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CHAPTER ONE

Judicial decision making and sentencing policy: continuation of a study

In sentencing, the judge's task is to determine the type and quantum of sentence appropriate to the facts of the case, and this judgment must be made in accordance with the relevant statutory provisions and appellate principles. But in Australia, as in England and elsewhere, sentencing law speaks in only general terms so that it is left to the sentencing judge to develop and apply the working rules required to give detailed effect to these provisions and principles in actual cases. What is not known is how individual judges have responded to this challenge. The present monograph is the second report from a continuing study of this matter. The first, Lovegrove (1989), examines how judges in Victoria scale and combine the seriousness of the offence characteristics, such as organization and violence, of a single count and use this to determine what is appropriate by way of sentence (quantum of imprisonment) for that count. The product of this work is a model offering both a decision strategy and a numerical guideline; since it takes no account of legally immaterial considerations or distortions in thinking arising from the limitations of human information processing, it represents an account of ideal (cf. actual) decision making in sentencing.

The present study extends that enquiry, being concerned with multiple-count cases: how in Victoria the judge, having fixed an appropriate sentence of imprisonment for each of the comprising counts, determines an effective sentence appropriate to the overall seriousness of the case.

One goal of this report is to present a decision strategy – a body of principle consisting of working rules – apparently relied on with varying awareness and comprehension by the judges for the purpose of determining effective sentences in cases comprising multiple counts; the strategy is general with respect to offence type, covering comprising counts both of the one offence

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type (e.g., multiple burglaries) and of a variety of offence types (e.g., burglary and armed robbery), and applies where the counts are properly regarded as separate transactions and the sentences fixed for them are appropriately sentences of imprisonment.

The second goal is to develop a prototypal numerical guideline by quantifying the judges' application of the preceding working rules: this takes the form of an algebraic model relating quanta of sentence for comprising counts to the effective sentence, so that the latter can be generated from the former.

Taken together, the decision strategy and numerical guideline have the potential to give rise to a decision structure or framework in the form of a comprehensive sentencing guideline comprising written policy statements and a numerical decision aid for the application of that principle to the sentencing of the multiple offender. With this there is the opportunity for sentencing judges to ensure they share a common policy, for the fairness and soundness of that policy to be open to appraisal, and for judges to refer to a decision aid when implementing that policy in individual cases.

These are the descriptive components of the study. Yet more than description was sought; the investigation has theoretical pretensions over and above the rather weak theoretical base required to facilitate description. In one of the two broad conceptual analyses, a solution is offered to the problem paramount in the sentencing of the multiple offender, as it has been identified by Ashworth (1983, 1992a), namely, the problem of integrating the seriousness of two or more offences of the same or of a different kind into a coherent system of proportionality principally related to the seriousness of single (principal) offences or classes of (principal) offence. Underlying the posing of this problem is a concern that the cumulation of sentence should not be untrammelled: that an effective sentence imposed for a multiplicity of minor counts should not be condign and more appropriate to a serious single count. The solution was not found in sentencing policy or in the sentencing data collected in the present or the previous study, but was formulated by the author. It involves the linking of the author's two decision models. The model in the present study covers the cumulation of seriousness, operationalized by quantum of sentence, of counts belonging to one or several varieties of offence category, but provides no principled basis for constraint on cumulation. The first (1989) model deals with not only the scaling of seriousness associated with offence factors characterizing single counts, as intimated above, but also the determination of the overall seriousness of a case comprising multiple counts of the same kind; moreover, its components are so defined and structured that there is a principled basis for constraint on cumulation. This first model directly

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addresses Ashworth's problem for multiple counts of the same kind; it can provide a principled limit on the cumulation of sentence for the second model's coverage of multiple counts of a different kind (and, of course, of the same kind) by means of its common coverage with that model of counts of the same kind.

