

Criminal Sentencing as Practical Wisdom

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Introduction

The passing of sentence by a judge on a convicted offender comprises the most public stage of the criminal justice process. The sentence imposed is the product of the sentencer's reasoned judgment. Whilst these decisions are often criticised by many—by the public and by academic commentators alike—the actual decision making process in sentencing is poorly understood.

This book attempts to address our lack of understanding about how judges sentence. It presents a study of the judicial methodology of sentencing, along with judicial perceptions and attitudes towards the sentencing process. The book examines and critically analyses approaches to sentencing through an examination of interviews with 25 serving Scottish judges. It elicits respondents' views on the nature of the sentencing process; how the judges come to their decisions in sentencing offenders; the importance of judicial discretion; the aims and purposes of sentencing; and the operation of the practice of allowing an offender a discount in sentence in return for tendering a plea of guilty.

Following O'Malley (2011: 5) it will be argued that, in order to comply with the demands of justice, sentencing must remain discretionary and the selection of sentence in specific cases must remain exclusively a judicial task. By reference to Isaiah Berlin's theory of value pluralism and the Aristotelian concept of *phronesis* (or 'practical wisdom'), it will be contended that the experience both of the law and of society which judicial officers take to the Bench is such that sentencers should be afforded a significant amount of discretion in discharging the sentencing task. Sentencing, it will be argued, is best conceptualised in terms of what the High Court of Australia has termed an 'instinctive synthesis'. It is, as the Canadian courts have observed, a very human process: a delicate art based on competence and expertise involving a 'wise blending' of penal aims. In recent years, however, sentencers have become obliged to consider a purpose—the so-called 'utilitarian value' of an offender's guilty plea—that is often not seen as a legitimate purpose of sentencing.

Previous Studies of Judicial Decision Making in Sentencing

In 1995, Ashworth made the following comments on the need for sentencing research:

[T]he social importance of sentencing is a powerful argument in favour of careful research. More ought to be known about the motivation of judges and magistrates. Such knowledge would assist in the formation of sentencing policy, and might also help to extend a form of accountability into this sphere of public decision-making ... [T]he public policy arguments for research must be confronted. They are surely overwhelming (Ashworth 1995a: 263–64).

It has been suggested, however, that almost as much has been written on the dearth of information on judicial views on sentencing as on the findings of such research (Bartels, 2009: 45; 2008: 89). Michael Kirby, former Justice of the High Court of Australia, notes that there is little research on judicial reasoning and decision making that goes beyond that contained in the reasons of the courts in formal published judgments (Kirby, 1999). His Honour continues: 'Judges are reticent because bound by convention to leave their inner thoughts to the words written in their published opinions. Yet it is impossible to give all of one's reasons in the manageable space available for published reports' (*ibid*).

A continuing feature of sentencing as a social practice is the paucity of empirical research on the decision making processes of sentencers (Ashworth, 2002: 232). We do not generally know what judges think about sentencing and how they go about it since the judiciary are infrequent contributors to scholarly debates on sentencing. This clouds the transparency of the process of sentencing and is an undesirable outcome in sentencing systems where significant levels of discretion are retained by the judiciary (Mackenzie, 2003: 288; 2001: 1).

Thus, what judges think about sentencing and how they approach the task are largely 'missing links in sentencing research' (Mackenzie, 2006a: 1, 2005: 2, 2001: 2; see also Roach Anleu and Mack, 2010: 565). Although the information would clearly be of significant benefit to sentencing research, comparatively little research has been undertaken into judicial methodology in sentencing compared to other aspects of the process (Mackenzie, 2005: 5, 2001: 30).

Ashworth (1995a: 263) observes that research into why judges do what they do has long been advocated as a prerequisite of the successful development of sentencing policy. Whilst questions about the extent to which judicial officers exercise discretion and the extent to which their decision making is rule governed can only be answered empirically (Hutton, 2013a: 90), sentencers in many countries seem to resist academic research. As demonstrated by the following review of previous sentencing research, there are very few studies which involve interviews with sentencers (Ashworth, 2002: 232).

'Protecting the Mysteries of their Craft'—Sentencing Research in the English Courts

In England and Wales, there is a history of the judiciary refusing to co-operate in academic research, particularly with research on sentencing. Writing in 1987, Pannick considered that: '[Judges] discourage sociological studies of their activities, such as sentencing. Like members of the Magic Circle who face expulsion if they explain how the trick is done, judges are eager to protect the mysteries of their craft' (Pannick, 1987: 10).

