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# Understanding judges' choices of sentence types as interpretative work: An explorative study in a Dutch police court

Peter Mascini, Irene van Oorschot, Don Weenink & Gratiëlla Schippers

## Introduction

The sociological study of sentencing is primarily preoccupied with a central promise of the Law: equal treatment before the Law. It mainly aims to estimate the extent to which various legal and extralegal factors, that is, specific offender characteristics such as race, class, and gender, impact sentencing outcomes.<sup>1</sup> In order to achieve its goal, this approach attempts to view many cases at once to reveal broad patterns that might not be evident 'up close'. Consequently, this kind of sentencing research is dominated by a 'binary epistemology'.<sup>2</sup> It focuses on a series of binary oppositions, e.g., the contrasts between offender and offense variables or the distinction between mitigating and aggravating 'factors'. This binary epistemology, for instance, includes the presumption that cases are 'bundles' of independent 'factors', which are implicitly understood to enjoy their 'own independent properties' that (presumably uniformly) exercise influence on the sentencing decision process.<sup>3</sup> That is, the prevailing sociological study of sentencing substitutes the *oligopticism of law* – its focus on individual cases and its highly selective ways of 'seeing' reality and of reducing it to a legal essence<sup>4</sup> – with the *panopticism of sociology*, that is, its desire to see things from afar so that while it cannot necessarily see *more*, it can see *cross-sectionally*.

Yet, while sociological-statistical modelling of sentencing decisions may be helpful in pointing out racial, ethnic, or gender biases in sentencing across the (statistical) board, an important limitation of the binary understandings of sentencing is that they are outcome oriented. This implies that although the authors of related studies understand the correlations found between these extralegal factors and the choice of sentence types in terms of judicial decision-making processes, they do not actually subject these interpretations to empirical investigation. As a result, such studies do not convincingly show *how* or *why* extralegal factors influence judges' decision-making with regard to sentence types. In this sense, the dominant research in sentencing neglects 'judgecraft'.<sup>5</sup> Rather than viewing bits and pieces of information about a case independently, judges try to 'see' cases holistically, synergistically, and narratively and impose their sentences accordingly.

1 Ulmer 2012.

2 Tata 2007.

3 Tata 2007, p. 435.

4 Latour 2005.

5 Tata 2007.

In this article, we want to explore whether it is feasible and useful to take judgecraft as the starting point for studying judges' choices between sentence types rather than falling back on a panoptic approach using a binary epistemology. In order to answer this question, we will analyze and provide an in-depth analysis of judges' naturally occurring interpretative practices in their choice of sentence types. As such, we want to determine if judges' choices of sentence types are neither unique nor fully determined by independent defendant characteristics but rather dependent on the specific constellation of the 'whole case narrative'.<sup>6</sup> If this is indeed the manner in which judges choose between sentence types, we would expect them to weigh, prioritize, and perhaps even elicit but also ignore personal (e.g., moral character, attitude), social (e.g., employment, having a partner and a family), and certain quasi-legal (e.g., prior convictions) features of defendants when choosing between sentence types in specific cases. A focus on the individual case may also imply that judges take other considerations into account that at times overshadow the interpretative practices revolving around the 'person of the defendant'. By adopting an approach that focuses on the interpretative practices in judges' choices of sentence types rather than on judges' sentencing outcomes, we not only hope to present an approach that is more closely aligned to the judges' actual sentencing practices but also to provide a better image of the processes that underlie judges' choices between sentence types. In the following section, we will first review the existing body of research focusing on judicial decision-making with regard to sentence types. Next, we will describe the methods used and present the findings of our study. We will end by drawing tentative conclusions and discussing the implications of our findings.

### **From factors to interpretative practices: prior research on inequalities in sentence types**

Mainstream research into sentencing inequalities provides statistical assessments of the extent to which a set of pre-given, supposedly independent factors, such as class, race/ethnicity, and gender, contributes to unequal sentencing outcomes. According to Mears, '[t]he typical approach to sentencing research is to create a dependent variable (i.e., sentencing outcome), that is then regressed on select legal (e.g., offense type and seriousness) and extralegal (e.g., class, race, gender) variables.'<sup>7</sup> Two concrete problems are related to this type of research.

First, irrespective of whether the focus is on gender, class, race, or the intersection of these defendant characteristics, the findings of these studies are usually inconclusive. After controlling for crime seriousness, prior criminal record, and other legally relevant factors that judges consider in determining the appropriate sentence, some but not all studies find significant correlations between these defendant characteristics and sentence type, although sometimes only with respect to certain types of offenses, for specific categories of defendants, or in

6 Tata 2007.

7 Mears 1998, p. 670.

particular social and political contexts.<sup>8</sup> In sum, it seems that class, race/ethnicity, and gender are better predictors of sentence type in some cases than in others, and that their effects differ across settings.