It will be clear now that the present study not only extends the first study, it is also complementary. In the first study a decision structure was developed for the determination of sentences for single counts in respect of their offence characteristics. The decision structure from the present study covers the aggregation of already-determined sentences for single counts comprising a multiple-count case. Finally, it is only by means of the first decision structure that it is possible to introduce in a principled way a limiting component into the second decision structure. Together, these two decision structures can be regarded as providing the armature underpinning the judicial determination of sentence. While the armature is largely derived from the description of current practice, it nevertheless has a normative character to it. This follows from its reliance on models of ideal decision making and the limit on cumulation being a theoretical formulation rather than an empirical discovery. Yet it is, of course, very much a circumscribed rationality, requiring a coherent logic only within the current general judicial approach to sentencing.

The point was made earlier that it has been left to the sentencing judge to work out in detail what is correct by way of approach to the sentencing of the multiple offender in individual cases. For some policy matters raised by this sentencing problem a particular judge may be guided by rules derived from and consistent with broad principle, for other matters the same judge may rely on unprincipled heuristics – what experience has shown are acceptable appropriate sentences for particular combinations of comprising sentences – and yet other policy matters may not be regarded as significant or even enter the judge's mind and for this reason be ignored; and, of course, the content and mix of this principle and heuristic and the areas of ignorance may vary across judges. When decision making in sentencing is viewed in this light there are inescapable implications for the methods of data collection; the consequence of this view for the method is that it should be characterized by the following three features: (1) the individual judge as the unit of analysis; (2) a data base of the judges' more or less conscious thoughts as they determine sentence (verbal protocols); and (3) a decision modelling process consistent with a requisite solution. The point is that care must be exercised that the techniques adopted for the purpose of studying the decision making are appropriate to the phenomenon and problem. A review of the empirical sentencing literature relevant to guideline development suggests that careful

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thought has not been given to this. Each of the preceding three method characteristics is dealt with in turn, but is not independent of the other two.

If the judges share a comprehensive body of principle and apply it reliably, a group analysis would be informative. But should these conditions not hold – should, say, there be only a few judges with a principled and shared understanding of this problem, the rest having little idea about what is correct by way of approach, or should there be a number of judges with their own limited understandings, but these to a considerable extent not being common in regard to element or content – then the averaging process in a group analysis would blur the researcher's view of this principle and favor the erroneous conclusion that there was little or no principle to be discovered.

In an area of study rich in theory, there is much to be learned by testing and comparing the ability of the various models to predict behavior, in this case the behavior being judges' effective sentences and the independent variables being case facts. But where the topic is largely uncharted conceptually, as in the sentencing of the multiple offender, it is a different matter: where hypotheses were unsupported, it would be helpful if there were clues to alternatives; and the testing and support of only a few hypotheses leaves the possibility of there being significant elements of the decision making yet to be uncovered. A record of the content and sequence of individual judges' thoughts may provide a means of moving beyond these unproductive and uncertain outcomes.

In circumstances where sentencing decisions may not be in regard to a settled, detailed and comprehensive approach, a research strategy aimed at discovering policy is inappropriate since, should that policy not exist, the strategy is doomed to failure: a crude and simple model must then be regarded as an end in itself or the search for a valid model must continue on, albeit fruitlessly. Now, these circumstances may hold in regard to the sentencing of the multiple offender; for this reason what is wanted is an approach aimed at fostering policy development by judges. From this viewpoint the task of the researcher initially is to tease out the part-approaches adopted by the various judges and to look for common and disparate aspects. The common elements may be regarded as a first draft of what after judicial consideration may come to be regarded as correct by way of approach, and the disparate elements are grist for judicial debate in the process of policy development. This describes the first steps in "requisite" decision modelling, a term introduced by Phillips (1984), a decision theorist. Clearly, this process would be facilitated by verbal protocols and would require the individual as the unit of analysis. Moreover, on matters on which there was not a detailed policy, the requirement to give a verbal protocol might prompt the judges to be deliberative and to attempt to

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work out how to apply the general policy in individual cases, and the protocol would provide a record of their thoughts as a basis for policy development.

The policy and quantitative analyses in this present study do not go further than these initial steps towards the development of a decision framework and comprehensive sentencing guideline for the multiple offender. Consequently, the decision strategy identified should be treated as no more than tentative and incomplete, and the numerical guideline as only illustrative, yet both can be regarded as ripe for development.

