

CONFERENCE

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## Sentencing research in Australia

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(Transcript of presentation)

## Sentencing research in Australia

What am I aiming to do in this presentation? The first thing I wanted to do was to try to provide an overview of the kinds of sentencing research that has been done. Secondly, to look at the prevalence of the various kinds, and then to try and offer some thoughts on the influence and value of sentencing research.

Now to do this, to think about the kinds of sentencing research, I thought I really need some kind of classification. So I looked first of all at the Pierce report's classification of legal research in general which is doctrinal and theoretical and also reform orientated. That has been criticised as being too narrow because it really doesn't encompass a lot of legal research these days. It doesn't look at empirical issues and that's clearly relevant, also historical issues and comparative issues and inter-disciplinary matters. So I came up with this classification. These are my five categories. Doctrinal is really what the law says, it's the law in the books, cases and statutes. Empirical is what the law does, so that's the law in action. Theoretical is rather broader. Why does the law say or do what it says or does? Critical reform category focuses on what is wrong with the law, what is wrong with what the law says and does. Finally, institutions and processes, describing sentencing institutions and processes in a way that's neither doctrinal, empirical, theoretical nor just purely critical.

Of course, these categories are not mutually exclusive and a lot of sentencing research is going to cover both, but by looking at sentencing material I thought that we could really put it into these categories. I thought that perhaps we could just test this a little. I thought that you might like a little quiz and to think about the kinds of papers that we have heard at this conference. So, just to take a couple of examples, if we talk about say Geraldine MacKenzie's paper on Judicial attitudes and perceptions toward the sentencing process - which of my categories do you think that one would fall into most obviously? Empirical, yes. Then James Ogloff, his paper on 'The impact of sentencing on the offender', again it is empirical isn't it? Well, what about Sir Gerard's paper at the conference dinner? Clearly, doctrinal. Roger Dive and his paper on 'Drug courts in NSW' ? institutions and processes, and a bit trickier, Arie's keynotes address. I didn't put a category of historical because I thought that you could usually put historical into one of the others. It was really more theoretical than the other categories.

The next thing that I did was to try and look at Australian publications over the last 6 years or so. So I did a literature search using the Infomat database, using sentence as my key word to try to get an idea of the relative volumes of sentencing research in these categories. I found that most of the research was critical research. Doctrinal about 20%, theoretical 5% and institutions and processes 15%. I'm conscious that I didn't pick up all sentencing research because I didn't get everything out of the international journals. I'm conscious that a lot of people do publish in international journals, but this was to just get some kind of indication of the various kinds.

I've used the definition of doctrinal research from The Committee of Law Deans, which says that doctrinal research at its best involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands and the challenge of extracting general principles from a mass of primary materials.

In the legal context, doctrinal sentencing research is relatively recent and it really struggled for some kind of recognition and legitimism. The only golden rule is that there is no golden rule. The next little quote is a quote from Norvell Morris where he said that's it's undeniable that courts have failed to develop anybody of theory bearing on the task of sentencing. Reasons are rarely given for sentences and appeal courts have failed to articulate sufficient coherent principles to guide lower courts. He said this at the 8<sup>th</sup> Legal Convention of the Law Council of Australia in 1953 and there was quite an angry response from the judges in the audience. It is worth reading this in the ALJ of that year. They had quite a stimulating debate about that.

It seems to me that there was a real turning point in the development of doctrinal research with the publication of D.A. Thomas's book "Principles of Sentencing" in 1970. He drew together reported and unreported cases into a structured narrative and this were really influential in creating an atmosphere in which principles of sentencing began to be regarded more seriously. His influence spread quite quickly to Australia and so in the 70's and 80's his book was very widely sighted by judges in their judgments. It was used in the courts and it is still in fact used today. So you find his formulation of totality principle is cited by the High Court, the Federal court and courts in all jurisdictions. In the 70's very few sentencing decisions were reported and there wasn't a lot of analysis distilling the cases in case law and statute.

