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Troubling Encounters

1.1 Ways of Case-Making: A Provocation

This book is a testament to a journey through social scientific and judicial case-making practices. That is, it seeks to take seriously how judges as well as social scientists make their case about the world: How, in other words, judges and social scientists draw on words, people, and things to produce an account of the way things are. The notion of case-making is used here speculatively, provocatively perhaps: Not as a way to suggest judges and social scientists may, after all, have a lot in common, but rather to propose that we take seriously the very different *practices* that go into making a case about the world, in the world. In so doing, this book commits itself to an understanding of social and legal life as practical, and occasionally messy business: always ongoing, never not concrete, irreducibly multiple.

This book concentrates, first, on the truths and facts sociologists have produced about legal practices. It is concerned with the questions of *what* these social scientific observers have seen when they cast their eyes on these practices; *how* they have seen what they have seen; and which *realities* they have enacted in their approaches. Second, this book zooms in on the ways judges, clerks, administrative personnel, and case files in a Dutch criminal court become instrumental in judicial ways of finding out "what really happened" and ways of qualifying these events legally. Drawing on an ethnography of judicial work practices, it is interested in the practicalities and technicalities of constructing, out of the very different accounts present in the file and offered in court, a serviceable, pragmatic truth to be judged. Third, it also aims to account for and reflect on the ways *this* case – the book you are holding in your

hands – is made, and an attempt to work through the necessary methodological and conceptual challenges that accompany the making of such a case. Taken together, these questions produce an account of a close encounter with the ingredients of judicial case-making practices – case files, clerks, judges, courtrooms, routines, and procedures – as well as a story about sociology and the law, knowledge and judgment, more generally.

1.2 Is/Ought Conundrums

Knowledge and judgment, after all, tend to be treated as radically distinct species. On the one hand, there is knowledge, which emerges when we let the world speak for itself and adjust our expectations – our theories, our stories – accordingly. Judgment, in contrast, consists of retaining our normative expectations even when these are breached, when the world disappoints them (cf. Luhmann 2004). The distinction between knowledge and judgment is between that which passes as valid under the governing logic of facts – de facto – and that which passes as valid under the governing logic of norms – de jure. In this capacity, knowledge and judgment, de facto and de jure, are mapped quite closely onto the difference between science and law. Even though both science and law can be understood as "two institutions for making order" (Jasanoff 2007: 761), both are fundamentally at odds on their relationship with the world. If science seeks to know, law seeks to intervene. Science represents, law decides.

This demarcation between kinds of statements (is versus ought) and kinds of practices (science versus law) has some practical use, not least because it safeguards and protects these practices against each other. After all, is it not frightening to imagine a science that is blind to reality, concerned only with passing judgment? How tyrannical would such a science be! And, is it not ridiculous to require verdicts to be subjected to scientific tests of factual accuracy? We all know how scientists can never seem to agree on anything, how no scientific judgment is ever the last word . . . We wouldn't be able to make decisions! The distinction between de jure and de facto helpfully ensures the identity and distinctness of these practices – especially necessary, perhaps, given the fact that both practices draw so uneasily on a similar vocabulary of proof, validity, facts, and truth, similar rituals of verification in juries of peers, and similar-sounding appeals to the necessities of capitalized abstractions of (scientific or legal) Law and Order. The binary pairs of fact/

norm, is/ought, science/law help to manage both this potential for miscommunication and, importantly, judgment in the name of science, and truth in the name of the norm.

Yet like all binary pairs, however, these distinctions do not only *contain*, but also *create* trouble – most crucially, of course, for those people, things, or practices that do not fit wholly and neatly into either of its classificatory slots. In this capacity, such troubles are *good to think with*, as they put the self-evidence of such distinctions in doubt. Let me introduce you to one such occasion for thinking. Its principal ingredients? Three social scientific researchers; one peer-reviewed study of sentencing disparities in Dutch criminal courts; some newspapers; a political actor here and there; public shock; and most importantly: A weary, even disgruntled judiciary.

