Article

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Re-thinking notions of evidence and proof for sentencing: Towards a more communitarian model

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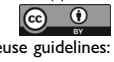

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Ralph Henham
Nottingham Law School, Nottingham Trent University, UK

Abstract

Judges and magistrates are often criticised for failing to take sufficient account of social factors such as poverty and social deprivation when sentencing offenders. The implication is that the sentencing practices of the courts lack an important social dimension—that of 'social justice'—namely, the perception that the punishment of criminalised behaviour by the state is fair and non-discriminatory. This article asserts that the notion of 'social justice' sits uneasily with the values that sustain the existing paradigm of adversarial trial. It is argued that shifting the focus of the adversarial trial away from its narrow preoccupation with individual accountability towards a more communitarian model of penal accountability would significantly enhance the moral credibility of sentencing and its social impact. A more flexible approach to the admissibility and evaluation of evidence is advocated, one conceived within a communitarian ideology whose purpose is to promote penal interventions which enhance social justice.

Keywords

arguments for a more communitarian approach to penal accountability aimed at greater social justice, negative impact of adversarial trial and retributive justice on the factual basis for sentencing, opportunities for intervention and diversion through increased judicial discretionary power, practical implications for broadening the social context of evidence relevant to sentence, sentencing policy

Introduction

Judges and magistrates are often criticised for failing to take sufficient account of social factors such as poverty, social deprivation and victimisation when sentencing offenders. The implication is that the sentencing practices of the courts lack an important social dimension—that of 'social justice'; namely, the perception that the punishment of criminalised behaviour by the state is fair and non-discriminatory.

Corresponding author:
Ralph Henham, Nottingham Law School, Nottingham Trent University, 50 Shakespeare Street, Nottingham NG1 4FQ, UK.
E-mail: ralph.henham@ntu.ac.uk

I have argued elsewhere that perceptions of 'social justice' in the policy and practice of sentencing are crucial in sustaining the moral credibility and legitimacy of state penality (Henham, 2018). This suggests that sentencing has a significant communitarian[1] dimension. More specifically, I argue that perceptions of social value are key to the development of a sentencing policy and practice that promotes social accountability and social cohesion.

In conceptual terms, linking penality and social context serves to signify the 'real' social worth of specific penal measures to both citizens and communities.[2] In concrete terms, such a perspective links the morality which underpins the policy and legal framework of sentencing to its social context. For present purposes, this broadens our understanding of the rules, procedures and decisions that determine the 'facts' available for sentencing within the broader context of the criminal trial. Above all, such an approach recognises that notions of evidence and proof are essentially contextualised and, more importantly, that perceptions of law, process and procedure are socially embedded.

This article asserts that the notion of 'social justice' sits uneasily with the values that sustain the paradigm of adversarial trial justice as currently conceived. As a general proposition, it suggests that this disjuncture has been exacerbated by the predominantly retributive criminal justice policies pursued by many Western liberal democracies during the late modern era.[3] Moreover, it argues further that the combined effect of the adversarial trial model and retributive justice policies has been to marginalise the significance attached to social justice in addressing state responses to crime. This, in turn, has hampered the mainstreaming of more communitarian interventions such as restorative justice, whilst reforms to the conventional paradigms of trial and sentencing have remained over-politicised and constrained.[4] Fundamentally, there is no sense in which social justice [5] may be regarded as a central moral pillar of state penality in England and Wales.[6]

The value pluralism and social fragmentation of late modern society reflects differing and overlapping views about the morality of criminalising and punishing certain behaviours, with the pragmatism of political expediency rather than social morality often claimed as the rationale for penal accountability.[7] In such circumstances state and community values often appear polarised, notwithstanding that the devolution of penal accountability to local communities may be justified politically as community empowerment, whereas in reality the locus of penal control remains unchanged. Hence, in such circumstances, one may argue that the state is in danger of abandoning one of its core functions, that of providing a socially egalitarian penality which effectively protects *all* citizens. This imposes, in essence, both an ideological and normative imperative on the state.

1. 'Communitarian' is used here to signify the interrelationship between the individual and the community and its importance in shaping notions of responsibility and accountability. See further Lacey (1988) and Cotterrell (1995).
2. This article adopts the following definition of 'penality': 'the networks of laws, processes, discourses, representations and institutions which make up the penal realm' see Garland (1990: 17) '…penality communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters' (1990: 252).
3. Scholars who defend retributivism as the main justification for punishment argue that sentencing should not concern itself with social policy questions like social deprivation; see Von Hirsch (1992). The fact that the punishment itself has an impact on offenders, victims and the wider community that may go far beyond the imposition of the sentence presents a fundamental dilemma for the retributive model; Easton (2008).
4. See Henham (2021). Notwithstanding, the development of problem-solving courts and 'out of court' disposals has increased; see further, Bowen (2021) and Gibson (2021), respectively.
5. Particularly significant for present purposes are values which might promote the individual autonomy, agency and empowerment of victims and victim communities.
6. The primary focus of this article is the sentencing policy and practice of England and Wales, although the arguments put forward are intended to be more generally applicable.
7. The extensive use and expansion of the guilty plea discount in recent years may be linked to increased political pressures for bureaucratic and financial constraint; see McConville and Marsh (2014).

According to this view, the state stands accused of failing to provide a representative (i.e., broadly shared) system of values through which to justify punishment. A likely consequence is that penal justifications and practices become increasingly distanced from social morality (Cotterrell, 2019). Moreover, any sense in which state values are representative of a shared morality whose underlying values promote the common good of civil society is also lacking. Such moral ambiguity may be easily exploited by the politicised morality of bureaucratic and financial expediency through which the labelling and punishment of crime is facilitated.

I argue that the solution lies in grounding the justifications for punishment in an ideology reflecting shared social values that promote the common good on the basis that an ethical practice developed from such values is more likely to foster moral and social cohesion in society (Henham, 2018: ch. 1). On this view, shared values relating to criminalisation, harm perception and penal accountability would not only imbue state penal policy and practice with greater moral legitimacy, they would also, more broadly, establish contextual parameters for understanding concepts such as 'harm' and public protection which accord with the state's moral obligations.

For over three hundred years, the adversarial mode of criminal trial has developed as the dominant paradigm in the common law world.[8] Whilst the trial and sentencing stages may remain distinct, the ethics, practices and procedures applicable to the trial phase have a profound impact on sentencing practice. Moreover, with certain exceptions, both trial and sentence are expressive of state penality, particularly the values and moral obligations which underpin the rule of law (Feinberg and Sugden, 1965). The public symbolism of sentencing may be evidenced in either declaratory, denunciatory or expressive terms. More specifically, its broader potential lies in emphasising the moral link between the offender's criminality, the penalty imposed, and its wider social impact on victims, including the victim community. Thus, in reaffirming state values, the penal sanction should reflect those values which are shared by citizens where these may be shown to promote the common good. I argue that this crucial recursive relationship is diminished by the existing paradigm.

My primary contention is that shifting the focus of the adversarial trial paradigm away from its narrow preoccupation with individual accountability towards a more communitarian model of penal accountability would significantly enhance the moral credibility of sentencing and its social impact. The article begins by highlighting some fundamental weaknesses in the existing paradigm before explaining how the proposed communitarian model would alter the nature and quality of the evidence available for sentence. The broader objective is to argue for new evidential parameters for sentencing based on a more communitarian conception of penal accountability grounded in social values.

The relationship between trial and sentencing

The prevailing sentencing paradigm in England and Wales mirrors the constraints prescribed by criminal offence definitions[9] and the limited extent to which social factors are permitted to intrude upon the evidence required to establish any necessary mental intention (Duff, 2007). This focus on establishing individual legal responsibility, or 'guilt', precludes wider consideration of social demographic factors in shaping beliefs, values, attitudes or motives for action, matters that remain at best tangential to the determination of conventional liberal understandings of intent.[10] However, such factors are of vital importance

8. See Langbein (2003). It is important to emphasise that the social, economic, political and moral foundations of crime and punishment are contextualised and change over time. More recently, some scholars have argued that the label 'adversarial' may no longer be appropriate; see e.g. Jackson and Summers (2012: ch. 2), suggesting that the development of fair trial standards has served to broaden the context for gathering evidence.
9. Certain offences may be racially or religiously aggravated; see Anti-terrorism, Crime and Security Act 2001, s 39.
10. For an example of the complexities of this debate in the indigenous context; see Australian Law Reform Commission (1986: ch. 18). The addition of more serious offences where motivated by religious or racial hatred, or the reflection of these factors as

in understanding some forms of criminality, particularly within certain socially disadvantaged minority communities.[11] In short, conceptions of restorative intervention sit uneasily with the adversarial trial paradigm's seemingly relentless focus on individual guilt, thereby hampering the fulfilment of restorative objectives, both in purpose and practice.