In 1985 when Richard Fox and Arie Frieberg wrote their sentencing book for Victoria, they commented that the jurisprudence of sentencing in Victoria was lost in a labyrinth of State and federal statutes and in a wilderness of case law. This was the situation that their book sought to address. It was funded by the criminology research council which at the time was funding a series of sentencing books from all of the jurisdictions. An innovative feature of Fox and Frieberg was that they published tables showing the range of sentences for the most common crimes and also discussed appeal court guidance in relation to those crimes. This was an idea that I copied for my sentencing book.

Second editions of Fox and Frieberg have been published and I've published a second edition of my book. We have sentencing manuals in Queensland and in South Australia. Another impudence for doctrinal sentencing was the birth of the Criminal Law Journal in 1977 and this was an avenue for the publication of doctrinal research articles. I had a look at that and found that about 30% of the articles in the Criminal Law Journal are sentencing research.

My next category is empirical research. Baldwin and Davis say its really easier to define by saying what it isn't rather than what it is. So it's not purely theoretical or doctrinal, it doesn't rest on any analysis of decided cases or statute and it doesn't rely on secondary sources. It involves the study of direct rather than secondary sources of the institutions rules, procedures and personnel of the law with a view to understanding how they operate. So, 20% of the publications I've found in the literature research were in this kind of category. What about the concerns of empirical research? I found that in the sentencing area it was divided into these categories: sentencing practices and trends (which I found to be the most prevalent grouping probably more than half of the volume of sentencing research), evaluative research in relation to sentencing options, policies and aims (about a quarter), the sentencing process and public opinion research. With sentencing practices and trends

you have research on general sentencing patterns and trends showing the proportion of penalty types for particular offences and the ranges within that penalty type. More general research looking at either specific sentencing options or perhaps at a specific crime. Then there is evaluative research and research on the sentencing process and public opinion research.

Theory is the next category. This is just research within law, so it's not just looking for conceptual basis of legal principles but much broader issues. Things like why punish? legal and philosophical questions. Here we look at the four traditional theories. Then also new paradigms, why there is still critical punishment theory. So what is the social and political context of state punishment and how do we understand developments and punishment? The state's right to punish is another issue.

Mandatory sentencing was a really common theme between 2000 and 2006 and I found over 30 articles in this critical reform area dealing with that topic. Institutions and processes; just 15% of publications, neither doctrinal, theoretical, empirical or critical reform, but descriptive, say descriptive of a drug court for example.

What about the value of sentencing research? Here I had a number of problems. First of all I had to decide what I meant by value and value could be defined as being influential, that which inspires an idea in another. But I took rather a broader definition than influential and included useful. So what is good or convenient to the cause and I also discovered there is a wealth of literature on influence.

Next question, valuable to whom? whom or what are the constituencies that we are looking at? Because traditionally of course, legal research aimed to be useful to the courts. It tried to help the courts to do their job better. When the focus of research widened somewhat, so did the audience. So then it became directed towards administrators and policy makers, legislators and activists etc. Now, how do we access it?

How do we assess influence or usefulness? Well I suppose we could look at the pink forms that you all fill out and see which presentations you found most useful and in which categories they fall into. There are various ways of doing this and citation analysis is something that scientists are very familiar with in trying to assess impact. It is not something that lawyers, legal academics, use a lot although in the US citation analysis has a long history in term of analysing citations of the work of legal academics in legal and case decisions. We could argue that looking at citations in cases is one way of assessing influence. So despite lots of problems it's accepted that perhaps you could use it as a proxy for influence. It seems that in the US there has been a decreasing trend for courts to rely upon the work of legal academics. In the UK it's rather different. They are finding the work of legal academics more useful, or at least they are citing it more often. But of course this also ties in with the fact that in the UK they didn't have this convention about not citing a living author.