Judges have traditionally been disinclined to engage in research which might shed light on their working practices. The unwillingness on the part of judges to be interviewed has hindered the development of academic research as interview data is a key tool in understanding the workings and culture of powerful groups (Malleon, 1999: 197). The prevailing attitude amongst English judges was generally that academic research had little to offer the judiciary, that it was potentially damaging and that they were not required to co-operate (*ibid* 198).

The best known example of judicial non-co-operation with sentencing research occurred in December 1981. During the previous year, in response to an initiative from the Centre

for Criminological Research at the University of Oxford, the Home Office agreed to fund a three-year research programme into sentencing policy and practice in the Crown Court. The study was led by Andrew Ashworth and began in October 1980. Having noted the 'dearth of reliable information about sentencing practices in the Crown Court' (Ashworth et al, 1984: 1), Ashworth and his colleagues were concerned about 'the general level of sentencing and the pressure on the prison system' (*ibid* 2). The study aimed to convey a more accurate picture of judicial decision making to the public and to those who might influence penal policy making. It appeared that such a study was opportune given that, in delivering the judgment of the Court of Appeal in *R v Bibi* in July 1980,¹ the Lord Chief Justice, Lord Lane, had acknowledged public concern about consistency in sentencing and had called for sentencers to adopt 'uniformity of approach' to the sentencing of crimes of moderate seriousness (Ashworth, 2003: 320).

In January 1981, Lord Lane granted permission for a pilot study, the aim of which was to determine the most appropriate research methods and to explore the issues which would be the focus of the main inquiry. His Lordship stated that he would consider the results of the pilot study when deciding whether to permit the main project to go ahead. The pilot study comprised, *inter alia*, interviews with 25 judges; however, the respondents were not selected randomly but were selected either by the Lord Chief Justice or by the local Presiding Judges (Ashworth et al, *ibid* 9–10; Ashworth, *ibid* 320–21).

A short report on the pilot stage, together with proposals for the main stage of the project, was prepared with advice from the Home Office Research Unit and was subsequently sent to the Lord Chief Justice in October 1981. In December 1981, his Lordship refused permission for the research to proceed any further (Ashworth et al, *ibid* 5). Ashworth and his colleagues were informed by the Lord Chief Justice that his Lordship did not consider the research to be 'worth the expenditure of judicial time and public money'. His Lordship took the view that many of the points raised in the pilot study were 'well known among judges' and that further research on these issues would therefore be of 'no assistance' to the judiciary (*ibid* 64).

Ashworth et al further reported that the Lord Chief Justice considered that neither the press, the public, nor politicians would take any notice of the research findings and so, in his Lordship's view, systematic research of the kind proposed could not be justified (*ibid*). Lord Gifford QC, a practising barrister and member of the House of Lords, later decried this as 'self-satisfied complacency ... characteristic of the legal world' (Gifford, 1986: 32). A further objection raised by the Lord Chief Justice was that:

[R]esearch into the attitudes, beliefs and reasoning of judges was not the way to obtain an accurate picture: sentencing was an art and not a science, and the further judges were pressed to articulate their reasons the less realistic the exercise would become ... In his view the available textbooks gave 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 might prove helpful (Ashworth et al, *ibid*; see also Fox, 1987: 219).

As Ashworth later noted, this amounted to a total rejection of the idea of the criminological study of sentencing, dismissing the possibility that sentencing might be influenced by

¹ (1980) 2 Cr App R (S) 177.

sentencers' differing views on the aims or the effectiveness of sentences (Ashworth, *ibid* 322). When the time came to publish the findings of the pilot study, substantial pressures were exerted on Ashworth and his colleagues by the Home Office in an attempt to avoid further alienation of the judiciary. When the report of the pilot study was finally published in 1984, it was denounced by the senior judiciary; the Lord Chancellor even gave a speech in which he questioned the integrity of the researchers (*ibid* 322–23).

Lord Lane's decision to refuse permission for the study to continue and the reaction of senior judges to the report of the pilot study had a profound effect on empirical research of the judiciary. The pilot study was seen as 'a shipwreck in the channel' around which future applicants would require to navigate (Ashworth, *ibid* 322). Criminologists decided that they were not welcome in the Crown Courts. Any research that was conducted was based only on court records, or observation of court proceedings from the public benches without any interviews or interaction with judges (*ibid* 323). Following the blocking of the Oxford pilot study, the judiciary established a procedure of its own to deal with applications from researchers for access to the Crown Court. Very few researchers were granted permission to interview judges (*ibid*).