Second, and more importantly, the explanations put forward for judges' contributions to the observed disparities in sentencing outcomes (as a small part of all possible explanations for such observed disparities) are seldom empirically grounded.<sup>9</sup> For instance, in some studies, differences in the choice of sentence types that are related to the socio-economic position of the defendant are attributed to judges' or prosecutors' assumptions about the varying consequences that different sentence types have for offenders with low and insecure or high and secure economic resources.<sup>10</sup> On the one hand, judges or prosecutors presumably assume that lower-class offenders suffer less from detention because they do not participate in the labor market (and hence do not lose their jobs if they are sent to prison) or they have manual jobs, which presumably are more abundant. On the other hand, it is suggested that they assume that offenders with a lower socio-economic status suffer more from fines because of their lower incomes. However, none of these studies have empirically investigated whether judges do indeed take these considerations into account when choosing between sentence types.<sup>11</sup> Similarly, when gender disparities in sentencing outcomes are found, it is often assumed that judges seek to avoid detention for female offenders with children because they presume that mothers have more child care responsibilities than male offenders with children. There is indeed scarce but strong evidence that judges, for example, 'are concerned with the practicalities of incarcerating mothers. [...] However, these [concerns] may well rest on judicial and prosecutorial attributions of who is a 'good' mother, with such attributions likely linked to race and class.'<sup>12</sup> Moreover, studies of racial and ethnic disparities often attribute these inequalities to the persistence of racial stereotyping, to the perceived symbolic or ethnic minority threat among judges, or to the relational distance between judges and defendants, but these explanations themselves are seldom subjected to empirical inquiry.<sup>13</sup> For instance, Wermink, Keijser, and Schuyt invoke the influential 'focal concerns theory' to explain why, controlling for all relevant variables, they find that defendants who look and speak Dutch have a smaller chance of being sent to prison than those who have a foreign appearance and/or do not speak Dutch.<sup>14</sup> However, the authors did not test the extent to which the alleged focus on foreigners' and non-Dutch-speaking offenders' culpability, their perceived dangerousness to society, and the practical consequences of the decision for the offender and the court caused the differences in prison sen-

8 Rovers 1999; Zatz 2000; Engen, Steen & Bridges 2002; Tracy 2002; Helms & Constanza 2010; Ulmer 2012.

9 Baumer 2013.

10 Jongman & Schilt 1976; for other references, see Rovers 1999, p. 46.

11 Rovers 1999, p. 36.

12 Zatz 2000.

13 Wang & Mears 2010.

14 Wermink, De Keijser & Schuyt 2012.

tence rates that they found in their study. Instead, they merely used the focal concerns theory to interpret their findings.

On a more fundamental level, mainstream research on inequalities in sentencing rests on two interrelated assumptions that seem problematic.<sup>15</sup> The first is that the complexity of the actually existing cases can be reduced to – made measurable – a collection of legal and extralegal factors that influence judges' decisions.<sup>16</sup> This means that the case in its totality is implicitly understood as the sum of its legal and extralegal parts (factors). Second, these factors are assumed to enjoy their 'own discrete independent properties, and maintain[s] [their] power on the outcome of the case, universally.'<sup>17</sup> However, in naturally occurring judicial decision-making processes, it cannot be taken for granted that judges take all defendants' characteristics into account; some facts and factors (such as race or ethnicity) may not be explicitly attended to or taken into account by judges. Moreover, the meanings of the facts or factors that judges do take into account are not fixed; rather, they are the product of active construction and interpretation, and as such they have a 'contingent, fluid, synergistic and constructed' nature.<sup>18</sup> This means that studies focusing on statistical associations between factors and sentencing outcomes seem to ignore the fact that the absence of such associations can be just as meaningful, and these studies devote insufficient attention to discovering *how* or *why* factors are identified by sentencing judges.<sup>19</sup>

Recognizing the limitations of their outcome-oriented studies, quantitative researchers in this area often call for a qualitative, process-oriented approach to sentencing decisions.<sup>20</sup> So far, a limited number of studies have given attention to the interpretative constitution of the facts of the case and the facts of the defendant by concentrating on the meanings, typifications, and narratives that come into play when judges arrive at a sentence in individual cases.<sup>21</sup> According to these studies, judges try to identify features of the defendants and their behavior during the judicial proceedings as signs of remorse or hope. Signs of remorse are signaled through defendants' cooperation during trial, their recognition of the severity of their offenses, and by their expressions of regret. When such signs of remorse are absent, judges generally attribute the actions of the defendants *internally*, that is, to their (lack of) moral character. When defendants do exhibit signs of remorse, the responsibility is generally attributed *externally*, that is, to the defendants' social circumstances.<sup>22</sup> These different perceptions of responsibility – internal and external – allow judges to categorize defendants as 'real tough nuts'

15 Tata 2007.

16 Law & Mol 2002.

17 Tata 2007, p. 435.

18 Tata 2007, p. 435.

19 Tata 2007, p. 435.

20 Maas & De Lange 1989; Bridges & Steen 1998; Spohn 2000, p. 480; Zatz 2000, 529; Ulmer 2012, p. 32-33; Baumer 2103, p. 249-250.