How a decision model is to be put to work should be a critical consideration in its development. Since this is an apparently little-appreciated point in sentencing research, it is important to ventilate it in this overview of matters of importance in the present study. The point has already been made that here the model is to be the basis of a policy statement and a decision aid for working judges. In view of this, a profitable distinction can be drawn in the model's content between the legally material case characteristics and the combination of these elements. It is one thing to establish that, say, the number and the seriousness of the comprising counts are significant factors in the sentencing of the multiple offender; whether the combination of these factors in the effective sentence is determined according to a simple linear-additive function or something more complex is another matter. In respect of both matters, Lovegrove (1989) has argued that in sentencing the content of the model must faithfully represent judicial thought. In general, empirical sentencing research does not satisfy this criterion; the importance of this point has been recognized in regard to the search for legally material case factors (Vining and Dean, 1980) and combination (Lawrence, 1988), but not as it applies to guideline development. It is this aspect which is the more important one in the context of the present study and needs to be explained. There are several cogent reasons for analyzing sentencing data in accordance with a decision model faithful to the structure of judicial thought, rather than by means of an atheoretically and directly applied standard descriptive statistical technique (see, generally, Lovegrove, 1989, 1995).

First, it has the potential to offer a more accurate, detailed and comprehensive description of judicial decision making in sentencing, in respect of the critical factors and their lines of influence, since the story data tell is partly a function of the type of analysis used to interpret them. The statistical model adopted by Wilkins, Kress, Gottfredson, Calpin and Gelman (1978), multiple regression, represents the combination of the individual case information by, as it were, adding the average effects of each element on sentence. Although this may be appropriate for describing the combined effect of various elements on the seriousness of the offence characteristics of a case (e.g., how the

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seriousness of the organization of a burglary, the value of the property stolen, the violence experienced by the victims and the damage to their property during the offence, contribute to the overall seriousness of the circumstances of that burglary), it is clearly inappropriate for representing certain aspects of the determination of sentence. The fact that a judge may have to achieve more than one goal in the sentencing decision provides one illustration of this point. In part the punishment must be proportional to the culpability of the offender, but it may have to be tempered so as to allow for the offender's favorable rehabilitation prospects. Some factors like remorse are involved in both decisions – in the first as a factor in the scaling of seriousness, in the second as an indicator of reform. If present, it will always carry weight in the first decision and, hence, affect sentence, but its effect on sentence by way of the second decision may depend on the presence of other factors suggestive of rehabilitation, and if, but only if, they are present, it may count a second time in the determination of sentence. Two difficulties associated with the validity of the regression equation as a representation of actual sentencing policy follow. First, in the above example, the factor of remorse would be under- or over-weighted in a particular case depending, respectively, on whether or not according to policy weight should be given to the goal of rehabilitation. Secondly, the approach to sentencing implicit in the equation – the addition and subtraction of factors so as to allow for the effects of aggravating and mitigating factors – is at variance with the orderly sequence of steps required by sentencing policy (see Chapter 2). The problem here is that the multiple regression model is incompatible with the structure of judicial thought and, consequently, some of the complexities of judicial thought processes could not be adequately represented. In these statistical approaches to the modelling of decision processes, the impression is given that the use of a statistical analysis is atheoretical in the sense that it allows the researcher to find the structure of the decision maker's thought in the data. This is not correct; it belies the fact that in such an analysis the data are organized around the structure of the statistical model. Now, a researcher cannot analyze data in a vacuum; data must be interpreted in relation to some sort of model. It is a model faithful to the structure of judicial decision making that has the potential to provide the most valid representation of the determination of sentence.

Secondly, as intimated above, sentencing policy may require development. Now, it would be expected that a description of current judicial decision making mirroring the structure of the judges' thought would provide the conditions most favorable to judicial reflection with a view to policy development, because the description could be understood and contemplated developments linked directly to the judges' existing decision scheme.