I tested this a little by looking at some sentencing cases to see what kind of trends we've got in Australia. I took some cases from "Sentencing decisions from the High Court", to see how often they cite legal authorities. I found no real trend, perhaps a slight increase to citing more but it depended more on the judge. So a judge like

Justice Kirby cites more legal academics than any other. He had an average citation rate of 4.5% compared with Justice Gleeson who had 0.4%.

The value of doctrinal research: this aims to be helpful to the courts and more ambitiously to try and foster the development of a coherent body of sentencing principle, which will try to eliminate unjustified disparity and promote consistency. Has it achieved this? Well I would argue that it has helped in the development in the common law and its application in practice. Looking at the Lexis Nexis Database from 1991 onwards, you find that books like Fox and Frieberg are cited very frequently mostly in Victoria but also in Western Australia as well. I found that my sentencing textbook is cited a lot in Tasmania, but rarely cited in any other jurisdiction, even though it does deal with more general principles.

The next issue is: have we really got a rational and well functioning body of law and has doctrinal research helped us achieve this? Well, I think we can say that it is better than it was, but also I think it depends a bit on who you ask. Lawyers, I think, are a bit more optimistic about the potential of the common law to develop a rational system whereas others are more critical. You will find Don Weatherburn, for example, saying that “OK, there a lot of sentencing cases out there, but it’s not making the body of sentencing law any more rational”. Others too have argued that even though we have got guideline judgements in some jurisdictions they don’t provide adequate guidance to sentencers.

The value of theory: theory can have enormous impact, but a lot of it has no impact at all. It seems that debates about the aims of punishment have had little impact on judicial thought. Geraldine MacKenzie’s study too found that few judges were really conversant with just desserts theory even though this was being debated widely in the academic literature. So what does this tell us, what conclusions can be draw from this? Perhaps we need more sentencing conferences. Theory has much more impact on policy makers and reformers. Just desserts for example has been recognised in sentencing statues and you would have to say that Braithwaite’s influence on restorative justice has been quite profound, giving this movement respectability and status that it probably wouldn’t otherwise have had. Although, we might add here, that not all citations are favourable.

The influence of empirical research: empirical research has really changed the nature of legal thinking and legal scholarship. It has given an analysis of what the law says a lot of depth and context. A lot of legal scholars have embraced empirical research. Often they don’t use very sophisticated quantative techniques, so they might use cross tabs and maybe pye squared but multi variant methods they tend to avoid. Also I think empirical research has impacted on theory, and we can see this in the demise of rehabilitation. But for many the impact of empirical research on penal policy has been really disappointing. A lot of initiatives are just not evidenced based but are based rather on common sense and punitiveness.

Data on sentencing patterns and trends is undoubtedly useful. Ivan Potas says that SIS enquiries in NSW amount to thousands per month. I think that research has assisted our understanding of how judges sentence, but more empirical research is needed.

Critical reformist work: questions about whether or not reform and activism is really the role of a sentencing scholar? Criticism is but should they go further than that? And there is another question about whether attacking punitive sentencing policies is really just preaching to the converted? but I would argue that law reform and certainly criticism is really a valuable activity although most criticism (particularly criticism of punitive sentencing policy) just falls on deaf ears. The motivations for punitiveness are really largely symbolic and non instrumental. But of course it's not without influence. Here I would just like to say that I found Richard Harding doing a review of sentencing research in Australia and he argued that Arie Frieberg's work, for example in Victoria, arguing about keeping the low imprisonment rate, has been extremely influential. He thinks that Arie has probably saved hundreds if not thousands of lives from being more repressive than they would have otherwise been.

Just in conclusion I would argue that sentencing is now a really well established area of scholarship. It is interdisciplinary and although doctrinal scholarship probably doesn't have the prestige that it did have in some areas of the law, it certainly is not dead. The best of it incorporated insights into all others areas of sentencing scholarship. We have got to focus on theoretical research and with empirical research there are still lots of gaps. So there is plenty of work for sentencing scholars.