating book begins such a dialogue, and I hope it will be read by members of the judiciary on both sides of the Atlantic.

## Notes

1. S. Freud, *Introductory Lectures on Psychoanalysis*. London: Allen and Unwin, 1922.

2. A. Ashworth, E. Genders, G. Mansfield, J. Peay, and E. Player, *Sentencing in the Crown Court: Report of an Exploratory Study*. Oxford: Centre for Criminological Research, Occasional Paper No. 10, 1984.
3. A. Tversky and D. Kahneman, "Judgement Under Uncertainty: Heuristics and Biases," 185 *Science* 1124 (1974).