In 1992, for example, Hood published the results of a statistical study into whether race was a factor that influenced sentencing in the Crown Court (Hood, 1992). Hood studied the outcome of a large number of cases involving ethnic minority defendants who had been convicted and sentenced at five Crown Courts serving a metropolitan police force area in the West Midlands in 1989 (*ibid* 29). Hood received permission from the Lord Chancellor's Department to obtain information on these cases (*ibid* 30). The study involved only an examination of Crown Court case files (*ibid* 35–36). On the issue of conducting interviews with the judges concerned, Hood said this:

[S]ome insight into whether judges perceived any special problems relating to the sentencing of ethnic minorities would have been valuable in interpreting the findings of the statistical analysis. Unfortunately they were, I was told, instructed 'by the powers that be' in the judiciary not to co-operate with this part of the planned study (*ibid* 37).

For a time at least, to even attempt to undertake research on the professional judiciary was seen as a futile exercise:

It was supposed that no one could break into the courts if the staff of the University of Oxford Centre for Criminological Research, working with Home Office money and support, could not do so ... A criminological taboo remained for a time and the few attempts made to breach it were not very successful (Rock, 1993: 5).

Thus, as Baldwin (2008: 385) notes, members of the senior judiciary have generally been hostile to empirical research projects, tending to view requests from researchers to participate almost as an impertinence. Although he cites a number of studies in which sentencing decisions have been examined, Baldwin acknowledges that they have either proceeded in an anonymous, statistical manner and not on a judge by judge basis or, alternatively, have been conducted in experimental settings (*ibid*). Those researchers who have tried to go beyond the statistics and talk directly to judges have, Baldwin reports, generally been frustrated (*ibid* 386). The professional judiciary's supposed 'distaste for research' has meant that criminologists and other researchers in England and Wales have only been able to conduct studies with lay magistrates (*ibid*). Whilst the English Magistrates' Association and

local benches of magistrates have participated in criminological research and have given serious consideration to some of the results, the professional judiciary—sentencers who deal with the most serious cases—have traditionally not allowed researchers to get close to their working practices and assumptions in this way (Ashworth, 2003: 319).

It appears, however, that the English judiciary is becoming more amenable to academic research. In a study funded by the Esmée Fairbairn Foundation, Hough et al (2003) explored the process by which sentencing decisions are made by judges and magistrates, particularly in relation to cases that are on the borderline between custody and community sentences. The authors conducted focus groups with 80 magistrates and one to one, semi-structured interviews with 48 Crown Court judges, recorders and district judges, along with five members of the senior judiciary (*ibid* x; 4–5). The study emphasised the importance of mitigating factors in sentencing. This led Jacobson and Hough (2007) to undertake a further study to examine the role of personal mitigation in sentencing in the Crown Court. This study involved observation of sentencing in open court and one to one interviews with sentencers in five Crown Court centres across England. Interviews were conducted with 27 full time judges and 13 recorders (*ibid* viii; 5–6; see also Jacobson and Hough, 2011).

Also in 2007, Drewry, Blom-Cooper and Blake published their research into the recent history and present day operation of the Civil Division of the Court of Appeal (Drewry et al, 2007). Although the authors conducted semi-structured interviews with 10 of the then 37 Lords Justices of Appeal (*ibid* 8), the study focused exclusively on the workings of the Court's Civil Division (*ibid* 5–6).

The most recent studies are those by Dhami (2013a), Fitz-Gibbon (2013), and Darbyshire (2011). Dhami's study sought to ascertain the views of Crown Court judges on the operation of English sentencing guidelines. A self-administered survey was issued during a judicial training event in 2010. A total of 89 Crown Court judges participated in the study (Dhami, 2013a: 298).² Fitz-Gibbon's study sought to examine whether English legal practitioners and the English judiciary considered the mandatory life sentence for murder to be in the best interests of justice (Fitz-Gibbon, 2013: 507). Fitz-Gibbon interviewed six members of the English judiciary, along with 20 practising barristers and three policy representatives, to consider arguments for and against the mandatory life sentence for murder (*ibid*). This study was part of a larger research project examining the comparative effects of homicide law reform in the English, New South Wales and Victorian criminal justice systems in which in-depth interviews were conducted with 81 judges and practitioners across the three jurisdictions (*ibid*; see also Fitz-Gibbon, 2016).