Conventional paradigms for evaluating punishment in both common and civil law jurisdictions attach great symbolic significance to the formal pronouncement of sentence and the elaboration of its rationale by the judiciary in individual cases.[12] The rhetoric and symbolism of the moment not only marks the conclusion of the trial process, acknowledging the extent of criminal liability through appropriate punishment, it also signals a natural break between the determination of guilt through verdict delivery and the consequences of its pronouncement.

More broadly, it may be argued that the conventional trial recursively reinforces relationships of power and subjugation within states and appropriates presumed mandates for punishment. Such mandates are normally based on an ideology whose rationality for punishment is forged *ex post facto* following analysis of the causes and consequences of crime, but is nevertheless generally taken to provide coherent and legitimate justifications for depriving individual citizens of their liberty through formalised punishment.[13] Consequently, as Garland (2001) suggests, the ideology of freedom and liberty is often replaced by that of control, so the processual reality of the trial may bear little resemblance to its proclaimed rationale, or the social context in which it operates.

Such an interpretation forces us to confront the dichotomy between objective representations of the trial and its relative reality for lay and professional participants and the wider social audience. In the present context this raises a number of salient questions, for example:

- Do the different phases of the trial actually represent key moments having some moral or normative significance for participants and citizens more generally?
- Can they be said to connect in some profound moral sense with what citizens deem as demonstrably necessary requirements for justice delivery?
- Alternatively, are such processual divisions devoid of any substantive or ideological relevance?
- If so, does this matter in any event?[14]

Recognising that our experience of law and the power of normative judgements is relative and reflective of value pluralism means that the answers to these questions can no longer be revealed by testing social reality against conventional paradigms of trial justice.[15] Conversely, they are unlikely to be answered by an approach which fails to question the moral integrity of law and its ideological foundations.[16] We are

aggravating factors in sentencing, does not change the fact that the relevance and admissibility of evidence remains constrained by the paradigms of adversarial trial and retributive justice.

11. The importance of taking these variables into account in sentencing has been acknowledged for some time; more particularly, for indigenous offenders in Australia and Canada. See Cowdery et al. (2020) and, more generally, Henham (2018: ch. 7, 226–229).
12. See Henham and Mannozzi (2003). The offender's presence at sentencing may be regarded as fundamental in reaffirming the public's condemnation of criminality. See the sentencing remarks of Mr Justice Sweeney in the case of *Sabina Nessa: The Queen* v *Koci Selamaj* at https://www.judiciary.uk/wp-content/uploads/2022/04/R-v-Koci-Selmaj-sentencing-remarks-080422.pdf (accessed 12 December 2022).
13. This absence of coherence and rationality is exacerbated in England and Wales by the Sentencing Act 2020, s 57 (formerly the Criminal Justice Act 2003, s 142) which fails to provide any guidance regarding how to go about prioritising, choosing or combining the five purposes for sentencing cited therein (see Ashworth (2004: 528) for extended criticism of this approach). See also Tiarks (2016).
14. It may be argued that the notion of legal closure precludes any consideration of the relevance of moral views in evaluating the validity and authority of law and legal norms.
15. See e.g. Packer's (1968) dichotomous due process and crime control model.
16. See Thomas (1979) for a positivist analysis of sentencing law and practice in the English context.

therefore left with the apparent paradox that any profound understanding of the meaning and significance of criminal process must be approached from a perspective which is tolerant of context and its impact on the perceptions of trial participants and the relevant social audience.[17]

Thus, it is fundamental to appreciate the influence of legal *and* social variables in formulating our understanding of the objectification of trial structure and human action within specific jurisdictional contexts. As Henham and Mannozzi (2003) argue, the objective reality of trial process is fluid, dynamic and recursive; it is an actuality constituted largely through instrumentally exercised judicial discretionary power as perceived by lay and professional participants (Rogers and Erez, 1999). Common experience of what constitutes the normative and processual reality of the trial is therefore firmly grounded in distinct contexts of legal culture and social demographics. This insight has particular relevance where those exercising discretionary power are required to reflect a penal ideology grounded in social values in their everyday decision-making.[18]

The factual basis for sentencing—the existing paradigm

Adversarial trial justice is driven by the overwhelming need to make a formal determination of individual guilt, whether or not this results from plea or verdict. Unfortunately, neither outcome necessarily establishes a sufficiently precise factual basis for the sentencer to assess the 'true' culpability of the offender. In addition, according to Ashworth, the problem is likely to be exacerbated (particularly following a guilty plea) where the system of criminal law is based on broadly defined offences.[19] As Thomas (1979) suggests, the facts upon which the sentence is based must be consistent with the formal determination of guilt. Consequently, if the offender is acquitted of a graver charge or pleads guilty to a lesser offence, the sentencer must accept this as constituting the factual basis for the determination of the sentence.

Structural problems

However, sentencers normally have a discretion regarding whose version of events to believe where there are conflicting accounts as to whether the offender was engaged in a continuous course of conduct, as long as they do not assume the existence of facts clearly negated by the formal finding of guilt. A crucial question that arises in this context is the extent to which general principles relating to the burden and quantum of proof apply in reaching a decision as to whether a fact is relevant to sentence. This issue gains in significance where the sentencing phase of the trial process is separated from that which determines guilt or innocence, and its form is determined by conventions, principles and relationships that differ from the main body of the trial. In England and Wales, not only has the sentencing phase of the trial traditionally been one where the principle of judicial independence has found its fullest expression, it has also developed its own philosophical rationales, procedural rules, sentencing principles and policy.

The separation of verdict from sentence, whether as a unified or two-stage process, also poses a significant structural question regarding the most appropriate processual context for realising the constructive potential of judicial discretion and facilitating the integration of restorative interventions in trial decision-making. One of the most significant practical implications resulting from the separation of verdict and sentence concerns the need for evidence to be reconstructed to serve the purposes of the

17. Focusing on law *as practiced* within a social context was central to the work of prominent twentieth century jurists Karl Llewellyn and Lon Fuller; see Llewellyn (1962) and Fuller (1969).
18. This imperative would be instigated through the policy-making process and regulated independently (e.g. The Sentencing Council for England and Wales), or institutionally (e.g. The Court of Appeal (Criminal) Division)).
19. See Ashworth (2000: 307). The issue is significant because it may impact directly on the choice between a custodial or non-custodial sentence or the length of any prison sentence.

sentencing phase. For example, evidence relevant to sentence (such as that relating to loss of control) may not be sufficiently explored, even during a full trial.[20] Where the offender pleads guilty these difficulties are exacerbated, since the prosecution and defence accounts of the facts may differ considerably. Yet this phenomenon can also occur within an integrated criminal process model. In Italy, for example, specific criteria establish the boundaries for the exercise of discretionary power relevant to sentence, but it is witness testimony elicited during the trial phase that is evaluated against these legal constraints. Judicial deliberations follow immediately after the close of the trial and, after considering any unresolved preliminary matters and/or procedural issues, judges must consider each issue of fact or law, as well as the proper sentence. Needless to say, such abbreviated proceedings and procedures may facilitate sentence bargaining and further distort the extent to which the facts upon which the sentence is based actually correspond with those that occurred. Similarly, rights accorded to victims are directed towards the trial (verdict and sentence) rather than to sentence alone.[21]

Arguments in favour of holding a separate sentencing hearing following conviction are considerable. For instance, in a mono-phase hearing, the necessary omission of mitigation evidence may prove prejudicial to the defence when it comes to sentencing because it restricts information concerning the individual's personal role in the commission of the crime and its immediate aftermath coming before the court. The introduction of such evidence during the trial may impact adversely on the accused's right of silence and protection against self-incrimination. In addition, the defence may be induced to introduce further witnesses during the trial process in order to establish the accused's good character and personal circumstances. Alternatively, from the prosecutor's point of view, a second hearing may facilitate the introduction of aggravating factors (for example, relating to the accused's criminal record) that might be considered inadmissible for reasons of irrelevance during the trial proper. In any event, the range of admissible material for sentencing purposes is potentially considerable.[22]

There are, however, broader issues raised. Firstly, there is an argument for supporting separate sentence hearings for symbolic reasons; that marking out as distinct from the verdict the public deliberation and pronouncement of sentence has an enormously powerful symbolic effect in drawing attention to and dramatising the punishment, as well as promoting psychological and emotional feelings relating to atonement and closure.[23] Arguably, a mono-phase process produces obfuscation in sentence justification and, since it does not promote an alternative context for sentencing, is likely to negate and stultify arguments that explore issues relating to the social impact of sentencing decisions in favour of those which sustain the *status quo*.