21 Albonetti 1991; Engen, Steen & Bridges 2002; Tombs & Jagger 2006; Beyens & Vanhamme 2008; Weisman 2014.

22 Bridges & Steen 1998.

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or, alternatively, as ‘poor, unfortunate souls’.<sup>23</sup> Signs of hope pertain to the defendants’ chances of successful rehabilitation, such as the initiative shown by the defendants to seek help, the strength of their ties with employers, and the presence of partners, children, and jobs. Judges perceive these social ties as stabilizing features that will help to reduce the defendants’ chances of recidivism. Consequently, such defendants are seen as deserving a second chance. Judges not only interpret labor market involvement and family ties in terms of hope and remorse, but it has been suggested that gender, judicial record, and ethnicity play a role in these interpretations as well.<sup>24</sup>

Furthermore, these studies suggest that judges rely on their interpretation of signs of hope and remorse to arrive at a sentence type. Defendants who neither display signs of remorse nor signs of hope are generally thought of as irredeemable. In such cases, judges tend to opt for detention. However, judges generally consider detention the most severe sentence type, appropriate only to realize punishment goals such as retribution or incapacitation, as they believe that detention hampers effective rehabilitation.<sup>25</sup> If judges do not perceive any signs of hope, they largely treat the negative, unintended consequences of detention (i.e., rehabilitation difficulties after detention) as surmountable, while they treat such negative consequences as insurmountable where such signs are present. This implies that judges connect signs of remorse and signs of hope to the various – and sometimes conflicting – goals of punishment (i.e., retribution, prevention, and rehabilitation).

In sum, several process-oriented studies have revealed that the factors that appear in outcome-oriented research are produced through judges’ interpretative practices, in which they link the identification of signs of hope and remorse to sentence types. The fact that employment, for instance, is a sign of hope in judges’ decision-making may explain why some studies have found an effect of social class on sentencing outcomes. However, by establishing that judges’ interpretations revolve around signs of hope and remorse, we run the risk of replacing one factor (e.g., labor market position) with another (sign of hope) and consequently turning attention away from the complexity of judges’ interpretative processes. For instance, we do not know how judges compare and weigh these signs of hope and remorse in actual sentencing practices. Moreover, for the judges, these features of defendants may not have stable and uniform meanings as hopeful or remorseful. Rather than perceiving judicial decision-making as adding up ‘aggravating factors’ and subtracting ‘mitigating factors’,<sup>26</sup> it could very well be that judges view certain personal, social, and even legal features of the defendants as mitigating in one case and aggravating in another. Both issues – how judges weigh the various pieces of information on the defendant and the possible ambiguity of the meanings of the defendants’ features – imply that analyses of judges’

23 Tombs & Jagger 2006, p. 815.

24 Albonetti 1991; Engen, Steen & Bridges 2002; Beyens & Vanhamme 2008.

25 Beyens & Vanhamme 2008.

26 Tata 2007, see also Shapland 1987; Halliday et al. 2007.

decision-making should focus on the individual cases as a whole rather than as a collection of separate features.<sup>27</sup>

We attempt to build upon the studies that focus on judges' interpretative practices but also to move beyond them by explicitly taking a holistic approach, wherein judges' interpretative accomplishments are analyzed in terms of the criminal case as a whole. Our central research questions are as follows: Do judges' interpretative practices in relation to their choice between sentence types indeed revolve around signs of hope and remorse? If so, how are these signs interpreted on the basis of defendants' personal, social, and legal features, and how are these signs weighted vis-à-vis one another in the context of the case – or even elicited by the judge? And finally, what other considerations play a role in judges' interpretative practices in relation to their choice between sentence types?

## Data and method

Two authors of this paper conducted research at one court in the city of Rotterdam in the Netherlands. We studied cases that were administered by so-called 'police-judges' (*politierechters*), who only deal with cases that are punishable with up to one year of prison. The main data on which this paper is grounded consist of judicial case files, in-court observations, and interviews with judges, which were conducted in 2010. In total, 27 cases were selected, in which 33 defendants were sentenced by 14 sentencing judges. The following charges were levelled against the 33 defendants: five cases of physical assault (including charges of domestic violence), eight theft or burglary charges (e.g., shoplifting), four cases of threatening (e.g., having issued threats against one's former employer after being fired), five cases of damages (e.g., the vandalizing of a police station after the loss of Rotterdam's major football team), one case of drunk driving, three drug-related offenses (e.g., drug-dealing in the vicinity of a rehabilitation center for drug addicts), and one defendant was accused of harassing a police officer.