1.3 Speaking Truth to Law

It is March 2012, and my fieldwork among the files, administrative staff, clerks, and judges of a lower criminal court in the Netherlands upon which this book is based is yet to commence. Aside from some exploratory interviews with both practicing and retired judges, I have yet to gain entry to the criminal court where I hope to study judicial decision-making practices. It is in this month, too, that a brief controversy about precisely these judicial decision-making practices evolves in the pages of Dutch newspapers (see e.g., *NRC* March 14, 2012; *NRC* March 15, 2012; *Algemeen Dagblad* March 14, 2012). The immediate cause for the media attention is the publication of a social scientific study of sentencing disparities in the *Dutch Jurists' Magazine* (*Nederlands Juristenblad* or *NJB*). This study, which was developed and published by three researchers associated with Leiden University, had found that lower-court magistrate judges (Dutch: *politierechters*) tend to punish certain defendant populations more harshly than others (Wermink, de Keijser and Schuyt 2012a). These lower-court magistrate judges, the authors demonstrated, are more likely to opt for an unconditional prison sentence in cases involving foreign-looking and non-Dutch-speaking defendants than in cases involving Dutch-looking and Dutch-speaking defendants.

The study was received with puzzled shock. How could this be? Does the law not promise equality before the law? Do judges not aim to treat like cases alike? In an editorial, the politically centrist *NRC Handelsblad* for instance concluded that the "intuitive judge has been caught out" (*NRC* 2012, March 15) and that "lady Justice's blindfold" seems an

"illusion, not a self-evident professional characteristic." Emphasizing that "judges are not immune to stereotypes," it suggested that further large-scale studies should be conducted, and raised the following questions: "Are criminal law judges sufficiently aware of the influence of negative stereotypes? Is there attention paid to such issues throughout their education and collegial feedback [*intervisie*]? Do people correct each other there or is this study a bolt from the blue? Are there, moreover, enough criminal law judges with a non-Dutch cultural background?" (*NRC* 2012, March 15).

In the wake of this media attention, not only did the National Minority Counsel (LOM) express their shock with the study's conclusions, members of Parliament, Recourt (PvdA, centrist Labour Party), Dibi (the Green Left), and van der Steur (VVD, the largest Liberal party) each submitted sets of formal questions to the then Minister of Security and Justice (Minister van Veiligheid en Justitie) Opstelten. These documents raised the question whether the Minister shares the researchers' conclusions "that negative stereotyping with regards to defendants with a foreign appearance play a role in their greater likelihood of receiving a harsher sentence," and queried what actions the Minister would undertake to make sure that "judges do not weigh the defendant's appearance in their sentencing decisions anymore" (Kamerstukken II 2011/12). In response, the Minister mobilized the help of the Scientific Research and Documentation Centre (WODC), whose critical appraisal of the study informed his formal reply to the Parliament. In that document, Minister Opstelten doubted the study's validity, stating that

> relevant variables that are often weighed up in the punishment stage, like having a permanent home address and a steady income, possible drug addiction, and flight risk, have not been included in the research. ... Furthermore, variables like the severity of the case, [the defendant's] criminal record, and custody have not sufficiently been controlled for. A large measure of uncertainty surrounds the strength of the reported correlations.
>
> (Ministerie van Veiligheid en Justitie [Ministry of Security and Justice] 2012: 2)

It is for these reasons, the Minister concluded, that "the model used diverges from the practice of judgment," and that, for now, it is impossible to draw robust conclusions about the choice of punishment by police judges with regard to persons with a foreign appearance (Ministerie van Veiligheid en Justitie [Ministry of Security and Justice] 2012: 2).

