Sentencing Scholarship in Australia

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Introduction

From the perspective of a legal academic, this article aims to give an overview of sentencing research published in Australia together with an indication of the kinds of sentencing research that most occupy scholars and writers in Australia. Secondly, it aims to offer some thoughts about the influence and usefulness of sentencing scholarship. It does not purport to analyse the quality of this work or to pursue in any depth the various influences on research activity such as intellectual fashion, publication outlets, funding sources, bureaucratic demands and so on, although these matters are touched on. With a national Australian Research Quality Framework (RQF)[1] audit to be carried out in 2008, discussion of research and its impact is timely.

This article's first aim demands some sort of classification of the types of sentencing scholarship. There have been a number of attempts to classify or categorise legal research in general. The Pearce Report of 1987 identified three categories of legal research: doctrinal, theoretical and reform-oriented (Pearce et al 1987:309–311). While this identifies three well-known kinds of legal research, it is clearly too narrow to capture the breadth and diversity of legal research, as a cursory examination of sentencing publications quickly reveals. The Canadian Arthurs Report identified a fourth category: fundamental legal research, defined as research designed to secure a deeper understanding of law as a social phenomenon, including research on the social, political, economic, philosophical and cultural implications of law (Arthurs 1983). More recently, the Council of Australian Law Deans (CALD) has considered the issue of the nature of legal research and has suggested that the Pearce classification does not embrace many elements of legal research today, namely empirical research, historical research, comparative research, research into the institutions and processes of law and interdisciplinary research, such as research into law and society (Council of Australian Law Deans 2005).

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1 The RQF is a research quality assessment exercise to be conducted in 2008 by the Australian Government which will influence the future distribution of government funding for research.

For the purposes of this paper, I have adopted the following five categories to classify and discuss sentencing research:

- Doctrinal
- Empirical
- Theoretical
- Critical/reform
- Institutions/processes

Doctrinal research has its primary focus on what the law says: that is, 'law in books'. It concerns itself primarily with traditional legal materials: cases and statutes. Empirical research examines what the law does: the 'law in action' (Pound 1910). The Pearce Report defined theoretical legal research as 'research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity' (Pearce et al 1987:311). If this suggests theoretical work is just research *in* law involving only traditional legal materials, my conception of theoretical work in sentencing is broader. Theoretical research explores sentencing aims, its underpinning principles and policies, the legal/philosophical question 'Why punish?' and the legal/sociological question 'How does one explain the new punitiveness in sentencing and penal policy?' The critical/reform category of research has its primary focus on what is wrong with what the law says or does. And the category institutions/processes examines or describes institutions or processes relevant to sentencing in a way which is neither primarily doctrinal, empirical, theoretical nor critical.

Sentencing research does include historical and comparative research (two categories suggested by CALD). However, sentencing research falling under these headings can be placed into one of the five categories. Work on the history of punishment (arguably penality rather than sentencing), linking it with cultural forces or new forms of discipline or control, fits comfortably in the theoretical category. Similarly, while much sentencing research is interdisciplinary (another category suggested by CALD), interdisciplinary sentencing research is invariably theoretical, empirical or critical. Of course my selected categories are not mutually exclusive — much sentencing research covers more than one category. Doctrinal research can, for example, be critical and reformist in spirit, and the line can be fuzzy between creative synthesis (doctrinal) and the exercise of reconceptualizing the principled bases of doctrine (theory, according to Pearce). However, by asking the questions:

- What is the writer trying to achieve?
- What technique did the writer employ in formulating his or her arguments? and
- What materials were relied upon?

— it is usually possible to put most sentencing research into one or other of the five categories.

To get a picture of the relative volume of research activity in the various categories, I searched for, and then classified, Australian sentencing publications from 2000–2005.[2] There are undoubtedly limitations with both the search and the classification, and it follows that any conclusions drawn from the exercise are tentative and must be treated with caution. Table 1 shows the distribution of publications by classification. It shows that critical/reform is the most prevalent grouping, followed by doctrinal, empirical, institutions and processes and theoretical.

Table 1 shows the distribution of publications by classification and reference type. The majority of publications appeared in journals with about 10% or so published as book chapters (book section) and a similar proportion of reports. The publication category 'reports' covered law reform publications (issues papers, discussion papers and reports); government reports including statistical reports; parliamentary briefing papers and Criminology Research Council Reports. This reference type overlapped with the book/ monograph category and some of the entries could have been classified either way. The databases searched uncovered very few sentencing papers in published conference proceedings.

Table 1: Australian Sentencing Publications 2000–2005

Research classification	*Journal*	*Book section*	*Book/ Monograph*	*Report*	*Conference proceedings*	*Total*	*%*
Doctrinal	72	1	2	1	2	78	22
Empirical	53	5	11	11	2	82	23
Theoretical	12	10	1	1	0	24	7
Critical/reform	92	9	2	22	2	127	35
Institution/processes	35	8	3	2	2	50	14
Total	264	33	19	37	8	361	100

Doctrinal research

Doctrinal research is defined by the Pearce Report (1987:309) as 'the systematic exposition, analysis and critical evaluation of legal rules and their interrelationships'.

In the legal context, doctrinal sentencing research is comparatively recent. This body of law was slow to emerge and for many years sentencing decisions were not accorded the same status as decisions in other areas. Few decisions were reported, unreported decisions were not readily accessible and there was very little for scholars to analyse and synthesise. Scholars bemoaned the failure of appellate courts to develop a coherent set of sentencing principles to guide sentencing decisions (Paul 1940; Morris 1953).

A significant event in the emergence of a worthwhile jurisprudence was the publication in England of the first edition of Thomas's *Principles of Sentencing*, a work which drew together both reported and unreported cases into a single structured narrative (Ashworth 2005:35). At least from the late 1970s and through the 1980s Thomas was widely used in Australian courts, and as in England, his analysis of sentencing principles created an atmosphere in which the common law of sentencing could develop. Moreover, this work inspired attempts to promote sentencing as a legitimate and principled area of law by the publication of a series of texts in each of the Australian jurisdictions (Daunton-Fear 1977, 1980; Newton 1979; Potas 1980, 1983, 1985, 1990; Fox & Freiberg 1980; Warner 1990), a

2 Searches were conducted on Informit, an online database service for Australasian scholarly research, with the following databases selected: AFPD, AGIS, APAIS and CINCH in the Law Crime and Justice data set. Search terms were 'sentenc*', 'punishment' and 'Australia' in the field subject (major and minor). The records were then edited to remove publications in newspapers, magazines and newsletters and some publications of minor relevance to sentencing. The search did not always pick up research published internationally by Australian authors; where known, this was added to the database.

strategy encouraged and supported by the Australian Institute of Criminology. Other landmarks in the emergence of sentencing as a recognised body of law include the birth of the *Criminal Law Journal* in 1977, a journal which published commentaries on sentencing cases and sentencing articles from the outset, and the publication of the *Australian Criminal Reports* from 1979. This new report series provided a source of reported sentencing decisions, an area of law largely overlooked as worthy of reporting by the authorised series.