First, we analyzed the information in the judicial case files, which incorporated documents produced by the police (police reports), the public prosecutor, as well as reports from psychiatrists and/or criminal justice social workers (social reports). Then, after having analyzed the judicial files, observations of courtroom proceedings of these cases were conducted. The observations of the court proceedings and the interviews were guided by the following questions: 1) What personal and social characteristics do judges mention and incorporate into their considerations? 2) How do judges classify the defendant as redeemable or irredeemable? 3) How do judges motivate their choices between sentence types? 4) What other considerations are related to this choice? All but one of the sentencing judges were interviewed. One judge refused to cooperate as he did not wish to share further information on the defendant outside the courtroom.

In addition to these data, one of the authors conducted ethnographic observation of judges at work in 2013, combining informal talk and conversations with judges

27 Tata 2007.

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with analyses of case files and observations of their work practices in the courtroom and in their offices as the judges went through the files. As the first study focused more directly on the central research questions of this paper than on the ethnography, we use the latter data as complementary illustration only.

### **Opening up judges choices between sentence types: the complexity of interpretative practices**

In this section, we will show first how judges, in relation to their choice between sentence types, weigh, prioritize, and seek out but also neglect various types of personal, social, and legal information in their interpretation of defendants' redeemability. Subsequently, we will demonstrate that redeemability is not tied to fixed signs of hope and remorse. Finally, we will establish that these interpretative practices that revolve around the person of the defendant may be overshadowed by other concerns.

#### *Interpreting defendants' personal, social, and legal features as signs of hope and remorse*

In Table 1, judges' choices of sentence types are linked to the defendants' characteristics that judges have explicitly mentioned during the court trials or in the interviews. The characteristics of the defendants refer to personal (attribution of responsibility for the offense, attitude), social (stabilizing factors such as employment, having a partner and a family), and certain quasi-legal (prior convictions) features. The judges chose detention as the sentence type in two cases. In those cases, the judges only mentioned features that signified the irredeemability of the defendant (e.g., internal attribution of responsibility for the offense, negative attitude, recidivism, single, unemployed). In other words, in these cases, all characteristics noticed by the judge pointed to the absence of signs of hope and remorse. This consistent negative image of offenders receiving detention as a sentence type corresponds to the reluctance shown by the judges to choose this type of sentence. Judges take into account the potential negative effects of detention: 'I am certainly aware that people do not leave prison as better persons' (judge C); 'People run the risk of losing their job, being unable to pay the mortgage, and having to start over from scratch' (judge T). Therefore, judges only choose detention 'when there really is no alternative' (judge B).

In 25 cases, the judges' sentences were community service or fines. In those cases, the judges referred to defendant characteristics that signified both the presence (e.g., external attribution of responsibility for the offense, positive attitude, employed, first offender, parent, stable relationship) and absence of signs of hope and remorse (e.g., internal attribution, negative attitude, recidivism, unemployed). The judges weighed the opposing signs of hope and remorse in choosing a sentence type or, additionally, actively elicited signs of hope and remorse before sentencing. Thus, we found three types of decisions judges made: first, wherein all signs noticed by judges pointed in the same direction (i.e., irredeemability of the defendant); second, wherein judges weighed signs pointing in opposite direc-



**Table 1** *Defendant characteristics noticed by judges in connection to judges' choice of sentence type*

	Detention	Community service or fine
<i>Absence of signs of hope and remorse</i>		
Internal attribution of responsibility for offense	2	5
Negative attitude	0	8
Recidivist	2	11
<i>Single, no stable relationship</i>	1	0
Unemployed, no stable job	1	1
<i>Signs of hope and remorse</i>		
External attribution of responsibility for offense	0	11
Positive attitude	0	12
Employed	0	13
First offender	0	12
Parent	0	4
Stable relationship	0	3
<b>N</b>	<b>2</b>	<b>25</b>

tions; and third, wherein judges elicited signs of hope and remorse before choosing a sentence type. What follows is an illustration of each of the three sentencing types, showing how judges assemble and interpret different bits and pieces of information to create a whole image of the defendant, on which they base their choice of a sentence type.