Secondly, an argument can be made out for suggesting that a two-stage process serves to emphasise the qualitative distinction between the pre and post conviction phases of the trial by signifying that different substantive and procedural norms apply. It is also significant that, in the English context, the sentencing phase of the trial is often used by judges to make what Ashworth refers to as 'moralistic homilies' and that the systematic analysis of relevant aggravating and mitigating factors is associated with and developed within this processual culture (Ashworth, 2000: 306). Arguably, such tendencies are negated within a mono-phase trial process, particularly where the process is dominated by a predominantly retributive ideology that does not encourage transparency or the reasoned analysis of evidence for broader socially constructive sentencing purposes.

Failure to clarify the relationship between substantive offence elements and sentencing principles[24] exacerbates these difficulties. By convention, substantive law establishes the minimum conditions for

20. For example, in cases where women have killed abusive partners; see Edwards (2021).
21. For detailed discussion, see Henham (2012: 264–291).
22. This includes the detailed consideration of expert medical, psychiatric and personal circumstances reports and witness testimony that are admitted and evaluated purely for sentencing purposes; see further Roberts (2011).
23. The extent to which this observation applies in the case of televised sentencing hearings remains to be seen.
24. As used herein the term 'sentencing principles' does not distinguish between those principles established by the Court of Appeal (Criminal Division) and the sentencing guidelines laid down by the Sentencing Council for England and Wales.

criminal liability whilst sentencing principles deal with the consequences that follow conviction, the moral distinctions between offences are drawn in the framing of substantive offences, with specific factors bearing on culpability and harm being reserved for the sentencing phase.

Conceptual confusion

It is therefore important to differentiate clearly and consistently between the notions of 'gravity' and 'seriousness' as commonly accepted for the purposes of trial and sentence. The 'gravity' of a crime is reflected in the legal definition which establishes the constituent elements of criminal liability, whereas 'seriousness' for sentencing purposes is used to denote the appropriate degree of harm and culpability in a particular case.[25]

More broadly, contemporary notions of 'gravity' should reflect public opinion,[26] whilst notions of 'seriousness' are employed to *indicate* the nature of the penalty and the appropriate sentence. Hence, the normative import of each factor is distinct. Viewed thus, the 'gravity' of a crime is concerned with the substantive issue of criminal liability, whereas the determination of 'seriousness' for sentencing purposes is essentially a procedural device linking criminal liability to the appropriate punishment. Policies and structures for achieving this goal may range from those which encourage the largely unfettered exercise of judicial discretionary power to the strict regulation of sentencing through prescriptive guidelines.

This dichotomy between substantive and procedural concerns raises significant evidential questions regarding the treatment and admissibility of material for sentencing. Thus, for example, the rules which govern the nature and admissibility of the evidence necessary to establish a racially or religiously aggravated crime will differ from those under the Sentencing Act 2020, s. 66 which deal with the level of sentence uplift appropriate to such crimes following conviction.

Procedural distortion

The disclosure, presentation, testing, admissibility and prioritisation of criminal evidence satisfy distinct purposes.[27] As moral and political ideologies shape the criminal law over time, so they correspondingly influence how the purposes of punishment are perceived. Crucially, contextual factors influence the criminalisation of behaviour by the state and the perceived severity and ranking of penalties according to 'seriousness' (von Hirsch, 1992). Thus, whilst the evidential requirements of criminal liability and punishment remain distinct, their instantiation as theory and practice remains relative to time and space.

The tendency for evidence relating to sentence to be ignored or marginalised is accentuated where offences are broadly defined. This problem is exacerbated where a plea of guilty has been entered to some or all of the offences charged.[28] The implications are considerable, since the paucity of relevant contextual material for sentencing may produce injustice in particular cases. Where a guilty plea exists a dispute regarding the nature of the factual evidence deemed relevant for mitigation by the

25. 'Culpability' is the concept used in sentencing to fix the degree of blame attaching to the harm caused by the offence. In retributive terms, the degree of 'culpability' is that which the offender deserves.
26. As Easton (2008) suggests, formal proportionality in retributivism is necessary to preserve what citizens generally regard as the correct relationship or balance between the gravity of a crime and the appropriate punishment.
27. As Roberts (2021b) reminds us, the theoretical and normative meanings attached to evidential concepts are not value free.
28. See further McConville and Marsh (2014). It is worth noting that the majority of cases in the Crown Court and the Magistrates Court result in a guilty plea rather than a full trial. Furthermore, since the vast majority of criminal cases are dealt with in the Magistrates Court, and magistrates are judges of both fact and law, it is difficult to identify and evaluate the impact of evidential decisions on the sentence decision-making process.

defence may need to be challenged by the court, either in terms that require the defence to adduce further evidence to substantiate their version of events, or through the instigation of some kind of procedural device[29] whereby various approaches are adopted in order to elicit an agreed version of the facts before proceeding to sentence (Wasik and Ashworth, 2020: 402).

Additional difficulties stem from the compromising effect of plea bargaining in this context.[30] A specific criticism illustrating the distorting effect of plea bargains and their capacity for downgrading the 'truth' in terms of how the trial marks the seriousness of what has taken place through punishment concerns the factual basis underlying the conduct charged. Plea bargains and other forms of negotiation manipulate evidential 'truth' to suit processual goals. Not only does the plea deny the possibility of testing the evidence in open court, the acceptance of a charge, or selected charges, as reflecting the totality of the accused's criminal conduct effectively denies the court the opportunity to give full expression to the totality of that criminality through the imposition of a penal sanction which adequately reflects the seriousness of the crime(s) in terms of harm and culpability (Johnston, 2020). More broadly, penal effectiveness and punishment's undoubted capacity for symbolic public expression and the denunciation of past crimes is seriously compromised if it fails to reflect the totality of the offender's criminal conduct. Hence, the guilty plea's marginalisation of the 'victim' and denial of participatory rights are particularly significant issues in the present context.[31]

Restorative potential

Conceptions of restorative justice, whilst being more suggestive of non-adversarial procedures, are not necessarily at variance with deserts-based retributive sentencing (Dignan, 2003; Dignan and Cavadino, 1996). Furthermore, as Zedner (1994: 248) suggests, both reparation and retribution are predicated upon notions of individual autonomy,[32] although ignoring the impact of structural inequality, power and social control. A potential difficulty lies in the fact that, whilst retribution equates proportionality with an objective assessment of culpability and harm, reparative justice is proportionate to victim harm, thereby suggesting a process of social intervention going beyond the normal boundaries of conventional criminal punishment. Such imperatives for reconciliation and reparation are also compatible with restorative justice principles aimed at increasing stakeholder empathy and understanding, empowering victims and communities and increasing the potential for meaningful participation. Certainly, restorative justice principles may be viewed as potentially capable of re-empowering citizens and a democratic force for social cohesion.