The publication of journal articles on sentencing received a further boost by the emergence of journals such as *Current Issues in Criminal Justice*, the *Alternative Law Journal*[3] and law reviews from newly created law schools. Table 1 shows that doctrinal research constituted almost 30% of journal publications on sentencing over the last 6 years. In the textbook area, new editions of Fox and Freiberg (1999) and Warner (2002) have been published, encyclopaedias have provided national compilations of sentencing law (Laws of Australia, Halsbury) and a Sentencing Manual for Queensland has been published (Robertson & Mackenzie 1998).

Empirical Research

Baldwin and Davis (2003:880–881) explain that empirical research in law is best defined by reference to what it is not as well as what it is:

> It is not purely theoretical or doctrinal; it does not rest on an analysis of statute and decided cases; and it does not rely on secondary sources. What empiricists do, in one way or another, is to study the operations and effects of the law.

So,

> ...empirical research in law involves the study, through direct rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have.

In the criminal justice field empirical research has a longer history than in the civil justice area. And in contrast with the slow emergence of doctrinal sentencing research, empirical sentencing research emerged comparatively early. It has benefited from research activity in the interdisciplinary field of criminology where there has been a long tradition of empirical social science research focussing on criminal justice issues which have at times included sentencing matters. The journal of the Australian and New Zealand Society of Criminology commenced publication in 1968 and has consistently published empirical papers — many of them quantitative — on court processes including sentencing and correctional issues (Homel 1996). This sentencing research has usually been conducted by researchers trained in sociology or psychology rather than law. The close relationship between social policy and criminal law and the strong demand for evidence-based policy making has also been a factor in stimulating empirical research in this area of the law. This has in turn led to government funding of criminological research with a number of government-funded bodies established with functions which include the conduct of empirical research in criminal justice, namely the New South Wales Bureau of Crime Statistics and Research (BOCSAR) in 1969, the Australian Institute of Criminology and the Criminology Research Council in 1973, South Australia's Office of Crime Statistics and Research in 1978 and the Crime Research Centre at the University of Western Australia in 1989. The Judicial Commission of New South Wales was established in 1986 with functions including

3 This is not to say that sentencing articles published in these journals are primarily doctrinal. *Current Issues in Criminal Justice* publishes high quality empirical work and the *Alternative Law Journal* has had a long reputation for its critical focus.

sentencing research and the publication of sentencing material. In addition, law reform agencies have conducted empirical research in connection with sentencing references. More recently sentencing councils have been established in Victoria and New South Wales with mandates which include the conduct of sentencing research.

The research income generating capacity of empirical research compared with doctrinal research has also been a factor stimulating research in sentencing. Pressure to attract research funding has gathered momentum in recent years and the government's planned RQF exercise has added to the pressure. It is clear that government imperatives and funding pressures have an influence on the type of sentencing research that is undertaken. Table 1 shows that empirical research is an important category of legal research: some 23% of sentencing publications in the years 2000–2005 satisfied this description. Most of the publications in this category (53 of 82) were articles appearing in a wide range of journals.

The concerns and methods of empirical sentencing research

Baldwin and Davis' broad definition of empirical research is intended to cover the full spectrum of empirical research methods from large-scale quantitative surveys down to small qualitative studies and including experimental and pilot programs. Empirical research in sentencing or on topics directly relevant to sentencing is both quantitative (simple and sophisticated, Homel 1996) and qualitative. Quite frequently researchers employ a combination of quantitative and qualitative measures. It is both descriptive and explanatory as well as evaluative. It covers the following questions or concerns:

- Sentencing practices and trends.
- Evaluative research (sentencing options, policies, aims).
- The sentencing process (including research on judicial decision making).
- Public opinion research.

Risk assessment is undoubtedly a relevant sentencing concern and there may be other related matters that my research did not retrieve. However, the analysis of published Australian empirical sentencing research from 2000–2005 revealed that all but one article dealing with risk assessment by mental health professionals could be classified into the above groups. The most prevalent grouping was sentencing practices and trends, comprising more than half of the publications. Evaluative studies were the next most prevalent with about one quarter of the total empirical publications, followed by sentencing process, with public opinion surveys and research receiving little coverage in the sample of publications retrieved.

Classification of publications into the four sub-categories was not always straight forward. Some studies which were primarily descriptive of a sentencing trend also had an evaluative component and some could also be placed in the sentencing process category, such as studies of the impact of guideline judgments.

Sentencing practices and trends

In some jurisdictions courts are required by statute to have regard to 'current sentencing practices' when imposing punishment (eg *Sentencing Act 1991* (Vic) s5(2)(b)). In any event, as Mason J stated in *Lowe v The Queen,* 'Consistency in punishment — a reflection of the notion of equal justice — is a fundamental element of any rational and fair system of criminal justice' (at 610–611). It follows that access to sentencing statistics showing the proportions of penalty types imposed for a particular type of offence, and the range within those types, is important for judicial officers and counsel. While courts have tended to be

cautious in their reliance on sentencing statistics and have sometimes baulked at references to 'tariffs' or 'the going rate' (Fox & Freiberg 1999:145; Bagaric 2001:23), it is generally acknowledged that statistics are helpful in a general way by providing a guide or yardstick as to the limits of sentencing discretion. When it comes to measuring whether a sentence subject to appeal is manifestly excessive or manifestly inadequate, the fact that the sentence is outside a clear sentencing pattern or range will put the appeal court on notice that the sentence requires scrutiny and the departure from the range will require an explanation (*Ferrer-Esis* at 237).

In its 1980 sentencing report, the Australian Law Reform Commission bemoaned the lack of quantitative information about sentencing patterns in Australia (1980:88). In exploring the issue of sentencing disparity, the Commission found that nowhere in Australia were statistics kept showing the sentences imposed by individual judicial officers. Only in New South Wales and South Australia were there some raw data showing the sentences imposed by magistrates courts and superior courts. The Commission recommended that to achieve greater sentencing consistency, sophisticated presentation of sentencing statistics be published. This information should be designed to be easily read and interpreted by those engaged in the sentencing process and should be accessible to judicial officers, prosecutors, defence counsel, accused persons and members of the public (Australian Law Reform Commission 1980:132). This recommendation was repeated in the Commission's final report in 1988. The Commission recommended that in addition to statistics on the range of penalties, sentencing information should have a qualitative component to identify those factors given weight in determining particular sentences. The task of preparing sentencing information was to be a task of the recommended Sentencing Council (Australian Law Reform Commission 1988:147–152).