The first case concerns an eighteen-year-old male defendant, who was charged with theft and physical assault. The defendant had stolen a delivery van and engaged in joyriding with friends. He had stolen the keys of the van from its owner in a bar that same night, so the theft did not appear to have been premeditated. Aside from these charges, the defendant had physically assaulted his girlfriend. Judge A concluded that these incidents were not 'isolated', nor did the judge perceive them as the result of unfavorable social circumstances. Thus, responsibility for the misdemeanors was attributed to the defendant's character, that is, internally. Furthermore, the judge did not hesitate in deciding on detention as the defendant had engaged in this type of behavior before. Incorporating concern regarding the defendants' long criminal record and the similarity of earlier charges on this criminal record, the judge argued that the defendant had not learned from the community service he had received as a result of these previous incidents:

'The defendants' life has all the necessary ingredients for him to stray into criminal territory again. [...] The defendant does not give me any reason to

take him into account anymore. He has had enough chances in the past, and it has got to stop at some point.’ (judge A)

The judge was especially piqued by the refusal of the defendant to confess to the charges of physical assault, even though two police officers had witnessed him beating and pushing his girlfriend. To the judge, this refusal demonstrated the defendant’s uncooperative attitude towards the court. In addition, he did not express regret or offer any apologies. The defendant was perceived to display insufficient understanding of ‘the punishable nature of his actions (of the assault)’. Finally, the defendant attempted to trivialize his actions as merely the expression of youthful rebellion, and ‘when defendants try to externalize or trivialize their actions, the punishment has to express a strong signal’ (judge A). The fact that the defendant was a recidivist was the most important reason, however, for the judge’s choice of detention: ‘What worries me is a criminal record of twelve pages at the age of eighteen. It would not surprise me if I am to see him again in a short while.’ All these considerations point to an interpretative effort to portray the defendant as lacking any signs of remorse and hope, and to create an image of his moral character. In this case, the judge interpreted the different clues in the same direction: the defendant’s lack of remorse, long criminal record, and negative attitude all led the judge to emphasize the irredeemability of the defendant. Hence, the judge chose detention as a sentence.

In the second case, judge D had a less coherent image of the moral character of the defendant, which required him to actively weigh and prioritize different elements. This case, in which the judge decided on community service, involved a twenty-year-old male suspected of dealing drugs in the vicinity of a drug rehabilitation center. The judge deemed this particular offense so severe and reprehensible that detention would be a definite possibility. Furthermore, the judge disapproved of the defendants’ attitude in court. The defendant had, for instance, trivialized the gravity of his offense with the argument that ‘if I don’t do it [deal drugs], someone else will’, to which the judge responded, ‘From your attitude it appears not to be clear to you that what you have done is wrong.’ However, while the interpretative effort so far appears to indicate a lack of signs of remorse, the judge did discern some signs of hope and consequently decided on an alternative measure. The defendant was a first-time offender. Additionally, he was employed on a full-time basis as a cleaner. Because the defendant was employed and had no criminal record, the judge did not perceive him as a ‘seasoned criminal’ and anticipated he would refrain from illegal activities in the future. After weighing both signs of hope – a first time offender who was employed – and lack of remorse, the judge decided upon a sentence of community service.

The third case highlights that judges do not only look for signs of hope and remorse; they may actively try to elicit such signs in interactions with defendants. This case was handled by judge L and concerned a young native Dutch woman, who, in a state of drunken jealousy and anger due to her friend’s romantic ties to a previous boyfriend, pushed a long drinking glass into her friends’ face. The glass shattered, and shards hit the chin of yet another female friend. The case was quite grave, as these kinds of injuries could result in permanent facial scarring.

Here, the defendant confessed to the charges completely. Furthermore, she had a job, no criminal record, and had already paid the victims a sum of money covering their medical bills, thus offering clear signs of hope. However, a significant portion of the court hearing centered on what both judge and public prosecutor perceived as the 'strange absence of any sense of empathy with the victims and an awareness of the gravity of the offense' (judge L); in other words, interpretative work was directed to trigger signs of remorse, which had been lacking. After a series of 'moralizing' questions from both the judge and public prosecutor,<sup>28</sup> the defendant broke down and started crying, mumbling that she was sorry. In the end, while both the public prosecutor and judge warned her during the hearing that she risked a prison sentence of up to four months, the judge decided on 100 hours of community service. Here, both the public prosecutor and judge seemed to actively demand not merely signs of hope to be present, but confronted the defendant in such a way that she finally offered them a sign of remorse – her apologies and tears.

In sum, these three cases illustrate how judges assemble different clues to create an image about the redeemability or irredeemability of the defendant. Furthermore, they show that judges do not consider these cues in isolation but try to relate them to one another in the context of the case. In their interpretative practices, judges may encounter various cues that they may interpret as signs of hope or remorse and others that point to the contrary. In weighing these signs, and against the background of the available sentence types, judges try to arrive at an image of the redeemability of the defendant. When they do not find the available clues conclusive, they may actively elicit various clues as signs of hope or remorse.