Whatever the potential for restorative justice, its value and relevance in the present context lies in its capacity to challenge conventional notions of retributivism and its relationship with other conceptualisations of penality in sentencing (Freiberg and Bartels, 2022).This includes a recognition that restorative objectives can promote social harmony and that values enabling reparation and reconciliation should direct sentencing rather than retributive practices lacking social legitimacy.[33]

29. Such as the English so-called 'Newton hearings'. See Wasik and Ashworth (2020) for further elaboration.
30. It is important to distinguish between 'plea bargains', which concern criminal liability, and 'sentence bargains', which are concerned with the penal consequences of a guilty verdict. See Henham (2001) for discussion of the arguments for and against plea bargaining.
31. See further Doak et al. (2009). Quirk (2018) suggests that increasing disclosure obligations on defendants in pursuit of greater efficiency tends to weaken the capacity of the criminal process to deliver adversarial 'justice' by weakening due process protections. See also Watson (2021: 8) on the relationship between respect and the consequences of the inducement provided by the guilty plea discount and Helm et al. (2022) for a discussion of autonomy in the context of the guilty plea discount.
32. See Braithwaite (2002) for further exploration of these issues.
33. Pre-trial and alternative forms of penal intervention are equally important.

Accordingly, sentencing policy should be developed from a firm commitment to ground rationality in social context. Sentencing can provide an operational context for relational forms of justice, implying the need for substantial sentencing discretion (du Bois-Pedain, 2017b; Henham, 2022). However, rationality alone, in terms of prioritising certain moral values and their expression as general justifications, is insufficient. It is only when values are operationalised effectively as normative principles that they have the capacity to influence individual thought and social action. Thus, the crucial empirical question is the extent to which practice actually gives effect to those values.

The predominant retributive paradigm facilitated through the adversarial trial model signifies a process whereby 'facts' are distilled and admitted as evidence through closely regulated norms of adversarial argument and interrogation. Similarly, guilt or innocence is based on the allocation of individual responsibility derived through prevailing argument, the 'victim' being vindicated through whatever state rules prescribe rather than communitarian interests. By contrast, in a restorative process the establishment of 'facts' which may be accepted as constituting 'truth' is derived through processes of mediation and reconciliation, the objective being to empower victims and victim communities to establish mutually accepted narratives of 'harm' through voluntary participation. Rather than the process allocating responsibility in a seemingly autonomous manner, restorative processes empower participants by ceding autonomy and agency, encouraging tolerance, and promoting reparation and restoration.[34]

By establishing the 'truthful story', restorative outcomes effectively vindicate the victim through community intervention whilst confirming community interests through restoration. Thus, in general terms, restorative processes empower victims to re-establish dominion by asserting their full rights as citizens. Extending the notion of 'victim' to include that of 'community' allows both to claim ownership of crime and achieve closure. Moreover, restorative justice discourages standardisation by questioning notions of consistency and proportionality typical of deserts-based sentencing regimes.[35]

In sum, mainstreaming restorative justice would require a reconceptualisation of the nature, meaning and significance of 'truth-finding' within the criminal trial. Accordingly, I argue that the present notion of criminal responsibility associated with the allocation of individual guilt should be tempered by a more socially instrumental notion of fact-finding, one that promotes the emergence of 'truth' from a process of compromise involving victims and victim communities. Such a process would be driven by a desire to regulate relationships of community for the common good, rather than in celebration of the subjugation of the offender and the vindication of the victim as part of the apparatus of social control.

Changing the factual basis for sentencing

Reconceptualising aims and justifications—social values[36] and restorative justice

I have argued that the promotion of social justice should become a key objective of sentencing policy, providing a new normative and ethical context for sentencing wherein relevant social impact evidence

34. O'Mahony and Doak have developed notions of agency and empowerment as a way of re-imagining and justifying the use of restorative justice. This article argues against the existing retributive-based ideology, suggesting its replacement with a value-based system (Henham 2018). Consequently, the purposes of sentencing, whether retributive, deterrent, rehabilitative, or re-integrative, or combinations thereof, are tied to the wider moral purpose of promoting shared social values. Whilst this favours the adoption of restorative ideals, values and practices, this is a consequence rather than *the* justification for change. The main focus here is on identifying which values, shared for reasons of the common good, are likely to provide a policy context for promoting social cohesion by validating changes to the structures, procedures and outcomes of sentencing. Hence, the article does not discuss or compare different approaches to restorative justice. For excellent discussion of these issues see Johnstone (2011); O'Mahony and Doak (2017).

35. On this see Tiarks (2019).

36. 'Social values' are values the state adopts as foundational (or 'core') values of penal ideology. However, the important issue here is the extent to which citizens' perceptions *accord* with those of the state and the reasons for this. 'Social value', on the

could be maximised without sacrificing core principles of proportionality and consistency (Henham, 2018: ch. 1). By emphasising social relevance and inclusivity, value would shift from prioritising individual guilt, allowing a principled engagement with communitarian notions of accountability. Thus, harm and culpability would be addressed within a framework sensitised by the need for sentencing, and penal policy more generally, to engage with the moral and social significance of crime and punishment at the grass roots level.

This approach recognises that social justice cannot be engineered or imposed successfully by the state, but must be achieved through a reconciliation of competing values. The declaratory role of sentencing as a public platform for expressing social values likely to promote social justice is invaluable in achieving this purpose. However, for social values to be recognised and operationalised through the ethics and practice of sentencing, there must first be some agreement as to what such values should be. Thus, once established, the familiar rhetoric of retributive penality would be replaced with a clear statement of which 'core' values the state supports in sentencing policy. Beyond this, however, such values would require demonstrable contextual validity before they could be operationalised effectively by the state through sentencing policy and practice.

Accordingly, the moral authority of what the state recognises as shared values for the common good, or what the British Academy Report suggests as 'core' values,[37] cannot be assumed simply on the basis that they are representative of the values that underpin most Western liberal democracies. Such assumptions do not confer social legitimacy on state penality *per se*—this requires empirical validation. However, certain values, such as dignity, autonomy and inclusion, may be deemed intrinsically good, and therefore valid, in the sense that they tend to promote social harmony, since social harmony is for the common good and essential to the maintenance of 'civil' society. Hence, empowering victims and communities to achieve greater autonomy by enhancing rights of access and participation in the sentencing process and beyond may be perceived as contributing to social cohesion.

Notwithstanding, since the value pluralism of contemporary society is reflected in the understandings and meanings citizens attach to moral questions, empirical verification is essential. Thus, the values adopted by the state as penal ideology require social legitimacy through empirical verification if they are to provide shared moral foundations for policy and practice. As things stand, the way 'core' values such as 'liberty, autonomy, dignity, inclusion and solidarity' come to be recognised or perceived by the state or citizens, in either an individual or social sense, cannot be assumed.[38]

If one accepts that the moral values by which the state justifies punishment should be broadly shared, there remains the normative question of how such moral imperatives can be operationalised through sentencing. Accepting the conclusion that shared values are essential to the social legitimacy of penal decision-making demands fundamental change to the existing paradigm for trial and sentencing. Crucially, this approach recognises that the ideology, practices and outcomes of sentencing are collectively implicated in amplifying and recursively reinforcing state penal power.[39]

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other hand, relates to impact and signifies the value citizens and communities *actually place* on specific penal interventions. Thus, social values guide the ordering of priorities, decision-making and interaction, whereas social value signifies the worth to victims, communities and society in general of specific penal measures.

37. See British Academy Report (2014). The 'core values' of liberty, autonomy, solidarity, dignity, inclusion and security identified in the Report may be regarded as a useful starting point (2014: section 3).
38. Cotterrell (2002: 35) draws attention to the social function of law and legal structures in enabling the rationality derived from political authority; 'There exists a need for legal rationality and political stability to give effect to pluralistic interests within the context of the nation state, and give some meaning to the notion of "community" in so far as it represents a collective accommodation reached between the interests of citizens and the exercise of state power.'
39. The degree to which penal rationality is supportive of social justice depends upon the nature and source of political authority; see du Bois-Pedain (2017a) and generally, Lacey (2021).

In practical terms, adopting a new paradigm to facilitate the introduction of contextualised information requires significant modifications to both substance and procedure.[40] Major substantive changes would include enhanced rights of access and participation for victims and other trial participants, both lay and professional. In essence, these changes are consistent with O'Mahony and Doak's call for greater autonomy and agency in re-imagining restorative justice (O'Mahony and Doak, 2017). Empowering those directly involved in penal intervention, especially victims and communities, accepts the need to respect shared values when shaping restorative resolutions to crime, particularly those which impact victims and victim communities. Accordingly, their approach recognises that the social embeddedness of crime and punishment, especially its link to social cohesion, should be acknowledged.