Almost 20 years later the position has improved but it is by no means clear that comprehensive and useful sentencing information is available in all jurisdictions. New South Wales has the most sophisticated sentencing information system. The Sentencing Information System (SIS) was developed by the Judicial Commission as part of its sentencing functions and launched in 1990 (Potas 2005). It is an electronic repository of case law, legislation and statistical information designed to provide quantitative and qualitative sentencing information to courts, criminal justice agencies and legal practitioners. The statistical component of the system provides local courts and higher courts with information on the range and severity of penalties imposed for a particular offence over a particular period of time, and this information can be displayed in relation to a list of selected variables: plea, prior offence, age and sex. SIS, or the Judicial Information Research System (JIRS) as it is now called, is widely used, and is an indispensable part of the criminal justice system of New South Wales. A Commonwealth sentencing database, modelled on JIRS, is currently being developed under the auspices of the National Judicial College of Australia (Australian Law Reform Commission 2006:526).

A number of states publish annual data on sentences handed down in the higher criminal courts and Magistrates' Courts. While these statistics may be helpful in a general way they have shortcomings and weaknesses that restrict their usefulness. More helpful are the tables prepared by Fox and Freiberg (1999) based on the Victorian statistics, which are presented with a discussion of the features of cases that distinguish the upper, mid and lower ranges of sentences reviewed by the Victorian Court of Appeal, together with any relevant guidelines or observations made by that court in relation to the offence in question. This information is now out of date. However, the recently created Victorian Sentencing Advisory Council has a mandate to make available clear and accurate sentencing statistics

and to conduct research into sentencing trends and issues. To date a number of 'Sentencing Snapshots' have been published on sentencing trends for particular offences[4] and the creation of a new sentencing information system is well underway.

In Tasmania, the Justice Department does not publish sentencing statistics for either the Supreme Court or the Magistrates Court. However, the Supreme Court has a sentencing database which contains the full text of all judicial comments on passing sentence imposed since 1990. This database is available to all judges, and legal practitioners have access to a slightly different version of it through Tasinlaw. While it is possible to search and find all sentences for a particular offence type and to refine this search by selecting all offenders of a particular age, criminal history or by plea, the programme does not display the sentences in tables or graphs. This has been done in Warner (2002) where tables showing the range of custodial and non-custodial sentences and the minimum, median and maximum sentence is displayed for each of the most common crimes and summary offences.

The literature search revealed a range of specific studies on sentencing patterns and trends — studies which focus either on a particular penalty (compensation orders, suspended sentences or disqualification for example); a particular offence (such as stalking, child pornography, child sexual assault); or a particular offender characteristic (eg gender, Aboriginality).

Evaluative Research

Within the social science discipline evaluative research is controversial. Some researchers counsel against viewing empirical research as primarily a means of monitoring and evaluating new initiatives because of its failure to address the fundamental causes of social problems (Baldwin & Davis 2003:889–893). Adding to the criticisms of critical criminologists that evaluation has a managerial bias and serves the interests of the powerful, Travers (2005:53) argues that it is 'not sufficiently reflective or self-critical, that it uses a narrow range of methods, and that it presents data in a positivist framework as if the facts speak for themselves'. Weatherburn (2005), in a characteristically spirited response to Travers, has challenged the criticism that evaluative research is necessarily methodologically flawed. He disputes Travers' contrast of evaluation on the one hand and academic peer-reviewed research on the other, and rejects the impossibility of disinterested and objective inquiry. Speaking at the Annual Conference of the Australian and New Zealand Society of Criminology, Hood (2001:14) has also criticised anti-positivism and the wholesale rejection of 'number-crunching', while at the same time recognising the problems of government-funded evaluative research and the need for criminology to be 'institutionally and intellectually protected against embracement by the authorities'.

The literature search undertaken for this article revealed that a significant amount of evaluation research is published on sentencing issues. Like evaluative research in general, it varies in methodological rigour. Evaluations of new innovations such as drug courts and youth conferencing are obvious examples. Home detention and parole have been evaluated as have policy initiatives such as the abolition of short terms of imprisonment and increased statutory penalties for drink driving. My search is likely to have missed an unknown amount of evaluative research that is not published by a commercial publisher or in a journal or other publication series.[5]

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4 For example, *Sentencing Snapshot: Sentencing trends for rape in Victoria*, Sentencing Advisory Council, December 2005, No 7; *Sentencing Snapshot: Sentencing trends for affray in the higher courts of Victoria*, Sentencing Advisory Council, September 2006, No 15.

The sentencing process

Empirical research on judicial decision making and information processing has been somewhat neglected in recent years. While there is some quantitative research relying upon court records and participation in sentencing exercises, research investigating sentencing decision-making which includes interviews with sentencers, and responses to questionnaires about background, personality and attitudes, is quite rare.[6] An early Australian example is the national survey of judicial officers concerning issues of sentencing reform which was undertaken for the Australian Law Reform Commission's sentencing reference in 1978/79 and in which some 350 Judges and Magistrates participated (Australian Law Reform Commission 1980:341–503). The best known analysis of the sentencing process is still Hogarth's 1971 study of magistrates in Canada which explored the factors that influence sentence and found that judicial attributes and attitudes were a stronger explanation of sentencing variations than the objective facts of the case.

One of the most thorough and sophisticated investigations of judicial decision making is Lovegrove's ongoing study,[7] which he describes as 'an exercise in behavioural science and law' (1997:13). This study began with an examination of how judges in Victoria scale and combine the seriousness of offence characteristics and use this to determine the appropriate sentence (Lovegrove 1989). This was extended in the second part of the study to multiple count cases to determine how the judge, having fixed an appropriate term of imprisonment for each count, determines an appropriate overall sentence. It aims to provide a decision-making strategy and a numerical guideline in the form of an algebraic model (Lovegrove 1997). Using empirical research and modelling, Lovegrove has proposed a model of 'quantitative narrative guidance' that combines the guidance of a narrative guideline judgment with numerical guidelines (Lovegrove 2001). Homel and Lawrence (1992) used court records, interviews with magistrates, analyses of simulated sentencing cases and sophisticated statistical techniques to throw light on the decision-making process of magistrates.

Geraldine Mackenzie's study, *How Judges Sentence* (2005), explored the sentencing process through an examination of judges' perceptions and attitudes towards sentencing by interviewing 31 judges of the Queensland Supreme and District courts. A different ethnomethodological approach was taken by Travers (2006) in his current study of the Youth Court in Tasmania in which the issue of how magistrates make decisions is explored by listening to what happens in court.

Survey Research and Public Opinion

An early national public opinion survey in Australia on sentencing was conducted for the Australian Law Reform Commission by the Age newspaper in 1979 (Australian Law Reform Commission 1980:12). The question dealt with capital punishment, alternatives to imprisonment and parole. Issues explored included attitudes to the use of non-custodial sentences for a range of offence types by sex, age and education. The Commission also conducted surveys of judges and magistrates, prosecutors and offenders. David Indermaur

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5 An example is the evaluations of Operation Flinders, see <www.operationflinders.org>, accessed 31 January 2006.