#### *The equivocal meanings of signs of hope and remorse*

The selecting, weighing, and eliciting of signs of hope and remorse show the complexity of judges' interpretative practices. What contributes to this complexity is the fact that the meanings that judges give to defendants' personal, social, and even legal characteristics are not fixed.<sup>29</sup>

Being employed, having a partner, and permanent residency are not always interpreted as positive signs, even though judges usually indicate that they perceive the three W's of '*Wonen, Werken, en Wif*' (a House, a Job, and a Wife) to be stabilizing factors. For instance, in one case, judge A did not consider the defendant's married status, his pregnant wife, and his full-time employment as positive signs since these factors had also been present at the time of the offense. Consequently, the judge doubted whether the defendant would refrain from breaking the law in the future since his wife with a child on the way and his job had not prevented him from doing so in the past.

Inversely, judges do not necessarily see repeat offenders as irredeemable. One important distinction they work with is relevant and irrelevant recidivism. Recidivism is here considered a relevant criterion when defendants appear in court on the basis of offenses similar to those they have been tried for in the past. In the

28 Duff 1986.

29 Tata 2007.

case just mentioned, the recidivism criterion was relevant to judge A as multiple charges of shoplifting appeared on the defendant's criminal record. The judge said, 'With similar charges on the [defendant's] criminal record, the risk of recidivism is generally thought to be greater. In other cases, it is not.' In a case handled by judge D, the defendant, whose criminal records showed irrelevant recidivism, was tried as a first offender. The defendant, a 31-year-old male charged with abusing his ex-girlfriend could, according to judge D, have faced detention. However, as the defendant's criminal record showed only irrelevant recidivism (theft, in this case), the judge did not estimate the defendant's likelihood of recidivism to be substantial enough to merit detention. Instead, the judge decided on community service as a punishment for this defendant.

Finally, the interpretation of defendants' negative attitudes towards the court does not have a fixed meaning either. For instance, in a case decided on by judge C, the suspects were four Iranian men between 23 and 32 years of age who had been charged with breaking and entering business premises in order to steal supplies from a marijuana plantation. The men had been caught red-handed, and the evidence put forward by the prosecution clearly indicated that they were guilty of the charges. However, all four men denied their involvement vehemently. In cases where the evidence against the defendants is overwhelming, judges usually interpret such an attitude to imply an absence of signs of remorse and hope (even though they insist denying is every defendants' right). Yet the judge did not incorporate the defendants' attitude into his decision-making. The men were, after all, Iranian, the judge argued, and had not been living in the Netherlands for a long time. Judge C argued that the men's negative attitudes towards the court should be interpreted in light of the large differences between the Dutch and Iranian legal context: 'The judicial system is completely different in Iran. There is no way to compare that with the system in the Netherlands.' According to the judge, denial of criminal charges is a very common and even necessary attitude in Iranian courtrooms, where taking responsibility for one's crimes greatly increases the likelihood of receiving longer and harsher sentences. Informal talks and conversations with judges suggest a similar process may be at work when judges face defendants of Moroccan and Turkish descent who deny their crimes. As these defendants are sometimes thought to 'come from shame cultures' (judge K), the fact that they are said to deny charges that are amply proven by other evidentiary materials should, according to this line of thought, not to be taken as an indication that they are disrespecting the court or refusing to see the gravity of the offense. Instead, judges argue that their denial should be regarded as a culturally specific strategy to deal with the loss of face in public. This typification of specifically Moroccan and Turkish defendants as usually denying is exemplified by the lunchtime joke, told by judges and clerks, regarding what a 'Moroccan confession' entails. The answer: after hearing the verdict, they immediately forego their right to appeal. Thus, judges may consider the absence of explicit signs of remorse less consequential if they invoke this culturalist framework.

To conclude, these findings indicate that judges' interpretations of defendants' personal, social, and legal characteristics as signs of hope and remorse are not fixed. This implies that the same information may be ignored in one case, seen as

aggravating the seriousness of another case, and seen as mitigating the seriousness of yet another. The results of our analysis thus offer support to claim that 'attempts to identify lists of aggravating and mitigating factors as fixed and universal predictors are, therefore, bound to fail'.<sup>30</sup>

*Alternative considerations with regard to the choice of sentence types*

Judges also take alternative considerations into account, which at times overrule their gauging of the redeemability of the defendant.

A first consideration pertains to the nature of the offense, with some offenses more unequivocally and automatically calling for a specific type of sentence than others. The judges indicated that physical assault and domestic violence charges usually warrant community service, whereas drunk driving usually calls for a fine. Judge T, for instance, motivated her choice for community service in the following way: 'A fine is not appropriate for this type of offense. He beat up his ex-girlfriend and would receive a bill to pay. That does not make sense.' Community service is deemed the 'most appropriate and corrective' punishment in such cases. In cases of drunk driving, in contrast, judges more or less automatically decide on a fine. Case 25 illustrates judges' consistency in deciding on sentence type in the case of drunk driving. In this case, involving a 42-year-old male charged with drunk driving, the judge decided on a fine even though the defendant argued that he would be unable to pay because of other debts and his relatively low salary as a cook. Nevertheless, judge G thought a fine was the most appropriate ruling for this type of offense, even though he had the discretion to take the defendant's financial situation into account and decide on a different type of sentence.<sup>31</sup>