Practical implications

We now turn to consider some specific changes which could be made to the legal and process norms that currently govern the adversarial form of criminal trial in order to promote a different approach to the treatment of evidence for sentencing, one which is more consistent with advancing a restorative and victim-centred resolution to the criminal process.

Changing the rules for admissibility. As currently conceived, the adversarial paradigm is chiefly concerned with establishing a version of the 'facts' that will either vindicate or negate the prosecution's allegations of guilt made in the indictment (Hillier and Dingwall, 2021). In other words, the adversarial trial as a context for determining guilt or innocence ensures that the norms which control the way factual information is admitted to the record conform to this overriding need to establish individual criminal responsibility for what is alleged. Nevertheless, how this information is perceived is not simply a matter dictated by the nature of the legal process as a juridical form. Social values and norms also influence the way trial information is perceived both within the trial and beyond. For instance, within the trial context, social norms may well be particularised as norms of legal culture.[41] Moreover, since the judiciary, trial professionals and other participants possess distinctive individual and social demographic characteristics, notions of guilt and innocence are unlikely to be perceived uniformly.

Discretionary rules are essentially neutral as regards their instrumental use within the trial.[42] The *exercise* of discretion depends upon human agency, particularly that of the judge. However, judicial discretionary power derives its authority from a variety of contextual factors, relative to time and place.[43] As argued above, the rationale for the admissibility and testing of evidence should not simply be based on establishing individual criminal responsibility for the alleged criminality. Rather, a broader social purpose is envisaged for the trial and sentencing in which the concept of individual responsibility is situated within a broader conception of social accountability. This approach recognises that the causes and consequences of individual criminal behaviour are socially embedded and so acknowledges the fundamental communitarian dimension of penal accountability.

However, as suggested, the intention is not to replace the concept of individual criminal responsibility, but to situate the concept of offender liability within a broader contextualised notion of what responsibility and accountability signify for the immediate victims and victim community. Hence, the objective

40. Note Easton (2008), who argues against this approach.
41. The influence of legal culture is a matter for conjecture.
42. Note, however, that certain exclusionary rules, such as those relating to hearsay, bad character, or sexual history evidence, have express statutory discretions attached to them.
43. See du Bois-Pedain (2017a). The nature and significance of this authority is heavily dependent upon the political, economic and social climate of the time and the extent to which the penal state deems it necessary to subjugate individual rights (as defined) in the 'public interest'. See Braithwaite (2022) for a fresh approach.

is to recognise that interdependence and the significance of penal values that enhance civil society for promoting social cohesion.

Moreover, how the notion of 'accountability' is perceived in retributive terms is equally relevant here, given that retribution is often a significant component of what citizens more generally perceive as 'justice'. Accordingly, 'retributive justice' may express a moral disapproval which resides within the wider community. The extent to which that moral disapproval is shared, either temporally or actually, will always remain an empirical question.

Reconsidering the burden and standard of proof. The appropriateness of recognising individual criminal responsibility as the basis for determining guilt and punishment within the trial and its possible modification to correspond with a concept which situates that responsibility within a more communitarian context raises significant substantive and procedural issues. One implication is the possibility of adopting a civil (or other) standard of proof at particular stages within the trial process, depending on the source, nature or utility[44] of the evidence.[45] However, the indiscriminate exercise of judicial discretionary power to vary the burden or standard of proof would be deemed contrary to the principles of natural justice and human rights (Wasik and Ashworth, 2020: 398–401).

What is proposed, in the first instance, is that the relevance and probative value of trial evidence, and hence its credibility, should be determined initially according to the existing rules, but that such rules should be modified so that judges are empowered to use their discretion during the course of either the prosecution or defence case (and subsequently during closing statements) to ask for and admit evidence to the record which has been tested against the lesser civil standard of proof, wherever that evidence can, in the court's opinion, be used to promote greater understanding of the broader social context of the alleged criminality.[46]

The reliability of such evidence would be established through the direct questioning of witnesses by the judge and on behalf of 'victims',[47] subject to procedural directions from the court. This broadened discretion would operate against the background of a changed rationale and increased participatory rights for victims and community representatives, providing each greater input on decisions taken *by the court* about the direction of the trial and the ultimate purpose of the sentence. In sum, the social value of these changes lies in the fact that the evidence required to establish individual criminal responsibility has a more pronounced social dimension, rather than being constructed and interpreted solely to satisfy the formal rules and processes of adversarial trial.

Whilst a formal division between verdict and sentence is desirable, for the reasons given, this should not limit the introduction of evidence at particular points in the process based solely upon whether or not this might involve some tactical advantage or disadvantage for the defence or the prosecution. If the scope for introducing material which might otherwise be regarded as prejudicial to the defence or prosecution case is widened to include more contextually relevant material, it should be on the basis that any potentially prejudicial evidence is no longer threatening because the underlying reason for the threat has been removed.

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44. As judged against the values that underpin sentencing policy and practice.
45. The suggestion is similar to that which already applies in cases where the burden of proof is reversed; see e.g. Homicide Act 1957, s. 2(2) in the case of diminished responsibility. It is worth noting the problem of possible incompatibility with the European Convention on Human Rights, Art. 6(2) if the reverse burden threatens the accused's right to a fair trial. Note also that the civil law model might be appropriate for the preliminary gathering and testing of evidence.
46. The crucial point here is that the relevant evidential tests would be informed by a distinct social purpose rather than constructed and interpreted through the application of formal rules and processes designed to satisfy the rigours of the adversarial trial model. See further, Henham (2018: 216–235) for detailed discussion of how contextual factors such as poverty and social deprivation might be accommodated within the existing sentencing framework.
47. As used herein, the notion of 'victim' includes the 'victim community' as well as individual victims of crime.

Were the context of admissibility to be broadened, as suggested, judges would be under a duty to explain the broader penal significance of admitting such material for offenders, victims and victim communities. However, it is important to emphasise that such evidence would not be introduced exclusively at the sentencing stage.[48] Rather, it would, subject to judicial discretion, be admissible during the course of the trial proper whenever the court felt that additional contextual evidence was necessary in order to encourage, or enhance the possible effectiveness of, a communitarian penal intervention, such as social rehabilitation.

Rejecting exculpatory or mitigating evidence as relevant only to the distinct phases of trial and sentence re-enforces an anomalous procedural dichotomy whose rationality is founded upon the theory that establishing individual guilt and responsibility should be the primary concerns of the criminal trial, and sentencing the individual offender the primary focus of penal accountability. This conventional distinction marginalises the fact that admitting such evidence might serve a wider social purpose, one that recognises the significance of social factors in understanding criminality, establishing responsibility and promoting the social value of penal accountability.[49]

Broader considerations. The proposed changes appear fundamental if considered solely from the perspective of the prevailing adversarial paradigm. However, their social value lies in adopting a communitarian rationale for the trial and sentencing.[50] As suggested, this involves broadening the underlying value system to facilitate a more purposeful engagement with the social dimensions of crime, particularly in developing contextualised accounts of harm, responsibility and accountability. Modifying the normative and ethical framework for sentencing to reflect this engagement should enhance social justice and the social effectiveness of penal intervention.