6 Goodman-Delahunty J et al (2005:469) observe that since the 1970s, psychologists have focused more on jury functioning than judicial decision making; Ashworth (2003:326) notes that in the UK there have been few studies in the Higher Courts permitting close observation of judicial sentencing practices and the situation is simular in Europe,

7 For a recent overview of this research see Lovegrove (2004).

has been at the forefront of Australian opinion research on sentencing. He has conducted public opinion surveys on attitudes to sentences as well as surveys of offenders' perceptions of sentencing (Indermaur 1987, 1994). More recently he has put Australian research findings into the context of more detailed research in the United States, Canada and the United Kingdom (Roberts et al 2003) and examined attitudes to current sentencing practice using responses from the 2003 Australian Survey of Social Attitudes, National Social Science Surveys and Australian Electoral Studies (Indermaur & Roberts 2006).

Theoretical Research

Although the parameters of theoretical sentencing research are difficult to establish precisely, the category includes normative legal philosophical justifications for punishment, as well as theoretical work that seeks to explain sentencing as a social practice with an appreciation of its historical, political and cultural practice.

The question 'Why punish?' has been an enduring theme for philosophers and jurists for centuries. While the Arthurs Report (1983) criticised legal education and legal academics for neglecting theory and focussing on doctrinal commentary and exposition, until relatively recently the purpose of punishment was the one and only sentencing issue a law student was likely to consider in the course of legal study. For the last 30 years there has been a burgeoning interest among criminal justice scholars in reassessing the rationale for sentence. In criminal justice discourse in the 1970s there was a significant shift away from utilitarianism or preventionism, and particularly from rehabilitation. Rehabilitation's popularity waned in favour of a just deserts version of retributivism for a number of reasons: research was said to show 'treatment' was ineffective[8] and there were concerns about the possibility of imposing disproportionate punishment in the name of treatment. However, there has been a revival of the rehabilitative rationale in recent years, and as well as new slants on utilitarianism, new paradigms have emerged, notably restorative justice and therapeutic jurisprudence.

In addition to the challenges to the four traditional theories from advocates of restorative justice, there are other critics who criticise the legal-philosophical enterprise on the grounds that it neglects the social and political contexts and meanings of state punishment (Tata 2002). Often such work involves a detailed and historical analysis of punishment that seeks to explain penal developments; examples are the work of Norrie (1991) and Garland (1990) in the United Kingdom. As von Hirsch and Ashworth (1998:360) point out, much of this work has not been developed in a normative direction.[9] Hence the term 'critical punishment theory' and the thought that it could equally be classified under my critical/reformist category. The discourse in Australia (and New Zealand) reflects that of the United Kingdom with scholars like David Brown, Mark Brown and John Pratt contributing to theoretical work that seeks to understand the emergence of 'new punitiveness' in its social, political and historical context,[10] and Arie Freiberg (2001) arguing that to confront public punitiveness we need to deal with both the instrumental and sentimental aspects of public policy.

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8 Martinson (1974) reported on a review of studies of rehabilitation programs conducted between 1945 and 1967 and concluded that the programs reviewed had no appreciable effects on recidivism; see also Lipton et al (1975) and Brody (1976).

9 However, the work of Barbara Hudson, Nicola Lacey and Braithwaite & Pettit does have a normative dimension (Ashworth 2005:87–88).

10 Most recently see chapters by these authors in *The New Punitiveness*, Willan Publishers, 2005.

There is much else besides, including such issues as the appropriate indices of offence seriousness in a desert based system, how sanction severity is to be graded, the relevance of prior convictions in a desert based system, and human rights constraints on sentencing (Ashworth 1995). On a broader level there is the debate about the state's right to punish, an issue that demands a foray into political and moral philosophy.[11]

The results of the literature search reported in Figure 1 suggests that theoretical sentencing scholarship is not well represented in Australian publications, with just 3% of publications in this grouping. However, this understates the volume of theoretical sentencing research activity in this country — theoretical work is more likely to be published internationally and less likely to be picked up in a search of Australian databases. Moreover, publications classified in other categories can have a strong theoretical component. For example, work on public opinion, as well as having empirical content, can seek to explain the relationship between public opinion and sentencing policy. And as David Brown's and Russell Hogg's work demonstrates (Brown 2005, Hogg & Brown 1998) scholarship which has a focus on the politics of law and order can be theoretical as well as critical.

Critical and reformist scholarship/research

This was the most prevalent category of research in my literature review — it comprised 35% of all publications. This is no surprise. One of the main roles of scholars is to use their independence in the service of critique and reform of existing practices. Critical and reformist research — research concerned with what is wrong with what the law says or does — makes use of all of the above categories of sentencing research: doctrinal, theoretical and empirical. It makes use of doctrinal research and the exposition and evaluation of sentencing principles and practices, to suggest new principles and practices. It makes use of theoretical debates and normative arguments, and views what the law says and does critically from a variety of different perspectives, such as feminist theory. Where possible, empirical research may be used to support changes to principles, practices or policies. For example, proponents and opponents of a restorative approach to sentencing will typically rely upon doctrinal points, theoretical arguments and empirical evaluations. Evidence of sentencing disparity has been used to argue for sentencing reforms aimed at constraining the exercise of sentencing discretion. Evaluations of sentencing alternatives will be used to support recommendations for change, for abolishing an existing sentencing option or for introducing a new one.

The Victorian Sentencing Council's 2005 recommendation for the abolition of suspended sentences of imprisonment is illustrative. It included evaluative studies (showing net-widening and breach rates), and public opinion polls. The recommendation was also supported by a doctrinal critique of the sentencing principles relating to suspended sentences.

Under the critical/reformist heading reference should be made to sentencing scholarship that focuses on the politics of law and order and the limits of the law and sentencing; particularly in terms of the capacity to achieve overarching goals such as the protection of society. This kind of critical/reformist work makes an important intellectual contribution to law and order debates. In the period 2000–2005 three-strikes legislation and mandatory sentencing was a hot issue on the political agenda — some 38 publications in the critical reform group dealt with this topic.[12]

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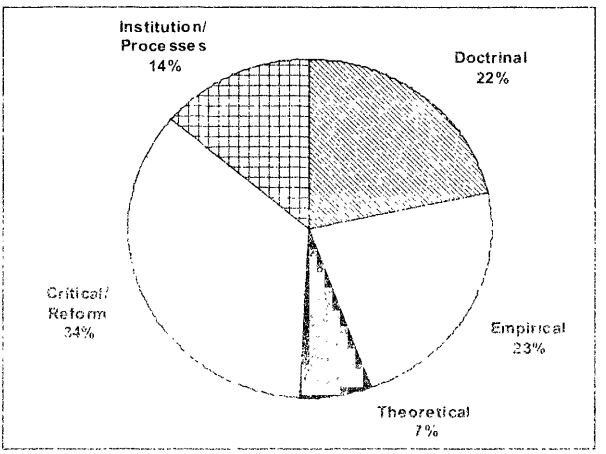
11 See Ashworth (2005:70) where a brief sketch of some justifications is offered.