1.4 Judges Speaking Back

While the controversy died a somewhat silent death in the media, its conclusions would linger on among members of the judiciary. The Council for the Judiciary (Raad voor de Rechtspraak), for instance, asked the Leiden researchers to design and execute a more methodologically sophisticated study into the judicial decision-making processes (see de Rechtspraak 2015: 6). Two practicing judges, furthermore, replied briefly to the study's findings in the same Dutch Jurists' Magazine later in 2012 (Bade and van der Nat 2012: 973). There, the two judges pointed out that it may be defendants' lack of income and lack of permanent home address, not their foreign looks, that could plausibly account for judges' choices for a prison term. Provocatively, the judges suggest that "the research seems partial," even raising the question whether the "researchers have any idea how a judge arrives at a sentencing decision?" (Bade and van der Nat 2012: 973).

In many of my later conversations with judges I would encounter similar frustrations. Many of them felt that the authors of the study did not appear to know much about judicial decision-making practices. And as a result of that lack of familiarity, it was suggested, the researchers had failed to do justice to their work. In fact, the study had rendered their own work practices alien and unrecognizable. All in all, its portrayal of their practices seemed partial at best, and distorted at worst. Judge Beech, frustrated but articulate, for instance commented that:

> At no point do I side-line the law just because I see that a defendant is from an ethnic minority. That is just ridiculous, and I resent the implication. I don't recognize what we do in what they are saying. Listen, we have our ways of dealing with cases: we have the information, we have the files. That and the law is what is important to us.

Placing knowledge of individual cases and the law in the hands of judges themselves, Judge Beech contests the researchers' credentials – what do they know anyway? – as well as the accuracy of their portrayal of judicial practices. Appealing to local knowledge – "we have the information, we have the files" – Judge Beech suggested that the study's portrayal of judicial practices is a highly specific kind of portrayal; a portrayal that distorts these practices beyond all recognition. It is as if the researchers were speaking about a different reality than that of the judges. The study and its aftermath among the members of the judiciary, then, points in the direction of a controversy over knowledge, recognition, and perhaps even respect. Perhaps the researchers merely sought to speak the

truth, but their study was received as both a distorted picture and indictment of judicial decision-making practices. But – to paraphrase judicial discomfort – what do they know anyway? And by extension: Who are they to judge?

1.5 Thinking with the Trouble

The study had clearly touched a nerve. Now, it may be tempting to make sense of judges' frustrations with reference to their professional "blind spots" and their professional pride. Of course they are hurt, or anxious, or frustrated, the argument may go: After all, the study debunks a dearly held professional engagement with equality before the law. Neither is it uncommon, sociologists might add, for people to exhibit some discomfort at having been turned into objects of study, especially if the sociologist manages to lay bare some inconvenient truths, for instance that a social practice that promises equality in actual fact reproduces social inequalities. Of course, this approach to the controversy places the researchers in a privileged, epistemic position vis-à-vis the judges studied: While judges may *think* they treat like cases alike, in *actual fact* they reproduce social inequalities. And while the law may want to keep up the appearance of equal treatment, its promise is just that: an appearance beyond which social scientists find a more fundamental truth. "Forgive them, for they know not what they do": This is one way to make sense of the controversial status of the study among the practicing members of the Dutch judiciary. After all, knowledge is expressly not what the law is seeking. It merely seeks to judge, and in so doing must remain blind to the social determinants and consequences of judgment. Meanwhile, who is to blame social scientists for telling the truth? Surely their account should not be taken to be a judgment? Reading the controversy this way, we manage to reinstate the imperative that judges judge, and scientists speak the truth. In a way, this way of dealing with the controversy denies its existence, suggesting that judges may simply be sore losers who better stick to their trade – judgment – while sociological observers stick to theirs – truth telling. No category mistakes have to be made, no crossings between law and science, between knowledge and judgment, have to occur (Latour 2013).

But such crossings do in fact occur – otherwise there would be no controversy here to begin with. We might just need another way to deal with the controversy, then; a way that takes judges' objections quite seriously. For something we do not consider, if we are content to sideline

these concerns as merely "hurt feelings," is that these judges might quite simply be right. That is: It might just be the case that social scientific accounts do much more than simply tell the truth about a singular world. Indeed, it might just be the case that social scientific accounts are rooted in active and specific interventions in the world, and that they shape the world about which they speak. What the judges are getting at, I think, is this performative dimension of knowledge-generating practices, that is the way knowledge-making practices shape and delineate their object in specific ways, perhaps even doing so in ways not easily commensurable with other ways of knowing the world, other "ways of world-making" (Goodman 1978). As such, the judges' discomfort points to a first conceptual trouble which is central here: the trouble presented by the fact that social scientific accounts do more than just "tell the truth" about the world. Taking this controversy seriously, then, demands that we try to understand and *account for* these *performative effects* of our knowledge practices (Haraway 1988).