A second consideration concerns the anticipated efficaciousness of the sentence type chosen by judges. One situation in which this consideration plays a role pertains to the perceived ability of defendants to pay fines. Contrary to judge G mentioned above, judge C indicated that he usually does not decide on a fine when the defendant does not have the financial resources to pay (which increases the chance that the fine cannot be collected by the authorities):

'In many cases the fine will not be paid, or there will be a lot of red tape to be worked through, which in the end will not be worth it. [...] The fine will just disappear in the pile of yet other bills to pay.' (judge C)<sup>32</sup>

30 Tata 2007.

31 The cases of drunk driving may give the impression that judges rely on the 'orientation points' of the LOVS (a national coordinating body of representatives of the judicial profession in the Netherlands) since fines are the 'standard sentence' for drunk driving (25). However, these 'orientation points' do not explain the consistency with which judges opt for community service in the case of domestic violence and physical assault charges, as these guidelines describe detention as the 'standard sentence' for such offenses (25). Moreover, judges are very concerned with the core professional values of neutrality and impartiality – precisely the reason why these 'orientation points' are *never* referred to among judges as *guidelines*.

32 The contrasting approaches of judges G and C suggest that the near automatic decisions only apply to certain offenses while with others, judges use their discretion to take the financial situations of defendants into account.

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Another situation where judges take efficaciousness into account appears in cases where punishable offenses have taken place long before the trial. Judge A and judge T, for example, claim that detention and community service are less effective options in these instances: 'After two years there is no sense in punishing a defendant harshly. It has been shown that community service does not have any corrective effect on defendants after one and a half years' (judge T). When defendants have not committed other offenses during the period between their offense and the trial, he argues, fines are the most appropriate option.

A third consideration, besides the interpretation of the defendant's personal and social characteristics, concerns the consistency of verdicts. For instance, in the case of a relatively young man of ethnic minority descent who was charged with petty theft, judge M pointed to a similar and very recent charge on the defendants' criminal record and decided that she would sentence the offender to precisely the same sentence – in this case, eight hours of community service. The judge motivated her choice by arguing that if both cases would have appeared simultaneously before the same judge – which is a relatively common practice, especially if both offenses are committed in a short span of time – the hypothetical sentencing judge would have decided on equal amounts of punishment and equal sentence types for both offenses. The judges' overriding concern here was not with the person of the defendant but sentencing consistency.

The finding that considerations other than the person of the defendant play a role in the choice between sentence types is in line with prior research showing that judges may consider the availability of detention opportunities when sentencing female offenders,<sup>33</sup> or that they may take into account the availability of internships and employment opportunities when choosing between community service and fines or detention.<sup>34</sup> We have shown that the perceived type of offense (in relation to specific punishment goals such as retribution, deterrence, and rehabilitation), efficaciousness of various sentence types, and sentence consistency may override concerns related to signs of hope or remorse.

## Conclusion and discussion

This is a small-scale explorative study that is situated in a specific setting. As a result, we cannot be sure that our analysis regarding the manner in which judges choose between sentence types has reached the point of saturation. Moreover, the cases that have been studied concern relatively light offenses decided upon by police-judges, who can choose between different sentence types. The discretion to choose between sentence types is less common when it comes to felonies, which are decided upon by full-bench panels with three judges. Further, in the Dutch inquisitorial judicial system, judges play an active role in checking the facts reported in the criminal file in court and in complementing the file by questioning the defendant. In adversarial legal systems, the role of judges is more

33 Ulmer & Kramer 1996.

34 Boone et al. 2008.

restricted to ensuring the legality of the procedures followed by opposing lawyers in establishing and challenging the facts of a case in the court room. This may imply that judges in the Netherlands are more actively involved in creating an image of the defendant than are judges in more adversarial legal settings. For these reasons, our findings cannot automatically be generalized to decisions made by full-bench panels with three judges or to the sentencing practices of judges in adversarial legal systems. Nonetheless, studies in other jurisdictions such as Belgium,<sup>35</sup> England,<sup>36</sup> and Canada<sup>37</sup> have also shown that judges choose between sentence types based on their image of the moral character of the defendant and the risk he or she poses to society. In this sense, our findings build on those other studies.