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Finally, it must be appreciated that no guideline, particularly a numerical decision aid, can be expected to take account of the less important and less common factors and patterns of influence. Accordingly, a numerical decision aid is to be regarded as providing a standard or reference sentence against which the sentencer must allow for the additional influence on this quantum of punishment of the less significant and the innovative considerations bearing upon a particular case. Again, and for the same reason of intelligibility offered under the preceding point, it would be expected that a numerical description of sentencing policy analyzed and presented in terms of a structure faithful to judicial thought would facilitate the ready and accurate allowance for matters not provided for in the guidance. While this point has been made in the decision-making literature (see Cohen's, 1993, concept of user-driven and prescriptive decision aiding), unfortunately sentencing guideline developers have not shown a regard for it.

A question remains over how to set about building the first draft of a requisite model, faithful to the judicial approach, with the potential to describe the working rules to be used by judges in applying the broad legislative provisions and appellate principles to the sentencing of individual multiple offenders. What is required in requisite modelling is a picture of the current judicial approach, one capable of accurately portraying its likely diversity and sparseness of thought, yet able to facilitate a move towards uniformity in a comprehensive and detailed approach. A review of the empirical literature showed that it held little for the present study: the range of factors included in these analyses was found to be extremely narrow and the combination of these factors was not treated as a part of the policy to be discovered but simply left to be represented by the structure of a standard statistical model. Fortunately, two English academic lawyers (Ashworth, 1983, 1992a; Thomas, 1979) have analyzed judgments of the Court of Appeal in an attempt to discern a decision strategy followed by the courts, and their analyses cover both legally material factors and the aspect of combination. Nevertheless, this work is fairly characterized as qualitative and limited in scope; happily, the two contributions are supplementary, not contradictory. To take these analyses further, the author considered possible implications of them, this step including aspects not covered directly by them, and in this way generated a detailed and comprehensive decision model. This, then, was used to derive predictions regarding how judges would sentence in a variety of cases, each case illustrating a different element of the sentencing of the multiple offender. The responses of the judges to these cases were used to test the validity of the model and to give clues to alternatives and to additional aspects of the judicial approach. This process seems to be compatible with the idea of requisite modelling.

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This introduction now turns to the other of the two broader conceptual questions canvassed: the nature of judicial intuition and the vexed problem of the proper place of intuition and deliberation in sentencing. Common judicial wisdom is that a system of individualized justice requires finely honed judgments for which intuition is a necessary condition; deliberation in the form of a conscious series of structured steps would make for almost certain error; moreover, since in a system of individualized justice there is infinite variation between cases in terms of the factors material to sentence, and differences on these factors and potentially relevant combinations of them for sentence, it is not possible to set down in more than general terms how these matters, and, indeed, how the considerations relating case facts and sentencing goals, should determine what is appropriate by way of sentence. Nor, it is said, can the sentencer profitably apply mathematical rules to the task of quantifying sentence; there are principles, but they are few and broad, and judgments about the facts of a case in relation to them must be subjective and qualitative, and articulated in general terms only. For the judicial aphorism "each case turns on its own facts," read "each case is a special case." The present study's data base of judges' more or less conscious thoughts as they apply legislation and appellate principles in individual cases can be used to indicate the extent to which this process is deliberative or is accessible to consciousness. From an examination of the content and pattern of these thoughts, and with the aid of the theoretical literature on intuition, it is possible to offer an interpretation of the nature of the judges' intuition, whether it represents an implicit understanding awaiting transfer to the deliberative realm, or masks an absence of thought or something else. The point of this analysis is to investigate whether a more deliberative approach is required for skilled judicial sentencing; until this question is resolved, an informed consideration of what, if any, policy development and guidance are required for better sentencing practice is difficult.

From the foregoing it will be apparent that the present project involves the application of behavioral science (psychological) methods to a legal problem, sentencing, with due consideration being given to the law, legal thought and the sentencing system. Psychology has been applied to the legal system from a number of perspectives; this study is in the decision-making tradition, of which notable examples are Pennington and Hastie's (1993) study of juror decision making and Greenberg and Ruback's (1992) work on victim decision making. In this approach the research task is not directly to discover those factors which influence the decision; rather the problem is to model the decision process – its structure and content. This perspective can be contrasted with the more traditional correlational and factorial approaches, illustrated in the study

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of sentencing by the work of Ebbesen and Konečni (1981) and Kapardis and Farrington (1981), respectively.