Institutions and Processes

There is a body of sentencing work which does not fit comfortably into any one of the above categories. It is neither primarily doctrinal, theoretical nor critical. It is perhaps closest to the critical/reform category, but often more descriptive. And rather than relying upon describing how an institution or process works through direct means, it does so relying largely upon secondary sources, so it cannot be called empirical work. In the literature search this body of work was quite significant — comprising almost 14% of publications (see Figure 1). A significant number of these publications were general overviews of sentencing or corrections, often published as book chapters in edited works. Typically they would include statistical overviews, descriptions of emerging trends and shifts in penological thinking. Descriptions of new courts, such as drug courts, other problem solving courts, and circle courts were classified under this heading, as well publications on guideline judgments, sentencing information systems or broader pieces on sentencing discretion. Some publications dealing with particular categories of offenders, such as fraud offenders, mentally disabled offenders, serious sex offender were also included. Typically they could include some statistics, doctrinal material, critical comment and theoretical observations.

Figure 1: Sentencing Publications 2000–2005, Research classification



Some thoughts on the meaning and measurement of value

Assessing the value of sentencing research raises a number of questions. A preliminary point is 'What is meant by value?' By 'value', I mean useful as well as influential. By including 'usefulness', I have extended the inquiry beyond a strict meaning of 'influence' in the sense of that which inspires an idea in another (Duxbury 2001:5) to include work that is a good or convenient analysis of a principle or source of information. 'Influence', it appears, is something that has engaged and confounded literary theorists. It has also engaged the attention of legal scholars (Duxbury 2001). My conception of value is also broader than the RQF definition of impact, defined as a major or significant 'identifiable

12 There were additional articles on mandatory sentencing that dealt with it primarily from a doctrinal or empirical point of view.

social, cultural, economic and/or environmental outcome, regionally within Australia, nationally or internationally' (Roberts 2005:24). The next question is 'Of value to whom?' In other words, 'Who are the important constituencies addressed by the work?' And thirdly 'How is this value to be measured?'

Traditionally, legal research aimed to be helpful to the courts. Doctrinal scholarship aims to make a modest but visible difference to the legal system by assisting courts to do their jobs better. As the focus of legal research expanded, academics became interested in broader critical questions about the legal system's structure and operation rather than simply in 'legal reasoning', which 'supplies no answers to questions about the relationship between law and the world it governs' (Twining et al 2003:930). Theoretical work involving high-level normative theories and critical work viewing the legal system from a range of perspectives does not aim to have a direct impact on judicial thinking. Instead it may have a range of purposes such as affecting policy making in an immediate way, creating long term visions of a better system or merely increasing understanding about the way the system operates. The 'valuable to whom' question depends then on the nature of legal research, and the audience includes judges, lawyers, other scholars, administrators and policy makers, legislators, advocacy groups, activists and so on. It follows that assessing the impact of legal research is no easy task.

Citation and influence

Citation of academic works in legal decisions could be one way of measuring influence on judicial thought, or at least the usefulness of legal scholarship to the courts. For a legal academic to be cited by the House of Lords is regarded as an accolade in Britain and is recognised as 'an indicator of esteem' in the Research Assessment Exercise (Twining et al 2003:928). Similarly, citation by the High Court or even the Supreme Courts has some prestige in Australia. However, systematic citation analysis and citation surveys are quite rare in England and Australia,[13] although in the US, legal citation study has a long history (Duxbury 2001:8). Moreover, in England and Australia, judges are less inclined to cite academic sources, perhaps because of the residual influence of the convention against citation of living authors. While this convention may well be dead, many judges do not see the need to acknowledge the assistance gained from academic commentators. Moreover, just as non-citation does not compel the conclusion of no influence or usefulness, given the varied motivations for citation, citation is not necessarily indicative of influence (Duxbury 2001:14) or even usefulness. Despite the many problems of using case citations as a measure, it has been argued citation is useful as a proxy for influence (Duxbury 2001:17) and, I would add, for usefulness.

In the USA judges have traditionally relied much more heavily on academic sources than their counterparts in Australia and England. However, high profile scholarship is increasingly critical, theoretical and interdisciplinary and it appears the influence of academic scholarship on judicial thought in the US is waning with the development of a rift between jurists and the judiciary. This is evidenced by judges expressing dissatisfaction with the usefulness of the work of leading scholars, fewer citations per opinion and scholars apparently indifferent to their diminishing influence (Twining et al 2003:929–931). Most influential research within the academy may be cited hundreds of times by academics but not once in a judicial opinion (Twining et al 2003:931). In the words of Twining et al (2003:929) it is 'useless to the courts'.

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13 The Australian citation studies conducted by Russell Smyth are an exception (Smyth 1998, Smyth 2001).

In England, on the other hand, the overt use of academic commentary has increased (Duxbury 2001) although there too, doctrinal scholarship has lost some of its prestige within the academy. One would expect the Australian situation to mirror the English picture more closely than that of the USA. A study of secondary sources cited by the High Court from 1960 to 1996 shows an increase in citations per case (Smyth 1999). In the sentencing context I tested this by examining the leading High Court sentencing judgments from *Veen No 1* (1979) to *Markarian* (2005) to determine if there have been any trends in the number of citations per opinion. There was no obvious trend other than a slight increased tendency to cite academic publications. What is striking however, is the difference between judges. Kirby J for example has cited on average 4.5 publications per judgment, easily the highest, with others in recent years citing between .4 (Gleeson CJ) and 1.9 (McHugh J).

Citations by other scholars may be an indicator of quality and influence, as it is in science where citation in refereed journals is regarded as an important measure and demonstration of esteem, and journals are allocated an 'impact factor'. Because of sentencing's association with criminology, citation analysis of criminology is relevant to sentencing. Interestingly, Richard Fox was the most cited scholar in the Australian and New Zealand Journal of Criminology in 1986–1990 and his most cited work was *Sentencing: State and Federal Law in Victoria* (1985) (Cohn & Farrington 1998:163). From 1991–1995 he was replaced by John Braithwaite as the most-cited scholar and his most cited work was *Crime, Shame and Reintegration* (1989). So a largely doctrinal sentencing book was the most cited scholar's most cited work in the earlier period and a theoretical book, which has had important implications for restorative justice and sentencing, was the most cited author's most cited publication in the second. Arie Freiberg, best known for his sentencing work and Fox's co-author of *Sentencing: State and Federal Law in Victoria*, was ranked 15 in the second period.

How valuable is sentencing scholarship?