Accepting its limitations, our study contributes to the understanding of judicial decision-making in three ways. First, the analysis indicates that research should treat the personal and social features of defendants as potential signals that emerge as meaningful only through an interpretative process as opposed to perceiving these features as independent and fixed factors that impact judges' decisions. In their interpretative work, judges determine which features are relevant in a particular case and which ones should be neglected or ignored. This also means that statistical research into sentencing disparities, while uniquely suited to demonstrate the existence of broad patterns in sentencing, should *not* be taken as an approximation or *model* of judicial sense-making activities, as the factors these studies identify *a priori* appear only through interpretative work and, hence, in potentially unpredictable ways. Second, in line with prior qualitative work, this study demonstrates that judges' interpretations of signs of hope and remorse play a role in their choices between sentence types. However, the results also suggest that this is often an ambiguous process, in which various signals with equivocal meanings, such as employment, recidivism, and denial of culpability in the presence of convincing evidence, are weighed and actively provoked in the context of the narrative of the case as a whole. Third, our analysis suggests that judges also incorporate an alternative set of considerations besides those pertaining to the person of the defendant, consisting of informal rules pertaining to the nature of the offense, perceived efficaciousness of sentence types, and sentencing consistency. We have been able to achieve these results by studying the judicial decision-making process in daily practice (instead of studying the outcomes of the decisions), relying on an approach in which criminal cases are analyzed as a whole rather than as a collection of independent defendant characteristics.<sup>38</sup> It is possible to extend this combined approach in several respects, which would provide more comprehensive insight into judicial decision-making.

First, in studying these judicial practices, there are two possible ways to further develop the approach followed here. To a large extent, our findings are based on interviews regarding cases the judges had decided on. When asked about what

35 Beyens & Vanhamme 2008.

36 Tombs & Jagger 2006.

37 Weisman 2014.

38 Hawkins 2001.

they had done, it is possible that the judges offered a polished and necessarily condensed view on how their interpretative work actually proceeded, thus glossing over the ambiguities they encountered or the signals they deemed irrelevant. The reasons judges provided afterwards were justifiable and purposive, but they may not have necessarily been accurate descriptions of their interpretative practices. One way to approach these practices more closely would be to conduct observations of judges' 'file-work',<sup>39</sup> i.e., how judges actually read (work with) case files, and to discuss their interpretations with the researcher on the spot. Second, the observations on which our analysis is based were limited to the defendants' verbal presentations; we did not explicitly take into account the non-verbal, embodied interactions between the judge and the defendant. However, the appearance, demeanor, dress, and gait of defendants may all influence judges' perceptions of their redeemability. The discussion of the case in which the judge and the public prosecutor actively sought to elicit a sign of remorse in the girl who had pushed a glass into her friends' face points to the importance of the interpretation of non-verbal signals, as the crying of the defendant was taken as a sign of remorse. Hence, in these two respects, a more in-depth approach is possible, in which judges' decision-making is viewed as interpretative work.

It may also be useful to broaden the holistic approach that we used. Although we relied on the case as a whole as our unit of analysis, we also treated judges as isolated entities. However, judges partake in communities of practices and are institutionally embedded; for instance, informal meetings in the court corridors, or more formally, during post-graduate training and conferences. A growing body of work, revolving around the notion of 'institutional work',<sup>40</sup> might prove especially useful in understanding the social dimension in the practice of decision-making. In doing file-work, judges and clerks collaborate in preparing the court hearings, and as such they may share similar patterns in interpreting, weighing, rejecting, or neglecting various signals.<sup>41</sup> These practices may be grounded in their 'prior knowledge'<sup>42</sup> specific to the profession and thus enable judges to anticipate cases and the consequences of their verdicts. The collective character of interpretative practices may also imply that collaborators attempt to influence one another in interpreting signals in typical ways and as such provide a standard for proper professional decision-making.<sup>43</sup> Finally, judges form only one link in the institutional decision-making chain. In other words, they only handle those cases that have been processed by other judicial actors such as police officers and the public prosecutor.<sup>44</sup> The latter may influence judges' decision-making by passing on the interpretative practices reigning in their organizational settings. For example, reports composed by parole officers, and the classifications used therein, might influence the judge's interpretation of signs of hope and remorse in a defendant and thus the verdict. In order to take the institutional embedded-

39 Scheffer 2007.

40 Lawrence & Suddaby 2006; Greenwood et al. 2008; Lawrence, Suddaby & Leca 2011.

41 Holvast 2014; Van Oorschot 2014.

42 Gilboy 1992, p. 571.

43 Shiner 2010.

44 Baumer 2013; Frase 2013.



ness of judicial decision-making into account, it might be worthwhile to 'trace cases' through the institutional landscape<sup>45</sup> and pay specific attention to, first, the interpretative practices that other actors in the institutional landscape conduct to 'make sense' of a case, and second, the extent to which judges may or may not draw on these prior interpretations in deciding on a verdict.

In sum, we hope to have shown that the proposed approach contributes to our understanding of how judges make their decisions, especially in comparison to outcome-oriented studies, which focus on criminal cases as a collection of independent legal and extralegal characteristics. A further extension of this approach would be fruitful for obtaining an even more accurate picture of the interpretative work that comprises judicial decision-making.

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