I would argue that modifying the evidential rules and procedures as suggested would not compromise basic trial rights such as the right to a fair trial or the right to equality before the law.[51] Rather, the norms authorising the admissibility of contextual material would, in effect, actualise the values underpinning sentencing law and policy, so that ethical practice remains consistent with contemporary notions of fairness, inclusion and equality.[52]

Achieving a greater measure of social justice implies the existence of a moral obligation on the part of the state to engage, empathise and reflect on the social value of rights held in the context of sentencing, particularly since their social significance is always relative to time and place. Accordingly, the moral justifications for state punishment to regulate freedom and curtail the liberty of citizens are in constant flux.[53] As du Bois-Pedain suggests (2017b: 395), the contingency of punishment reflects the basis

48. For detailed discussion of the limitations of the present system; see Wasik and Ashworth (2020: 400), noting particularly that the present law draws a distinction between mitigation directly relevant to the circumstances of the offence and that which may be described as 'extraneous mitigation'; in other words, mitigation unconnected to the facts or circumstances of the offence. Only the former must be established beyond all reasonable doubt.
49. Contextualisation is particularly important in understanding how evidential rules are used to structure notions of blame and guilt, especially in cases of rape; see Pickard (2021).
50. 'Communitarian' is used here to emphasise the social value of taking greater account of the interconnectedness between the individual and the community and its impact on criminality and penal outcomes. See Loader (2006) and Norrie (2009) on the gradual shift from a relationship of dependency between human agency and social context towards a more insular form of neo-liberal individual responsibility detached from its communitarian roots.
51. The European Court of Human Rights has by convention avoided articulating the specific nature of the evidential rules to be applied across different procedural traditions; see, for example, *Khan* v *United Kingdom* (2000) 31 EHRR 1016, at para 34.
52. I have argued elsewhere the need to adopt a rights-based approach which is sensitive to the contextual nature of rights. This implies that the social and political contexts in which rights exist and are exercised can only be discovered through the adoption of models which are capable of identifying competing interests. Thus, how rights are perceived and protected in reality is an empirical question (Henham, 1998).
53. Lewis (forthcoming) describes the extent to which the European Court of Human Rights contextualises rights of free speech and freedom of expression. The notion of the court deferring to the need for knowledge of local conditions to identify the 'public

upon which the polity's ongoing relationship with the offender is progressed. It effectively personalises the state's moral responsibility and recognises its fulfilment at the point of decision-making. Moreover, it acknowledges that the state's moral obligations to citizens and communities with regard to punishment are socially contingent. From this perspective, sentencing provides a public forum where the moral boundaries of civil society are constantly restated and re-enforced. Hence, sentencing's purposes, norms and structures should always be conceived as reflexive and socially contingent.

Notwithstanding, Tiarks (2019) appears to reject the idea of an ideal or single purpose for sentencing, preferring instead an approach that focuses on procedural fairness as the key to eliminating incoherence and enhancing legitimacy. This differs markedly from the value-based approach argued for in this article.[54] Tiarks (2019) cites Meares and Tyler's assertion that procedural fairness is more important than whether or not the decision is substantively fair (Meares and Tyler, 2014). However, this argument ignores the possibility that what citizens perceive as a fair procedure may in fact be masking an abuse of power by the state. In other words, the morality of state penality is not justified through procedural justice. Procedural justice is not a stand-alone morality, it forms part of what citizens individually and collectively perceive to be the legitimacy of state punishment. This is essentially to do with how the state exercises penal power and the underlying values which justify the exercise of such power, recognising that this has significant political and constitutional dimensions (Du Bois-Pedain, 2017a). A paradigm providing meaningful opportunities for access and participation is therefore more likely to enhance the perceived legitimacy of punishment than prescriptive sentencing guidelines which restrict judicial discretion and the scope for individualisation.

Tiarks also suggests that the problem of incoherence in sentencing is really caused by the absence 'of a coherent method for choosing between different purposes for punishment and a coherent process of deciding what would be 'just' in any particular case' (Tiarks, 2016: 254). Restorative justice is preferred as a methodology for reconciling different penal purposes and achieving procedural fairness. However, I would argue that penal outcomes should be grounded in a framework which serves the needs of civil society, with parameters set by the state in terms of the values informing penal ideology. From a normative perspective, such values should, through the normal political processes of policymaking and legislative enactment, then facilitate the provision of appropriate operational structures, allowing courts and decision-makers to engage with the crime-related social issues raised by value pluralism at the community level. This conceptual linkage will become increasingly important as accountability for crime continues to be devolved by the state.

Accordingly, ethical practice should not only operationalise values that are shared within victim communities for reasons of the common good, it should also be demonstrably consistent with the moral imperatives set by state ideology.[55] State penality would otherwise lack the moral credibility of existing for the common good of civil society. Where that moral credibility is evidenced, the exercise of judicial discretionary power would be informed by a clear moral purpose through which the individualisation of sentencing could be pursued.

As proposed, value change would provide a more flexible process attaching equal priority to both retributive and restorative responses to crime, as with other aims.[56] In addition, normative and ethical change would provide the impetus for social impact evidence to be given greater prominence during

interest' issues involved may be viewed as comparable to that of relevance and admissibility of contextualised knowledge in sentencing.

54. Hence, the aims or purposes to be achieved in any specific case should be informed by this approach.

55. It is important to note the potential limitations of adapting or incorporating restorative practices from other cultures or jurisdictions into existing retributive justice paradigms since their effectiveness may depend upon their distinctive, local, contextualised focus; see Tauri (2022). Arguably, such dangers would be mitigated where restorative values are already embedded in penal ideology, policy and practice.

56. For analysis of the difficulties in reconciling these two paradigms, see von Hirsch et al. (2003).

the trial phase, providing a factual basis for sentence that takes more account of social factors (Henham, 2018: 200-–235). However, key practical issues remain: for example, which factors should be recognised; what kind of causal link should exist; how should this be demonstrated in court; at what stage in the process; how to quantify social adversity for the purpose of sentencing.[57] Furthermore, Easton and Piper suggest that victimisation rates for different offences may vary and responses to relative deprivation may differ markedly within and between different groups and communities (Easton and Piper, 2008: 330).

I have argued that sentencing principles should be applied generally without social or cultural differentiation (Henham, 2018: ch. 7). However, those factors contributing to social disadvantage that arise by virtue of such social or cultural differentiation should be legitimate considerations for sentence determination. Whilst the social value placed upon the punishment of a particular offence is not of itself a mitigating factor, it should be taken into account in responding to the offender's criminality. In so doing, the court should take account of how social and cultural differences define the social value of punishment within victim communities and the reasons for this. The objective seriousness of the crime and the particular subjective circumstances of the offender should be assessed in the context of the social setting. However, these considerations should be balanced against prospects for desistance that engage with social and cultural definitions of social value. Thus, the resolution of contradictory policy considerations arising in sentencing should take account of differentiated social and cultural definitions of social value. Desired penal impacts should engage with how individuals perceive themselves, and are perceived, within particular communities in terms of moral accountability, not simply legal accountability.[58]

Intervention and diversion. The prospects for intervention and diversion depend upon the dynamics of each case. However, the proposed new paradigm would recognise certain indicators or triggers for judicial intervention, contingent on the offender's willingness to acknowledge guilt, express remorse, or repair harm, and the victim and victim community's willingness to accept apologies, offer forgiveness, accept reparation or work towards a collective resolution that promotes social harmony.[59]

Essentially, this approach acknowledges the relativity of 'truth',[60] focusing particularly on how evidence of remorse, repentance and the desire for reconciliation is constructed.[61] As now, the offender's genuine acceptance of guilt and desire to assume responsibility for the crime would be set against system advantages such as the timing of a plea, saving the time and expense of a trial, avoiding witness attendance and reducing distress. However, procedural rules would go beyond this, allowing evidence regarding the impact of guilty pleas on victims and victim communities and admitting testimony

57. Roberts (2021a). Following value change, a transformed role for sentencing within the criminal trial is proposed, requiring significant changes to structure and practice. The criminal process, including pre-trial, trial and sentencing stages, would be conceived as an appropriate epistemic context for evidence going beyond that needed to establish individual responsibility for the crime. Such will be the case where it is informed by a value system which enhances its capacity to receive more broadly based evidence. How a workable test of social value might be developed and implemented is dealt with by Henham (2018: 223).
58. The crucial limitation here is that such definitions must be shared for reasons of the common good. In the present context, 'communitarianism' conceptualises the essence of the common good. Central to this is the belief that the reciprocal nature of the relationship between the individual and the community gives meaning and value to the common good. This shared belief is crucial to social cohesion.
59. It is worth noting Braithwaite's observation that a critical feature of communitarian societies is that they should be more capable of shaming which amounts to stigmatization and less willing to condemn deviance; Braithwaite (1989). Clearly, this will vary so that the degree to which any justice process (whether trial-based or alternative) can respond to communitarian demands for justice and the possibilities for achieving them will depend upon how it comes to perceive what they are.
60. Thus, accepting that perceptions of 'truth' are intimately related to social context.
61. It is crucial to identify the appropriate epistemic context for realising the potential of judicial discretion to advance the integration of restorative themes in trial decision-making; see Jackson (2009) for discussion of this theme in the context of international criminal justice.

from those directly involved, or their representatives. A broader remit taking account of shared values and local perceptions of justice might examine how a negotiated outcome could add social value and remain consistent with contextualised notions of social justice.