Citation is but one, and a rather flawed, indicator of influence on judicial and scholarly thought. In the following section I offer some tentative comments in relation to the impact of the various categories of sentencing research on judicial decision making and the legal system more generally. I acknowledge that it can be rather artificial to discuss impact of categories of research separately. As demonstrated by the 'nothing works' saga, the impact of theory and empirical research on policy is interconnected. Empirical research findings said to demonstrate that, when it comes to sentencing, 'nothing works', had no impact on policy until 'retributive conceptions of justice took hold' and people where ready to listen to the arguments in Martinson's article (1974) and to act on what they thought it suggested (Tonry & Green 2003:487). Similarly, 'nothing works' supported the retributive revival and boosted the popularity of just deserts. However, discussing the categories of research separately does give some kind of structure to the discussion.

Doctrinal research

Doctrinal sentencing scholarship has ambitious goals: not only will it contribute to the development of the law but by doing so it will foster the development of a coherent body of sentencing principles which aspires to eliminate unjustified disparity and promote consistency.

Sentencing is now a recognised area of legal scholarship. There is now a well-developed body of sentencing law both common law and statutory. It has been critically analysed and synthesised by sentencing scholars. In turn prosecutors, defence lawyers and sentencers

(particularly judges in the higher courts) refer to and rely on this work. Fox & Freiberg (1985, 1999) is regularly referred to and cited in judgments in Victorian courts and in other jurisdictions. An examination of unreported decisions in the LexisNexis case database since 1991 showed Fox & Freiberg is easily the most cited Australian work: there are 91 citations to the first edition and 65 to the second. Most citations are in Victorian cases but Western Australia cases have also cited Fox & Freiberg frequently (21 citations to the second edition). In Tasmania, Warner (1991, 2002) is widely used. It is quoted in sentencing hearings by counsel. It is frequently referred to in sentencing appeals. Each edition has been cited 26 times but it is rarely cited by cases in other jurisdictions. Interestingly, about half of the citations refer to the chapter on specific crimes data and the discussion on sentencing patterns. In contrast, the chapter in Fox and Freiberg that is most cited is the chapter on general sentencing principles. In New South Wales, Potas' *Sentencing Manual* has been cited 8 times, as well as attracting isolated citations in other jurisdictions. However, Thomas' *Principles of Sentencing* remains the most often cited sentencing text in Australian courts with some 378 citations, 192 of them in Western Australia.

The body of sentencing law has developed enormously in the last three decades. Sentencing scholarship has undoubtedly helped in this development and in the application of sentencing law in practice. An assessment of whether we now have a rational and well functioning body of sentencing law is a question which is controversial. It is better than it was. But have we, in Norval Morris' words of more than 50 years ago (1953:196), managed to 'build up a sentencing theory, a body of principles and practice capable of application by the various judges whatever their personalities'?

The answer depends on whom you ask. In general, lawyers are more likely to give a positive answer. Perhaps seduced by their familiarity with the subtlety of legal reasoning and common law legal method that promises both constancy and change, they have faith in the potential of developing a body of principle that will constrain the choice of sentence in the same way that the common law constrains the admission of evidence in a criminal trial. Non-lawyers are more critical. Writing in 1987, Don Weatherburn, Director of the New South Wales Bureau of Crime Statistics and Research and a psychologist by training, argued that the existence of an abundance of sentencing principles does not mean that there is a real level of constraint on sentencing choice. He argued that general sentencing principles provide no meaningful constraint on the choice of sentence, nor do limiting principles such as proportionality and appellate guidance in relation to specific crimes do any better. He was also critical of judging sentences on the basis of sentences normally imposed rather than the Court itself determining the propriety of the range. Weatherburn's suggested solutions were, first, a clearly articulated framework for sentencing policy; secondly, guideline judgments of the sort promulgated by the English Court of Appeal; and thirdly, a sentencing information system properly informed by actual sentencing practice (Weatherburn 1987).

A sentencing information system is now, of course, a reality for New South Wales. And the New South Wales Court of Criminal Appeal has embraced the idea of guideline judgments. However, not all would agree that it is any closer to having a coherent set of sentencing policies and principles that provide adequate guidance for sentencers. Lovegrove (2001) has argued that guideline judgments are deficient; that words are not enough even if coupled with numerical starting points. He advocates a method of drafting quantitative narrative guidance that allows for different combinations of case characteristics. And Bagaric and Edney (2004) still see sentencing law as rambling and imprecise and attribute this to the law's failure to endorse a tenable rationale of punishment.

Theory

Sentencing scholars who focus their efforts on higher levels of theory can have a significant impact. However, this is unlikely to occur, or to be clearly visible if it does. Twining et al's (2003:932–933) analysis of the impact of theoretical legal scholarship is well put and worth repeating:

> They [those engaging with theory] are operating as wholesalers, relying on others to turn their ideas into concrete possibilities for legislation, regulation, or judicial decision. Any single piece of writing in this vein is unlikely ever to make any difference, but it may contribute to a body of work that infects the thinking of other academics, which in turn affects the milieu in which their colleagues talk and their students are trained. The ideas may gradually be imported into public life by students or colleagues who venture into government service as law clerks,[14] judges, regulators, and so forth. The final impact may be hard to discern or trace to its source, yet still be greater than the impact of an idea retailed directly to judges in a law review article.

Scholars have observed that the theoretical debates about the aims of punishment have little influence on the thinking of judges and magistrates in their sentencing practice. Freiberg and Ross (1999:202) found that despite the waning popularity of rehabilitation in the literature, this has had little impact on the judiciary in Victoria, 'many of whom remained happily oblivious to this criminological fashion'. Mackenzie's (2005:131,132) study suggested that some Queensland judges did not appear to have clear understanding of the aims of punishment, and contrary to the retribution renaissance, it found favour with few judges and few were conversant with the concept of just deserts.

Theoretical scholarship concerned with rationales of punishment has had more impact on policy makers than judicial thinking. While many rationales of punishment remain in play, the renaissance of retribution in the guise of just deserts was embraced by law reform bodies and the imposition of a punishment that is 'just' is recognised as a purpose for which a sentence may be imposed in the legislation of most Australian states. Also influential at a policy level has been the restorative justice movement. There is little doubt that Braithwaite's theory of reintegrative shaming and the complementary 'Not Just Deserts' theory of criminal justice (Braithwaite & Pettit 1990) has had a significant impact on this movement, providing it with a strong, if controversial, theoretical base that has contributed to a willingness to implement restorative processes such as conferencing, at least at the 'soft end' of the juvenile justice system. In a development which has some similarities with conferencing, problem-solving courts involving a new way of sentencing emerged as a grass-roots initiative of judges in the USA and later became linked with therapeutic jurisprudence. This provided a theoretical underpinning to this alternative form of justice, no doubt giving it a degree of respectability which appears to have contributed to its popularity with policy makers. Therapeutic jurisprudence now goes beyond problem solving courts and advocates a new approach to the judicial sentencing role which has been endorsed by Western Australian country magistrates (Daly 2006:454).