Given the controversy, here is a second thing to consider: Judges may also be right to question social scientific researchers about what they think they know about judicial practices. To reiterate Bade and van der Nat's (2012) provocative question: *Do* we have any idea as to how judges arrive at a sentencing decision? That is, how do "we" – social scientific observers – tend to understand these decision-making practices, and crucially: What are we missing out on? Staying with the troubling controversy hence calls for a critical account of the work our own observations are doing in rendering judicial practices intelligible. Such an account would also, to my mind, attend to perplexities and aporias – a-poros, that which we do not manage to pass through – in our understanding of these practices. Especially provoking, in this case, is the contrast drawn between sociological understandings of judicial practices and "our own way of dealing with cases." While sociologists may have one way to "deal with cases," what are judges' ways to deal with cases? Judge Beech's comments point to concrete practices of case-making: of having "all the information, and the files," so that judges may come to a sense of what it is they must do. In that capacity, her comment also points to "epistemic practices" (Lynch 1993) within these judicial practices, that is for instance local ways of evaluating evidence, of constructing a story, of attributing plausibility to different scenarios, and of arriving at an operative sense of the truth of the matter. The controversial study missed out on precisely these local ways of finding out what happened, local ways of "seeing the case," local ways of deciding on

punishment. Can we develop tools to remain sensitive to these local practices of case-making?

On a theoretical level, then, the controversy complicates a convenient mapping of judgment and knowledge onto, respectively, the law and science. There is more to social scientific accounts than just facts: They seem to be active in the making of worlds. There is, on the other hand, more to judicial practices than just judgment: There, too, an operative sense of "what really happened" must be arrived at. Scientific practices do not yield mere representation; neither are judicial practices indifferent to the facts. In a way, both are case-making practices: Ways to shape, delineate, and organize facts, and ways consequential to the realities these facts are ostensibly drawn from. These case-making practices represent the troubles and impurities that dwell at the borders of our demarcations: The fact of performativity in scientific, representational practices on the one hand, and on the other, that fact of epistemic practices within judicial practices. My efforts consist of staying with these troubles (Haraway 2016) and to see how these ways of case-making proceed in action. These efforts translate into three questions, which together make up the core of this book.

The first problematic is both specific and general, in that it wants to attend to the specifics of the aforementioned study, but also seeks to situate it vis-à-vis conceptualizations of the relationship between sociology and the law more generally. What are the limitations and productivities of sociological descriptions of the law anyway? Can the effort to define, describe, and know the law do justice to the law at all? What do these descriptions render visible and make possible – and what do they render invisible, and impossible? How, in other words, are sociological cases made about the law, and what realities are hence enacted?

The feeling, among judges, that their practices are being misrepresented of course raises the question whether there are different ways to represent these practices, grounded perhaps in different empirical engagements with judicial practices. Reading the exasperated question whether "the researchers have any idea what our practices look like," as an invitation, I aim to develop conceptual and empirical means to take seriously the everyday practices of case-making in a criminal court. How are cases dealt with, taking into account both "the law" and, to speak with Judge Beech again, "the information, the files"? In other words, how are judicial cases made in actual practices?

Questions multiply further as I allow these questions to affect my own knowledge-seeking practices. What does it take, methodologically and

conceptually, to account for the case I myself am making? How do I position myself in relation to these legal practices and the dense packing of sociological descriptions around these practices? Do I need to accept a scientific role as a producer of facts, and facts only, or may I try to rearticulate just what it means to do description? How, in the midst of these case-making practices, do I make my case?