In the course of research sponsored by the Nuffield Foundation, Darbyshire spent seven years interviewing and shadowing 40 judges from across the full range of courts in England and Wales and interviewing a further 37 judges (Darbyshire, 2011: 5–6). Darbyshire reports that her ethnographic study of the judiciary was conducted with the support and assistance of Sir Igor Judge, the former Lord Chief Justice of England and Wales (*ibid*). The study aimed to describe by observational research a sample of judges in their working lives, examining, inter alia, the judges' career backgrounds and aspirations; their day to day work and workload; the job of judging; their attitudes towards recent and proposed changes in procedure;

² The structure and operation of the English sentencing guideline system is considered in Chapter 6.

their attitude towards proposed changes to the trial structure; and their relationship with the jury (*ibid* 2). Darbyshire's report of the way in which her fieldwork was conducted stands in stark contrast to earlier studies of the English judiciary:

The amount of information gleaned over the years was overwhelming. I was granted unlimited access to the research judges and many others and everything that impinged on their work. There was absolute transparency. There was almost no activity from which I was debarred and no documentation denied (*ibid* 10).

Darbyshire considers such unprecedented access to the professional judiciary 'a prize beyond jewels' (*ibid*). Crucially, however, Darbyshire explicitly states that hers was *not* a study in either judicial decision making or sentencing (*ibid* 15). She states that there are 'ample sentencing studies in the UK [*sic*], which interview magistrates, the primary sentencers' and cites the same studies listed by Baldwin (2008). In so doing, Darbyshire appears to disregard the fact that Scotland has its own legal system³ and fails to note that a small number of important studies on the sentencing practice of the professional judiciary have been conducted in this jurisdiction.

Previous Research on Scottish Judges and Sentencing

Insofar as sentencing research on the judiciary is concerned, it is probably fair to say that more has been achieved in Scotland than in England and Wales (Ashworth, 2003: 326). In 1988, for example, a group of academics at the then Department of Jurisprudence, University of Glasgow, published the results of a study examining the use made by the Scottish criminal courts of their power to award payments of compensation from convicted offenders (Maher et al, 1988). The research, funded by the Scottish Office, was seen as making a contribution to general issues of the use of sentencing powers and, in particular, to the question of how sentencers adapt to a new disposal (*ibid* 15).

The research was carried out over a three year period between October 1981 and December 1984 (*ibid* 16). Interviews with various criminal justice professionals were conducted during the second half of the project (*ibid*). Prior to embarking on the main study, the researchers undertook a pilot study involving semi-structured interviews with, inter alios, 11 sheriffs across six sheriff courts (*ibid* 17). Following the submission of an interim report based on the pilot study in November 1982, the researchers commenced the main study which involved interviewing 48 sheriffs in 23 towns and cities across Scotland (*ibid* 18). The range of topics in the questionnaire included general attitudes towards compensation via the criminal courts and the perceived effects of the system on offenders and victims; the types of offence for which compensation orders were, and were not, made; the relationship between compensation orders and other methods of disposal; and the factors which inclined sentencers to award compensation (*ibid* 18).

³ As Garland (1999a: xiv) notes, the Scottish criminal justice system differs from the standard reference points for scholarly discussion which tend still to be the US and the UK and, all too often in such scholarly discourse, 'the UK' really means England and Wales. See also Croall et al (2010: 5–8) and McAra (2008: 481).

In a later review of the methodology used in the research project, the lead researcher commented:

A point which is worthy of public record is the extensive co-operation given to the researchers by those we interviewed and also the considerable goodwill and interest shown towards the project. To say the least, our experience augurs well for future co-operation between academics and legal practitioners in the field of criminal justice research (Maher, 1988: 34).

The Scottish Office continued to fund sentencing research. The study by Carnie (1990) sought to record and assess the perceptions of Scottish sentencers towards community service as a disposal (*ibid* 1). Carnie interviewed two High Court judges, 21 sheriffs and 14 lay justices of the peace between June and August 1989. The interviews addressed sentencers' perceptions of community service in relation to other sentencing options, their views as to the purpose and philosophy of the community service order, and their attitudes towards the operation of community service schemes (*ibid* 1–2).