Now that the goals of the study have been stated and the matters of importance relevant to the attainment of these goals have been aired, the detailed reporting of the study can begin. The various theoretical and empirical analyses and policy matters are covered throughout the book. In the remainder of this chapter four topics are addressed: the contribution of the study in the context of sentencing reform; the nature of sentencing policy and the sentencing decision; studies of judicial sentencing and sentencing guidelines in regard to the multiple offender; and sentencing law and policy matters as applying to the multiple offender, including the attempts by Thomas (1979) and Ashworth (1983, 1992a) to discern a decision strategy in appellate judgments of the Court of Appeal in England. (In the second and third sections some matters, but not those specifically related to the nature of intuition or to the multiple offender, have been canvassed comprehensively in Lovegrove, 1989, and, accordingly, although updated are treated here in outline only.)

Chapter 2 presents Lovegrove's (1989) decision model describing the determination of quantum of sentence for single and multiple counts of the same kind. Its presentation here is a priority, because it was used by the author to elaborate, combine and inform with precision the part-strategies formulated by Ashworth (1983, 1992a) and Thomas (1979), and in this way is the conceptual foundation of the detailed and comprehensive decision model underpinning the present empirical exploration of sentencing in cases where the multiple counts differ in kind; this latter model is set out in Chapter 3.

The next step was to derive predictions from the author's decision model and to formulate, as a means of testing the model, a series of approximately forty sentencing problems relating to critical aspects of the decision process. This is described in Chapter 4. The case or cases comprising a problem were presented in the form of skeleton descriptions. For example, in one of the problems one case comprised an armed robbery for which the appropriate sentence was four-and-a-half years and a three-year arson, and the second case a four-and-a-half year burglary and a three-year arson. (In each case the assumption was to be made that the offender had a serious relevant criminal record and little if anything by way of mitigation.) The judges' task was to determine an effective sentence for each case. The point of this problem, of course, was to investigate whether the seriousness of the legal category of the principal offence is a relevant factor in the decision regarding the degree of cumulation of the sentence for the secondary offence.

The subjects were eight County Court judges, all of whom were regarded as

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experienced in the criminal jurisdiction. The problems were presented to the judges individually in two sessions. In the first session each of the judges was required to determine sentences for the cases and provide a record of his thinking (verbal protocol); in the second session the author explained how the hypothesized decision model applied to each problem and the judge was asked to comment on its validity (reflective report). Details concerning the method are set out and justified in Chapter 5.

In the following chapter the quantitative and qualitative responses of the judges to the sentencing problems are presented and analyzed.

A discussion of the fate of the author's model at the hands of the data introduces the next chapter – Chapter 7. The model was not supported; however, the outline of an alternative decision model for the sentencing of the multiple offender could be discerned in the judges' responses, although only two of the judges could be regarded as having more than a vague and fragmentary understanding of this sentencing problem. The next section of this chapter sets out the comprising principles of what is called the alternative decision model and discusses the limitations of this model. Finally, the records of the judges' protocols and reflective reports, together with the relevant theoretical literature, are used to assess the extent to which their thought is marked by deliberation and to interpret the nature of their intuition. The principles of the alternative decision model form the draft written policy statements of a sentencing guideline for the multiple offender.

Following this analysis it was necessary to validate and quantify the alternative model. In respect of validation, the question was whether the judges in determining effective sentences for multiple-count cases combined the sentences they had considered appropriate for the comprising counts in accordance with this model. In respect of quantification, the task was to find and quantify an algebraic model, one consistent with the decision model and providing a good fit to the data showing the relationship between the effective and component sentences. This model forms the numerical decision aid by which means in multiple-count cases effective sentences can be generated from the sentences considered appropriate to the comprising counts and in accordance with the written policy statements. A prototypal numerical guideline was developed for the judge who was best able to give quantitative effect to his stated policy. Four of the eight judges participated in this part of this study. The data base comprised the sentences they imposed for approximately forty fictitious cases, comprising armed robberies and burglaries, presented as comprehensive summary descriptions, and varying in terms of the number and the seriousness of the comprising counts. The judges individually did them in three parts, and worked on them in their own time. The method details,

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