1.6 Abstract Accounts and the Concreteness of Practice

Staying with these troubles and trying to answer these three questions is, in this case, also an effort to *stay with the concrete*. In this book, I develop the argument that attempts to map knowledge onto science and judgment onto law has the unfortunate side effect of rendering the concrete practices of both "law" and "science" difficult to apprehend. For instance, once we adopt a conception of law as *really* being about judgment and science as *really* about truth, it is tempting to slide into the suggestion that law is *only* about judgment and science *only* about truth – and that other, more troubling practices are therefore out of bounds. As we will see throughout Chapter 2, "Abstractionism Revisited," this tendency to slide from the "really" to the "only" is very much with us today and exercises a strong conceptual pull on both legal positivists and social scientific observers of the law. Their attempts to radically distinguish between the normativity of the law and the factuality of science either slide into purification, in which the distinction between law and science is rigidly asserted, or else is rearticulated in the form of a problematic perspectivism, within which different conceptions of the law are argued to be rooted in the observer's location "inside" or "outside" the law. Neither of these two solutions, I argue, puts us in touch with the robust and concrete character of legal or scientific realities. Indeed, even Latour's sociology of law (2013, 2010) falls prey to this tendency towards purified abstraction, particularly so in his *An Inquiry into Modes of Existence* (2013). While he traces a trajectory through the concrete practices taking place in the highest administrative Court of France – the Conseil d'État – his sociology of law, too, is one that reinstates, after all his ambulations, the distinction between law and science, hence purifying them both of troublesome noise. Tracing the fact–norm distinction through these debates, I zoom in on a tendency William James (1909) calls "vicious abstractionism." This intellectual tendency proceeds by way of "singling out some salient or important feature" of a "concrete situation" – for instance, truth in the concrete situation that is science,

judgment in the concrete situation that is the law – after which we reduce "the originally rich phenomenon to the naked suggestions of that name abstractly taken, treating it as a case of 'nothing but' that concept" (James 1909: 110). In so doing we miss out on the opportunity to do justice to concrete troubles: Truth-making in legal practices, and world-making in scientific practices. This is not to say that all abstraction is necessarily wrong: James quips, for instance, that without abstractions we merely "hop on one foot" (James 1909: 109). After all, it is only in the encounter between the abstract and the concrete that we manage to make ourselves capable of inquisitive movement: "using concepts along with the particulars, we become bipedal. We throw our concept forward, get a foothold on the consequence, hitch our line to this, and draw our precept up, travelling thus with a hop, skip, and jump over the surface of life at a vaster rapider rate" (James 1909: 109). While we need both the abstract and the concrete to move about at all, then, abstractions may also fail us in our attempts to "hop, skip, and jump." Faced with the troubling presence of performativities in social scientific accounts and truth-making within legal practices, abstracted accounts may not organize and order concrete experience satisfactorily, and as such fail to operate as "tools to think with," and think *through*, the specificity and concreteness of the practices we encounter (Stengers 2005). That is, if we accept that the law is really, and only, about judgment, we miss out on the opportunity to study and trace how, within legal practices, knowledge of the reality it seeks to judge is arrived at. To be more precise: Once we purify our conceptions of law to include only that which we call legal and exclude "the remainder of things" (Whitehead 1953: 73) we encounter in concrete experiences, we have lost the ability to do justice to these concrete, if troubling, practices. The same goes for our understanding of scientific practices. If we accept the dictum that science is really and only about faithful representation of the world out there, we have lost the ability to do justice to the performative dimensions of our knowledge practices. Dupret, Lynch, and Berard call such purification "hyper-explanations" (2015: 4): In trying to explain everything legal or scientific, such accounts actually explain very little at all.

Having discussed the limitations of abstractionism, then, this chapter also aims to give conceptual flesh and bone to a turn towards the concrete. The conceptual movement I make there is in many ways indebted to pragmatist philosophy and its sociological incarnations, that is, ethnomethodology and actor-network theory in particular. There, I show that one way out of the law–science conundrum – and