In 1993 the senior judiciary approached academics at Strathclyde University to assist in developing a Sentencing Information System, or 'SIS' (Ashworth, 2003; Hutton, 2013b and 2003: 326; Hutton and Tata, 2000: 316–22; Tata, 2013: 245 and 2010a: 210). Tata reports that implementation of the SIS was phased-in during the 1990s and handed over to the Scottish Courts Service in 2003. It was decided that clerks of court would assume responsibility for maintaining the system and by keeping it up to date by recording information on sentenced cases. The quality assurance processes recommended by the university team were not, however, followed by the Scottish Courts Service; the entry of data after 2003 was not reliable and the SIS 'appears to have been left to quietly wither away' (Tata, 2013: 247 and 2010a: 210; see also Ashworth, 2015: 453). In any event, as Ashworth (2003: 326) notes, even the development of the SIS fell short of the kind of fundamental qualitative research required in order to better understand judicial decision making.

Tata et al (2008) undertook a four year qualitative study on the preparation and use of pre-sentence (or social enquiry) reports. The study was funded by the Economic and Social Research Council and examined pre-sentence social enquiry reporting from the perspective of both social workers and sheriffs (*ibid* 839). The authors conducted 17 interviews with sheriffs in two sheriff courts after sentencing diets had been observed and conducted five focus group discussions with sheriffs throughout Scotland (McNeill et al, 2009: 425). A total of 26 sheriffs participated (*ibid*). The aim of the authors was to explore in-depth the communication process between the producers of reports (criminal justice social workers) and their principal consumers (sentencers) (*ibid* 424; Tata et al, *ibid* 839; Tata, 2010b: 243).

An earlier study by Tata and Hutton (1998) focused on the issues of consistency and disparity in sentencing. The study, funded by the Scottish Office, was initiated by 10 sheriffs who sat in three separate courts within the same sheriffdom. These sheriffs decided that they would find information about their own sentencing practices useful and approached the authors for assistance (*ibid* 342). The custodial sentencing patterns of the 10 sheriffs were examined by collecting retrospective information on all custodial sentences passed by them over a two year period. The objectives of the study were, firstly, to provide the respondents with information about their own sentencing practices and, secondly, to devise a means of examining the nature and extent of variation in custodial sentencing practices by comparing the sentencing practices of each sheriff (*ibid*). As these two studies focused on, respectively, pre-sentence

reports and sentencing disparity, neither was designed to specifically consider the nature of the decision making process by examining issues such as the methodology of sentencing, the aims of sentencing, judicial discretion, reception of appeal court judgments in the sheriff court and guilty plea discounting in detail. In any event, and as Hutton himself later noted, the study was conducted on a small scale and cannot be generalised to the country as a whole (Hutton, 2003: 322).

One of the most insightful studies of judicial perceptions of the sentencing process and of judicial methodology in sentencing is *A Unique Punishment—Sentencing and the Prison Population in Scotland*, published by Tombs in 2004. The study was designed to be comparable with the earlier study by Hough et al (2003). It aimed to understand how sentencing practices affect the prison population in Scotland; it sought to identify what might discourage sentencers from making use of custody and what might encourage them to make use of alternative community sentences. In addition to an analysis of government statistics on sentencing and the prison population over the preceding 10 years and an observation of decision making in the sheriff courts, Tombs undertook one to one semi-structured interviews with five judges, 34 sheriffs and a stipendiary magistrate. The interviews took place at 16 sheriff courts across Scotland's six sheriffdoms (Tombs, 2004: 15).

In order to gain insight into the factors that influence sentencers in deciding whether or not to impose a custodial sentence, Tombs' interviews with sheriffs included questions about how they had made specific sentencing decisions in borderline cases involving adult offenders where they had recently passed (i) a prison sentence after giving serious consideration to specific non-custodial options, and (ii) a non-custodial sentence, having seriously considered a short prison sentence (*ibid* 16). Further work was published based on the research in which Tombs examined the ways in which policy rhetoric has become a reality for sentencers and how this framed sentencers' practices (Tombs, 2008); in which Tombs and Jagger explored the ways in which sentencers made their decisions to imprison and called for a better understanding by policy makers and legislators of sentencers' logic (Tombs and Jagger, 2006); and in which Millie, Tombs and Hough examined how sentencers in Scotland, England and Wales differed in their sentencing decision making. This last study concluded that, despite differences between the two legal systems and criminal justice structures, the decision making process in the two jurisdictions was in fact remarkably similar (Millie et al, 2007).