Empirical Research

At a broad level there is no doubt that the academic discipline of sentencing has been transformed by the contribution of an empirical perspective. In common with other areas of criminal justice, empirical research has changed the nature of legal scholarship and

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14 The Australian equivalent is a judge's associate. In the US many judges delegate the task of research and writing drafts to law clerks, see Duxbury (2001, 20–21). In Australia some research, at least, is delegated by some judges to associates.

orientation of thinking. Scholars in this area have embraced an interdisciplinary approach and their analysis of what the law says is given depth and context by the perspective of what the law does. Moreover, many academic sentencing lawyers, like other colleagues in the criminal justice area, have embraced empirical methods as an essential tool in their research. They address many of the same issues as social scientists and have a literature which is overlapping (Baldwin & Davis 2003:885).

At an international level, empirical research has had some part to play in the rise and fall of rationales of punishment at the level of both academic discourse and penal practice as the demise of rehabilitation in the face of evidence 'nothing works' in the 1970s and its revival in the current 'what works' era attests (Rex 1998; Sarre 2001). At a national level, evaluations of restorative justice programs such as conferencing have no doubt played an important role in the popularity of this new paradigm. However, it is widely acknowledged that the impact of criminological research on penal policies, including sentencing, has been enormously disappointing. Rather than being 'evidence-based', many policy initiatives in the sentencing area are based on 'common sense' and 'popular punitiveness'. So three strikes legislation, mandatory penalties and increased maximum penalties have been introduced on the assumption of their greater general deterrent and incapacitative effects despite a lack of evidence supporting their effectiveness. Indefinite sentences have been revived and extended sentences introduced in response to a perceived public demand for harsher sentences for those regarded as dangerous. This is in the face of the concerns of legal scholars and criminologists in relation to 'accuracy of diagnosis, degree of risk, procedural protections and human rights' (Hood 2001:3). As Ashworth (2003:307) points out, it is not the norm for empirical research to inform the introduction of new forms of sentences. Typically, they are introduced and effectiveness research follows — often to assess whether it is workable rather than effective.

The controversy about methodological approaches and evaluation studies is relevant here. Hood and others have warned of the dangers of academics neglecting quantitative approaches in favour of other worthy but broader areas of scholarship at the expense of providing the kind of evidence that is regarded as convincing proof to policy makers, or as Janet Chan (1995) has put it, 'producing a body of *defensible and useful knowledge* about criminal justice issues' (Hood 2001:12). At the same time there are concerns that in supporting 'evidence-based' policy making, academics are involving themselves in 'narrowly focused' 'uncritical' research and 'atheoretical fact finding' which reinforces state defined notions of criminality (Hillyard et al 2003, Walters 2006).

Sentencing patterns and trends

Sentencing statistics undoubtedly assist sentencers and legal counsel by providing information on the range of penalties imposed for past offences of a similar kind and by identifying penalties that fall outside the range of normal penalties imposed in the past for the offence in question. Potas (2005:23) reports that every month in New South Wales thousands of SIS (now JIRS) inquiries are made by judicial officers, prosecutors, public defenders and legal aid practitioners. The usefulness of the statistics as a mean of ensuring consistency has been adverted to by the Court of Criminal Appeal (*Bloomfield* at 408). And in a number of guideline judgment cases reference has been made to statistics, to assess whether there has been systematic inconsistency in sentencing and therefore a need for the court to promulgate a guideline judgment.[15] Whether sentencing statistics *do* assist in promoting consistency and avoiding unjustified sentencing disparity is unknown. Nor is it

15 Potas (2004) citing *R v Jurisic* (1998) 45 NSWLR 209 at 221; *R v Henry* (1999) 46 NSWLR 346 at [109].

known how sentencers use statistics or guideline judgments. This is an area where there is a need for more research into judicial decision making. Ashworth (2003:325) argues that it is unlikely that guidelines and guidance will achieve their goals so long as there is insufficient understanding of the facts that actually influence sentencers. It should also be noted that there are issues in relation to how sentencing statistics should be used. They are not a panacea for achieving just, consistent and principled sentences and can have unwanted effects such as focus on figures rather than principles and reasons (Ashworth 2003:314).

Understanding of judicial sentencing

As I have already indicated, there is insufficient research on the sentencing process to claim we have an adequate understanding of it. Ashworth (2003:330) argues that by making known the way in which judges typically approach the sentencing task, by uncovering their motivations, attitudes and practices, their knowledge of sentencing law and their reliance on counsel and probation officers, research can bring greater transparency to this important public function. It might also foster a greater public understanding of sentencing and better inform policy makers and the judiciary themselves as the authors of guidelines and appellate advice. He categorically rejects the reasons Lord Lane gave for refusing to continue with a research project in the Crown Court on sentencing practices in the UK, namely that 'the available textbooks give a fairly clear account of the factors which judges take into account in sentencing, and he could not think of any aspects of judicial sentencing upon which research may be helpful' (Ashworth 2003:309).

Survey research and public opinion

Media polls and representative surveys invariably show that between 70–80% of the public consider sentences are too lenient (Indermaur & Roberts 2005:155, Roberts et al 2003:29). Criminologists and sentencing scholars have pointed out the inadequacies of these methods of assessing public opinion — in representative surveys respondents respond punitively because they tend to think of violent and repeat offenders. Moreover, most people have a poor knowledge of the criminal justice system and crime trends and the least knowledgeable are the most punitive (Hough & Roberts 2002). Studies using case studies and vignettes have shown that punitiveness decreases with more information (Roberts at al 2003:29–32, Walker et al 1987). This work has important implications — it suggests a better-informed public will have more confidence in courts and sentencing. Ways of improving the measurement of public attitudes to punishment have been suggested (Roberts et al 2003:167). Properly ascertained public opinion is clearly valuable — it allows for informed political debate about sentencing policy and enables public opinion to be taken into account in sentencing. The Victorian Sentencing Advisory Council has recently completed a public opinion project which involved creating a suite of tools for its measurement (Gelb 2006).

Critical/reformist scholarship

Sentencing scholarship that is primarily reformist aims to directly influence policy making. This work is the antithesis of the kind of disinterested objective research advocated by scholars such as Stanley Cohen, who has famously asserted that 'it is simply not the professional job [of criminologists] to advise, consult, recommend or make decisions' (1985:238). It has also been argued that mixing advocacy with research distorts research priorities and produces bad research (Tonry & Green 2003:486). Drawing a bright line in this way between advocacy of penal reform and criminological knowledge which is divorced from political and ideological considerations is understandable for social scientists. However, for many legal scholars, advocacy — using their knowledge and expertise to promote change and engaging in law reform activities — is a well-recognised

and well-regarded form of scholarship (Coper 2005). The fact that most law reform cannot be divorced from policy issues, and hence moral value judgments and political considerations, should not exclude scholars from promoting and advocating a particular policy change. Indeed, sentencing scholars have had an important influence on law and policy through contributions to law reform. First Duncan Chappell and later George Zdenkowski were appointed as Commissioners working on the Australian Law Reform Commission's sentencing reference. Both had the opportunity to contribute their sentencing and criminological expertise to the reports of the Commission. In Victoria, Freiberg has had an important and ongoing role as a consultant on sentencing matters drawing upon 'theoretical principles explored and refined, in conjunction with Richard Fox, over a considerable period' (Harding 2003:481). Harding (2003:482) asserts that the impact of his work, by assisting to maintain Victoria's position as the state with the lowest imprisonment rate, has made hundreds if not thousands of citizens' lives less oppressive.