Developing judicial discretionary power. Ultimately, the mobilisation of judicial discretion would depend upon reshaping the ideology of the trial and sentencing, moving away from the adversarial towards a more problem-solving approach, in order to prioritise mediated and restorative outcomes. An important ethical focus for this mobilisation is to develop a contextualised approach to individualisation in sentencing.[62] Such an approach is consistent with the arguments advanced herein. As Browne suggests (Browne, 2017: 230), individualisation is achieved '…through judicial recognition of the profoundly contextualised nature of the process'.

However, I would take issue with De Girolamo's notion that procedural justice should be taken as a significant indicator of substantive justice rather than other measures of justice such as 'popular justice' (De Girolamo, 2019). Exploring the distinctions between the contructs of legal and justice consciousness, De Girolamo makes the pertinent observation that 'Justice consciousness…seeks subjective understandings of justice in particular contexts: the focus here is on the experience or perception of justice during a process [mediation] that sits outside of the law.' However, subjective notions of 'justice' are also morally subjective. This notion sits ill with value pluralism and the idea that punishment should be morally justified by the state, or, more particularly, that state punishment should possess broader moral credibility to claim legitimacy. The moral subjectivity of 'justice' may provide a starting point, but it cannot be more than that.

Shared perceptions as to the morality of processual justice are necessarily value judgements. Moreover, understanding the rationale and context for this reasoning is crucial to explaining the perceived legitimacy of sentencing and its probable social impact. By engaging with these shared perceptions the state can develop mechanisms to both identify and operationalise core values through which to justify punishment. Focusing purely on the subjectivity of process rather than the outcomes of trial and sentence serves only to distance the morality of state punishment from its social context.

In sum, the concept and practice of individualisation is presently circumscribed by the pervading retributive ideology which underpins the substantive and procedural framework for trial and sentence. This ideology not only militates against the development of sentencing guidance that encourages socially contextualised notions of rehabilitation, crucially, it hinders that objective by endorsing procedural devices such as plea and sentence bargaining which marginalise principled judicial intervention through individualised sentencing. Mobilising judicial discretionary power for restorative purposes requires a reconceptualisation of trial ideology, substantive normative change and the development of new techniques for advancing the jurisprudence of restorative intervention within this changed environment.[63]

Conclusions

Issues of principle and value

Although social values may be articulated as abstract concepts, the legitimacy of sentencing largely depends upon the way individual sentencing decisions are perceived. Social values are essentially relational values. Hence, their meaning and relevance must be established empirically. Moreover, social values should be shared for reasons of the common good before being recognised as foundational

62. See further Tata (2019).
63. See further Henham, 2022.

values for state punishment. Fundamentally, such an approach recognises that the moral authority of penal values is always socially contingent, relative to time and space.

Watson has recently explored the contingency of respect as a value and ethic for practice (Watson, 2021). In particular, she argues that respect and legitimacy in sentencing are relational in that they are concerned with the nature and quality of the interaction between citizen and state. As Watson suggests, 'respect and legitimacy might, in fact, be preconditions for an effective justice system because they promote meaningful citizen-state relations and are good predictors of offender compliance with the sentence imposed' (Watson, 2021: 6). Hence, respect as a value in the context of procedural fairness appears crucial to the perceived legitimacy of sentencing, both in terms of the process itself and the likely success of the penalties imposed. If respect is related, either directly or indirectly, to perceptions of what is just and fair, then this should have a significant influence on the values and norms governing social interaction, and consequently the degree of social cohesion within a given society. Regrettably, as Watson suggests, respect remains vague as a concept, subordinate to the instrumental goals and constraints of criminal justice institutions and largely disconnected from the subjective contextual realities of crime and victimisation.

A key question in the present context is whether, and to what extent, respect is, or can become, relevant to enhancing the moral credibility of sentencing (Henham, 2018: 114). In this sense, as a foundational value, respect should influence the form and direction of sentencing policy, particularly if one takes the view that sentencing must empathise with the subjective understandings of stakeholders to retain legitimacy. Such a relationship should reflect and become part of an ongoing discourse between citizen and state regarding the aims and purposes of punishment. Recognising the intrinsic value of respect as an organising principle is crucial to legitimacy because respect for equality and inclusion as providing meaningful rights of access, participation and treatment are prerequisites for social justice. As such, respect represents a key aspect of the moral basis upon which citizens implicitly agree to restrictions being placed upon their individual rights by the state in response to crime.

Increasing the perception of social justice is likely to impact effectiveness and alert sentencers to the diverse social and moral contexts of criminality and victimisation within communities. Such an approach not only recognises the fluidity and relativity of moral values, but also their overlapping nature and complex patterns of communication. Fundamentally, however, it recognises the need for penal law and policy to pre-empt citizens expectations,[64] rather than simply react to change where value pluralism persists. Thus, policy should be sensitised, engaged and reflective of social values in a real sense (Henham, 2018: ch. 4).

If respect is to be valued as an ethical constraint, moral empathy and sensitivity in criminal justice practice must be genuine and empirically grounded. As argued, new foundational values are required to achieve such meaningful change in ethics and practice. Hence, values such as respect demand both conceptual and normative clarity before their reformative potential may be realised.[65]

The above discussion has significant implications in the present context. In principle, values such as liberty, autonomy, solidarity, dignity, inclusion and security should be respected by the state in its dealings with each citizen. However, the extent to which sentencing policy promotes such values *is* both socially and politically contingent. Socially contingent, because sentencing policy should as far as

64. '…criminal justice institutions ought to be responsive to respect and legitimacy, but empirical research will be essential to gain a deeper understanding of their precise operation and impact. Only then might we speak with greater authority on respect and legitimacy and make a successful case for both values to be elevated to the status of institutional standards at sentencing'; Watson (2021: 15) and see Watson (2020).

65. As Acorn (2022) suggests, the essential link between values such as respect as desirable aims or purposes of criminal justice and their instrumental effectiveness as ethical and normative constraints needs to be recognised. In short, values as desired aims and purposes must be related to social reality. If values are obscure, conflicting or unrecognisable in the real world, their social legitimacy is limited.

possible be based on values that are shared for reasons of the common good and, politically contingent, because the extent to which such values are reflected in policy within liberal democracies is a function of how political power is secured and exercised in the penal context.

The latter raises fundamental questions about the meaning of control and participation in relation to the criminal trial and sentencing and the extent to which social justice values are, or may be, realised for *all* citizens. Control is the critical variable here, since actualising penal values through the criminal trial and sentencing suggests a relational dynamic that consistently restates the power relations between citizen and state. Viewed thus, structure and process are crucial in shaping the nature, quality and impact of the trial's 'truth'.[66] Hence, the social legitimacy of trial justice needs to be consistently restated *and* re-enforced.

At the core of reconceptualising the foundational values of the criminal trial and sentencing is the purpose for which evidence is utilised; a desire to construct a 'truth' conceived within a paradigm which is more engaged with the social contexts of criminality and desistance.[67] Broader notions of access and 'participatory rights' have been slow to develop within the existing paradigm, despite pressure to extend rights of access and participation to victims (Doak et al, 2009). Existing laws, rules and procedures have also failed to respond adequately to changed expectations regarding the aims and outcomes of penal intervention.[68] For example, Doak et al. (2021) argue that recent evidential developments for vulnerable witnesses are only now moving away from the orality principle and traditional conceptions of cross-examination.

Notwithstanding, such reforms remain seriously constrained by the existing retributive and adversarial paradigm. More broadly, the moral distance between state penality and social values persists, such obfuscation being magnified by value pluralism. As Doak et al. (2021:110) suggest, changing entrenched values and practices is difficult; institutional pressures to preserve existing rights remain considerable. Hence, it is important to consider how the changes argued for might enhance social justice in sentencing.