'The Human Face of Judging'—Sentencing Research in other Commonwealth Jurisdictions

Important studies on judicial methodology in sentencing have been conducted in Commonwealth jurisdictions, particularly Canada and Australia. One of the earliest such studies was conducted by Hogarth. Hogarth's study focused on the sentencing behaviour of 71 magistrates in the Canadian province of Ontario and was published in 1971 as *Sentencing as a Human Process*. Hogarth explained that his research was 'directed towards formulating generalizations about observed regularities in behaviour' and, to this end, three principal questions were asked: '[a] What does sentencing mean to each individual judge? [b] What common patterns of meaning exist among the judges as a group? [c] What does sentencing mean to us as students of the process?' (Hogarth, 1971: x).

Mackenzie (2001: 32) notes that Hogarth's research remains of interest and importance because of its depth and relative rarity. The three questions posed by Hogarth are substantially the same as those posed both by Mackenzie (*ibid*) and by the present study, over 40 years later.

Three further Canadian studies are also of relevance. Firstly, research into the Canadian judicial system was conducted by McCormick and Greene in the late 1970s and early 1980s; the results were published in 1990 (McCormick and Greene, 1990). Interviews were conducted with 91 judges at all levels of court in Alberta and Ontario; basic biographical data was also collected for a sample of 277 judges across Canada (*ibid* vi). The authors analysed the appointment of judges, judges' backgrounds, their attitudes to sentencing and their role in decision making through interviews with the judiciary in Alberta and Ontario. Secondly, the Canadian Sentencing Commission conducted a written survey of judges' opinions on various sentencing issues. The Commission noted in its 1987 report that judges from across Canada responded to the invitation and that many judges included thoughtful comments in their responses (Canadian Sentencing Commission, 1987: 281). Finally, Doob and Beaulieu conducted research on the sentencing of young offenders in the early 1990s (Doob and Beaulieu, 1992). A set of four hypothetical cases was sent to approximately 60 youth court judges across Canada. Respondents were asked to indicate what sentence they would impose and to answer a series of questions relating to the case (*ibid* 40). Completed questionnaires were returned by 43 judges (*ibid* 39).

In Australia, Seifman interviewed 22 county court judges and 16 Supreme Court judges for his study on plea bargaining in the state of Victoria (Seifman, 1982). More recently, Bartels conducted interviews with 16 Tasmanian judicial officers for her 2008 doctoral thesis at the University of Tasmania entitled *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania* (Bartels, 2008; see also Bartels, 2009). Bartels interviewed all six of the judges of the Supreme Court of Tasmania and 10 of the 12 magistrates, canvassing their views on the operation of suspended sentences (Bartels, 2009: 46–47, 2008: 92–93).

The study of sentencing behaviour in a jurisdiction outwith the UK which has most relevance to the present research, however, is that conducted by Mackenzie for her PhD thesis at the University of New South Wales entitled *A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing* (Mackenzie, 2001)—later published in *How Judges Sentence* (Mackenzie, 2005). Mackenzie examined judicial perceptions and attitudes to the sentencing process by conducting interviews with 21 judges of the District Court of Queensland and 10 judges from the Supreme Court of Queensland (both the Trial Division and the Court of Appeal) at Brisbane in November and December 1998 (Mackenzie, 2001: 9; 112–13).

Respondents were questioned about how they saw the sentencing function and their role in the process; judicial discretion; the aims and purposes of sentencing, and public opinion and the media. Mackenzie analysed the interview transcripts in detail by comparing and contrasting respondents' statements on various issues; she was then able to draw conclusions on how the judges in the study perceived the sentencing process and how they went about making sentencing decisions from the analysis of the results (*ibid* 9–10). This study provides an extremely valuable insight into the minds of sentencers. What Mackenzie says of her interview data is this:

The answers are frank, and sometimes provocative and unexpected. Above all, they demonstrate that judges are thoughtful, generally reflective as to their own practice, and at times have strong

opinions on contentious issues. In short, what is revealed is the human face of judging, together with a unique insight into how judges go about making sentencing decisions (*ibid* 37; see also Mackenzie, 2005: 12).

The same can be said of the data collected from the Scottish judges and sheriffs for the present study. Mackenzie reports that, despite geographical distance, cultural differences and the passage of time, the conclusions of her study and those of the English Crown Court study conducted 17 years earlier by Ashworth et al (1984) were remarkably similar. The results of the present study with the Scottish judiciary are, in turn, remarkably similar in places with those of Mackenzie.