Authors of critical works, such as Brown & Hogg (1998) have argued, passionately and in an accessible way, against law and order commonsense and the need for tougher penalties. They, together with Zdenkowski (1999; 2000) and Morgan (2000; 2002) and many other writers, have trenchantly criticised mandatory penalties on normative, empirical and doctrinal grounds, as well as attacking other punitive sentencing policies and legislation. The impact of such work is not quantifiable. Much of it is preaching to the converted. As Morgan (2002:307) acknowledges, quoting Auden, such articles appeal to those who 'think like one'. But do they make a difference? In the Northern Territory the mandatory regime for property offences was repealed. However, for some sexual and violent offenders there are still mandatory sentences of imprisonment, and in Western Australia the three strikes home burglary laws remain.

The debate about mandatory penalties and tough sentencing more generally illustrates the point made elsewhere in relation to empirical research and criminal justice policy (Tonry & Green 2003:492–494): negative findings influence only a small part of the motivation for a measure. Even if the instrumental reasons for a measure (such as general deterrence or reduced recidivism rates) are shown to be untenable, focussing on this by critics of the measure will not lead to its abandonment if the latent goals for its introduction (holding offenders accountable, denouncing bad acts, the political need to be seen to be tough) were as important as the claimed instrumental goals. Similarly, normative arguments are not necessarily effective in the face of widely held beliefs and intuitions. This said, it does not mean that such work is pointless and without influence. By constantly challenging taken-for-granted assumptions and 'law and order commonsense', critical scholarship can alter widely held beliefs and the way that policy makers think about problems. However, there is a need to continue to attempt to understand why it is that rationalist responses to punitive policies in terms of ineffectiveness and cost seem to fall on deaf ears. Here, we need theories to explain the public's punitive response and empirical research which explores reasons for such attitudes (Freiberg 2001:271).

Institutions and Processes

It could be thought that this category of research has less potential to have impact and value than any of the five categories; that it is simply descriptive and adds little to our understanding of criminal justice; or that is ' a mechanism for self-congratulation, navel-gazing or propagandising'.[16] An examination of the publications falling into this category suggests that none of these conclusions are valid. While sometimes primarily descriptive rather than critical, these publication have a useful role in increasing our understanding of

16 Questions asked by the anonymous reviewer.

the way the criminal justice system operates. Describing new developments, such as a drug court in a particular jurisdiction or a new sentencing information system, highlighting their advantages and limitations, can assist policy makers in evaluating their potential. A discussion of the role and value of pre-sentence reports of a particular kind can assist the decision-making of judicial officers and those who are responsible for preparing reports. Similarly an informed and critical discussion about risk assessment has a useful role in informing sentencers about the value and reliability of such assessments. An article reviewing the role of guideline judgments can be considered by courts as well as policy makers in deciding whether or not to embrace their use. Rather like publications in the critical/research category, this kind of publication can synthesise the results of other empirical work, doctrinal work and theoretical insights in an accessible way.

The considerable number of broad overviews of sentencing developments is also of value. They too add to an understanding of the criminal justice system by stakeholders, but importantly they can inform the thinking of theorists who are seeking to understand and explain sentencing and penal developments in their social and political context.

Conclusion

What has this outline of published Australian sentencing research revealed? First, that sentencing is now a well-established area of scholarship with a considerable body of literature. This is broad in scope and has benefited greatly from interdisciplinary input from criminology, psychology, philosophy and other social sciences. While I have some reservations about the usefulness of the typology of sentencing research employed in this article -- the categories are artificial constructs and not mutually exclusive -- the very task of classification has demonstrated for me that there is considerable overlap between the groups and cross-fertilisation of ideas and expertise.

Doctrinal sentencing scholarship has been shown to represent a significant proportion of published sentencing scholarship. I would argue that it has been useful to the courts, if not influential. Scholars have helped to incorporate 'rule of law values into the discretionary sphere of sentencing' (Ashworth 2003:309). In Australia, at least in this area of the law, there is no evidence of the disjunction between legal scholarship and legal practice said to exist in the USA, which has led Twining et al (2003:929) to assert that:

> ... the high-status, high profile work in the legal academy nowadays tends to be increasingly critical, theoretical, interdisciplinary, interesting to other academics, and useless to courts.

Certainly no Australian judge has publicly attacked legal scholarship in the way some American judges have. So doctrinalism in sentencing is not dead. Nor do I consider that this kind of research has lost its prestige, provided it is not purely expository and analytical. Indeed, it is attracting eminent legal scholars to its ranks. I believe there is a continuing role for doctrinal sentencing scholarship, for synthesising information, offering critical reflection, employing theory, a knowledge of the context and empirical research to criticise doctrine and to propose or oppose changes in the law and policy. In other words, the best of doctrinal research now incorporates insights from all the areas of sentencing scholarship that I have identified, invigorating it but keeping it relevant to its primary audience, lawyers and judges.

Empirical research -- law in action studies and evaluative work -- have made a valuable contribution to sentencing. The findings of researchers may often be ignored by policy makers but their work is vital. And there remains much to do from the empirical perspective. We need to understand more about the sentencing process, about how judges

approach the sentencing task, their use of statistics, appellate guidance and the factors that influence sentencing decisions. In Australia we need to know more about public opinion on a range of sentencing matters and have a better understanding of public knowledge of crime and punishment and of the best ways to counteract law and order commonsense. And there will always, I believe, be a place for evaluative research provided that we don't make a fetish out of it, and provided that funding support and encouragement for critical sentencing research remains.

Despite the small volume of theoretical publications uncovered by my literature search, scholarship which is primarily theoretical in focus is significant in the sentencing area, and its contribution is vital. In rethinking the rationale for punishment, in seeking to understand changes in sentencing policy, it can infuse the thinking of academics and students and it has the potential for lasting impact.

Critical/reformist sentencing scholarship is flourishing and sentencing scholars and commentators have a continuing role to play in critically analysing existing principle, policy and practice. Their contribution to sentencing reform is likely to continue and to remain an important resource for law reform bodies. Similarly, scholarship in the institutional processes category has value. Primarily descriptive analyses of new initiatives, existing procedures, options and processes and general overviews of sentencing developments have value for policy makers, criminal justice personnel and theorists.

Sentencing research, I would argue, has produced much that is of value to the law, to the courts, to administrators and policy makers and legislatures. Measuring research impact by identifying social outcomes of such research and linking it to the work of individual researchers is a challenge to be faced by RQF panels in the near future.

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