'Public interest' arguments for balancing rights and liberties ultimately depend upon how the goals of punishment come to be defined and resolved.[69] If the aims and solutions are perceived as partial or repressive, then it may be seen as appropriate to challenge the basis upon which particular rights are secured and upheld in criminal trials. In this regard, one may question whether the 'public interest' is best served by penal pragmatism or the adoption of values that promote inclusion, autonomy and dignity. I have argued that the social value of penal intervention is significantly diminished when issues of race, religion and discrimination are ignored or marginalised. Moreover, operational goals should never privilege bureaucratic efficiency and fiscal prudence at the expense of social justice. The latter requires policy based upon foundational values with a clear social purpose.

As Findlay and Henham suggest (2010: ch. 6), social accountability requires the construction of a socially inclusive framework for justice delivery based on a clear social agenda. In the domestic

66. Arguably, the limited ability of European Human Rights law to influence the kind of approach taken by common law courts to enhancing fairness and participation in evidentiary matters illustrates a broader need to develop a contextualised approach to evidential reasoning based on the social value of rights; see Jackson (2019).

67. As Stein (2000: 127–128) points out, evidential rules cannot be justified intrinsically, notwithstanding their possible impact on the judicial determination of substantive rights. Thus, one may argue that the epistemic value of evidential rules lies in that which determines penal ideology and its normative significance, relative to time and place. So the constant interplay between moral values and social reality determines the social value of substantive rights. This is essentially a fluid and relational reality.

68. For example, the role of the emotions has long been recognised as central to the perception of criminal 'justice'; see Karstedt et al. (2011). Yet, emotions alone are insufficient, they require direction if state penality is to engage with them in a positive sense. So the challenge remains in finding the 'right' way to mobilise feelings for the common good, both individually and collectively.

69. See further Ashworth (2002).

context, such an inclusive accountability for the trial should reflect democratic values by identifying and giving relevant stakeholders appropriate rights of access and participation; encouraging honesty and transparency through building trust and promoting 'truth-telling' through process; and supporting socially valued outcomes in facilitating mediation, reconciliation and social reconstruction. As argued, the potential for achieving social accountability through the greater involvement of communities is severely restricted by retributive ideology and the adversarial mode of trial. Developing a capacity for social accountability requires a penal framework that is sensitive to the contextual needs and moral sensibilities of victims and victim communities.

Pragmatism and social justice

Pragmatism will continue to drive sentencing policy if values considered more likely to promote social cohesion remain marginalised.[70] At present, the short-term political pragmatism driving policy and practice serves only to perpetuate rule of law justifications and the *status quo* of punitive penal intervention. Such instrumentalism symbolises the antithesis of democratic governance and so diminishes the social value of punishment. In short, penal pragmatism tends to marginalise social justice in favour of self-serving instrumental goals.

Notwithstanding, the aims and values attached to the criminal trial and sentencing and the ethical principles which inform normative practice are beginning to change. Johnston, for example, argues that the current disclosure and case management regime with its emphasis on speed and efficiency has precipitated a fundamental change in the nature of the criminal trial.[71] Furthermore, Thomason suggests that the admissibility of evidence as regulated by the existing rules is gradually being undermined by evidence as negotiated and agreed between the parties. Hence, the notion of adversarialism where the parameters of the contest are defined by the parties is under threat. Thomason concludes that increasing managerialism threatens to undermine the epistemic function of the rules of evidence and procedure in the adversarial contest.[72]

Taking this argument one step further, the shift away from conventional adversarialism towards increased managerialism, diminishing rights and lack of individual autonomy raises broader issues about the social significance of the values that sustain the existing system of criminal trial and sentencing and its normative and ethical framework. Managerialism, particularly through centralising control, symbolises a distancing of the trial form from the kind of structure that is capable of delivering socially valued solutions to crime problems; it either marginalises or fails to engage with the crucial reality that legitimacy and penal governance demand greater social accountability.[73] Fundamentally, where the values that give 'meaning' and 'relevance' to state penality begin to lose common attachment, so does the legitimate authority for depriving citizens of their liberty.[74]

The above suggests that penal ideology should promote a sense of common purpose based upon shared values in order to restore the social legitimacy of punishment. Whilst the sense of common justification may be enhanced through the empowerment and agency of both the victim and the accused, this

70. See British Academy (2014). 'Pragmatism' refers to an approach where policy is justified by desired results rather than ideology.
71. See Johnston (2020). Johnston suggests that what may be accepted as 'facts' through proof has gradually been replaced by a more interventionist process focused on managing how the 'truth' of what took place becomes established. Thus, the burden of proof placed on the prosecution has been replaced by an administratively driven search for 'truth'.
72. See Thomason (2021) and the extensive literature on this topic cited therein.
73. Social accountability here refers to ongoing collective collaboration between the state and citizens aimed at reducing the gap between citizens' needs and expectations and what the state provides. It favours citizen empowerment through widening access and participation for victims and victim communities.
74. See further du Bois-Pedain (2017a).

must exist within the framework of a value system that is shared, supported and valued by the community to be effective. The moral justification for restorative intervention is key to realising this imperative, since it reaches beyond the immediate parties to the community itself. Thus, the empowerment and agency of the parties engages directly with the community in a process of social as well as personal healing. If, as argued here, that process is facilitated through a changed penal ideology grounded in shared values, the 'truth' sought through process and procedure should possess a focus shaped by shared purposes and values. Thus, the trial's 'truth' should embody a shared 'meaning' and 'relevance' it currently lacks.

Fundamentally, what is proposed seeks to establish both a communitarian and political basis for the legitimate authority of state penality.[75] The communitarian basis for this authority would derive from the identification and establishment of a shared value system to underpin state penal ideology for reasons of the common good. Correspondingly, political legitimacy would derive from the system's commitment to the egalitarian engagement of *all* citizens in promoting the social value of penal intervention.

I have argued that the empowerment, autonomy and agency of key stakeholders is crucial to realising a communitarian vision for the criminal trial and sentencing.[76] However, this can only be achieved if the values which inform the new paradigm are linked normatively through the criminal process to particular social purposes. Reflecting shared moral values in state penality is always problematic where value pluralism persists, particularly if one accepts the premise that such values should engender policies and practices that promote the common good. Within that context, reducing the distance between the moral and social reality of the trial's 'truth' is paramount.

Cotterrell (2002) argues that the measure of justice is 'not conclusively given by existing law', rather, it should by implication arise from the need for social solidarity. Hence, law should respond by promoting that solidarity. This argument is consistent with Durkheim's ideas about society's need for law to function as a mechanism that promotes social cohesion based on citizens' moral allegiance to law. However, moral allegiance demands a tangible reality for law, notwithstanding that this is often incompatible with social reality. Hence, it is important to consider the implications of law as a framework that promotes social cohesion in terms of access to justice. As argued, this is a moral question which depends upon the extent to which the values which underpin law are shared by citizens, and the reasons why.

This article has attempted to illustrate how the pivotal role played by evidential rules operating within the constraints of adversarialism and retributive ideology has served to increase the moral distance between citizen and state. A more flexible approach to the admissibility and evaluation of evidence for sentencing is advocated, one conceived within a communitarian ideology whose purpose is to promote penal interventions which enhance social justice.

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75. See Gallo (2021). In developing a theory of punishment, Lacey (1988: 175–176) refers to the notion of community as '…a group of human beings, each participating directly, and also possibly indirectly, by electing representatives, in the development of their group framework, policies and norms, bound by a sense of commitment to the maintenance of the community, through acknowledgement of its importance for themselves and others, and united thus by a second-level commitment to the values and goals adopted through the process of public decision on democratic principles.' See also Lacey's insightful discussion about the importance of social conditions in determining what is an acceptable balance between autonomy and welfare when deciding the distribution of punishments (1988: 186–193).
76. My argument is that *all* citizens have a stake in penal outcomes in the sense that all actions taken by the state against citizens attract value, so the state is complicit in perpetuating social *injustice* where it fails to prevent discriminatory practices in sentencing. Consequently, unless state penal ideology is imbued with a different or new morality, the moral purchase of rights will not materially change or alter the impact of punishment on the quality of people's lives in disadvantaged and poorer areas (Henham 2018: 202). See also Brooks (2014) for elaboration of the idea of stakeholder sentencing.

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ORCID iD


Ralph Henham https://orcid.org/0000-0002-5631-0214

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