Conclusion

There has been very little research exploring the issues of judicial sentencing methodology and judicial perceptions of, and attitudes towards, the sentencing process. Such studies as do exist and which have attempted to gain information through the use of judicial interviews have tended to have been undertaken by researchers in England and Wales, or in Australian jurisdictions. In Scotland, the most recent research in this vein was published over 10 years ago and so, despite their capacity to contribute to the knowledge and debate in this area, the voices of Scottish sentencers are rarely heard.

The present study critically analyses the responses of the 25 judges and sheriffs, together with case law (domestic and Commonwealth), findings from previous studies, and the results of a comprehensive review of the literature on sentencing—both the substantive law of sentencing and the philosophical justifications for a wide sentencing discretion. Conclusions are then drawn on the nature of the sentencing task and judicial perceptions and attitudes towards sentencing. In so doing, a unique insight is provided into how sentencers in Scotland make their decisions.

Chapter 2 introduces the qualitative empirical study which grounds the research. The chapter begins with a discussion of the rationale for conducting interviews with the professional judiciary. The qualitative, empirical research is then considered. Questions of access to the judiciary are examined. A discussion of the conduct of the judicial interviews is provided, along with certain issues relating to the thematic analysis of the interview data.

Chapter 3 examines judicial sentencing methodology from a comparative perspective. The Canadian courts' emphasis on individualised sentencing and the requirement of proportionality are considered. There follows an examination and critique of Australian sentencing methodology, specifically the tension between the discretion-orientated 'instinctive synthesis' approach and the 'staged' or 'two-tiered' approach which aims to make sentencing more transparent and consistent. The use of the preferred approach—that of the instinctive synthesis—in the Scottish courts is then considered.

In Chapter 4 the justification for advancing a view of sentencing based on the instinctive synthesis model is further considered by reference to its compatibility with the rule of law. The principal argument in favour of the structured approach to sentencing (that the instinctive synthesis is contrary to the rule of law) is addressed by reference to Lawrence Solum's notion of equity in the application of the rule of law and by recourse to his 'virtue-centered' theory of judging (Solum, 2003, 1994). The findings from previous studies on

judicial conceptions of the nature of sentencing are then examined and contrasted with the findings of the present study.

In Chapter 5, the operation of a wide judicial discretion in sentencing is explored through an application of Isaiah Berlin's concept of value pluralism and of the Aristotelian concept of *phronesis*, or 'practical wisdom', as recently re-interpreted by Bent Flyvbjerg (2001). The links between intuition, expert knowledge, information processing and decision making are examined in the context of sentencing law and practice.

Chapter 6 considers ways in which the discretion afforded to sentencers can be structured. Through a comparison of the current system of English sentencing guidelines and a consideration of the system of appellate sentencing guidance in Scotland, it is demonstrated that the judges and sheriffs interviewed for the study are value pluralist decision makers. In sentencing offenders, they routinely employ the concept of *phronesis* (although they never articulate the sentencing task in such terms). It will be argued that wide judicial discretion in sentencing can be justified because the sentencing task is essentially one of *phronetic synthesis* with a premium placed on the practical experience, practical wisdom and reasoning of the sentencing judge.

In Chapter 7, the guilty plea discount principle is used as a lens through which to examine the core themes discussed throughout the book. The chapter reviews the controversy surrounding the guilty plea discount. It analyses the law and practice in various common law jurisdictions and considers it in relation to the contrast between guideline sentencing and discretionary sentencing. In particular, the sentence discount jurisprudence is contrasted with the importance of practical wisdom in sentencing, the importance of context and of narrative. By reference to the judicial interviews, it is demonstrated that the system of guilty plea discounting is a matter of concern to sentencers, particularly in the High Court. It is demonstrated that defence agents and counsel have come to expect standardised discounts; that the sentencers interviewed for the study regarded the appellate guidance on discounting as too prescriptive; and that the guilty plea discount can in certain cases—especially in tandem with plea/charge bargaining—result in what are perceived by the respondents to be disproportionately low sentences.

Chapter 8 outlines the major themes which emerge from the study. It offers certain suggestions for reform of the practice of guilty plea discounting. It also draws conclusions about the nature of judicial sentencing and the sentencing methodology employed by judges in Scotland and in other Commonwealth jurisdictions.