

# **Sentencing the Multiple Offender: Judicial Practice and Legal Principle**

**Austin Lovegrove**

**Research and Public Policy Series**

**No. 59**

**Australian Institute of Criminology**

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Criminology  
Research  
Council



**Australian Government**

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**Australian Institute of Criminology**

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## Foreword

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This study comprises an empirical examination of judicial practice and policy analysis of legal principle and has been carried out with a view to understanding current practice and to further develop existing policy. It examines the approach of Victorian judges to the determination of sentencing for an offender convicted of multiple offences, where these offences are considered jointly for the purposes of sentencing. Of particular interest in this study is the case comprising multiple offences where each offence is properly regarded in its own right as a separate transaction warranting a term of imprisonment.

Justice in sentencing requires fair, coherent and openly stated policies, and their consistent application in sentencing judgments. What is offered here is description and guidance. Understanding how judges apply general sentencing principles is important, since it is a prerequisite to the evaluation of the soundness and fairness of sentencing practice.

This is a complex and technical subject and the report reflects this in its detail. The executive summary provides a useful overview of the specific legal principles and judicial practices involved in sentencing the multiple offender, for those who will primarily be interested in the outcomes of the research. These outcomes highlight the need for policy debate over how to approach the sentencing of the multiple offender. Given that a substantial percentage of criminal cases involve a multiple offender and that criminological research has shown that the majority of offences are accounted for by a smaller group of repeat offenders, the sentencing of such offenders is a matter of significant public policy interest.

The empirical work undertaken in this study, and funded by the Australian Research Council and the Criminology Research Council, indicates that there is a need to develop a more detailed and comprehensive set of sentencing principles and an associated numerical framework for guidance. This research will add significantly to criminal justice policy in Australia. To date there has been no satisfactory system of statistical guidance available to judges for the sentencing of multiple offenders.

**Toni Makkai**  
**Director**  
**Australian Institute of Criminology**

## Acknowledgments

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Santina Perrone oversaw the data collection and preliminary analysis. To these tasks she applied herself conscientiously and always responded to my various requests with good grace; Mark Halsey ably assisted Santina in collecting the data.

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## Disclaimer

The views expressed are the responsibility of the author. This research report does not necessarily reflect the policy position of the Criminology Research Council or the Australian Government.

# Contents

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Executive summary	1
Introduction	6
<b>Part 1: The totality principle in practice</b>	<b>13</b>
Chapter 1: Background to the study	14
The multiple offender as a sentencing problem	14
Sentencing the multiple offender: a decision model	16
Research on the sentencing of multiple offenders: judicial practice and numerical guidance	21
Chapter 2: The study	28
The data base	28
The analysis of the data	34
Chapter 3: Concurrency and the multiple offender: a parallel study	51
Chapter 4: Description, guidance and the cumulation of sentence: a discussion of the analysis	53
The description of sentencing	53
Guidance for sentencers	65
Concluding observations	67
Chapter 5: The phenomenon of concurrency	69
Notes	73
<b>Part 2: Proportionality in principle and practice</b>	<b>75</b>
Chapter 6: Background and the numerical standard of proportionality	76
Outline of the framework	77
Legal justification of the framework	82
Potential limitations of the framework	88
Chapter 7: The analysis of the data	91
General analysis	91
The incidence of disproportionately severe cumulation	108
Disproportionately severe cumulation and the serious sexual offender	110

---

Chapter 8: Proportionality and the cumulation of sentence: a discussion of the analysis	111
General discussion	112
Concluding observations	116
Notes	118
<b>Part 3: The totality principle</b>	<b>120</b>
Chapter 9: An alternative review of case law	121
The law	121
Case law and the numerical framework	136
Conclusion	144
Notes	146
<b>Part 4: Principled numerical guidance</b>	<b>147</b>
Chapter 10: Guidance for totality	148
The representation of the guidance	150
Use of the guidance	159
Development of the guidance	163
Conclusion	173
Chapter 11: Guidance and judicial intuition	174
Good legal decision-making	174
Intuition and good legal decision-making	175
The numerical framework and good legal decision-making	177
Intuition and structure in sentencing	181
Notes	184
Cases cited	186
References	187

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## List of figures

Figure 1	Graphical representation of the judicial decision strategy for the sentencing of multiple offenders	19
Figure 2	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) for the four categories of armed robbery (n=27)	38
Figure 3	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) and the mean individual sentence (in years) – armed robbery (n=27)	42
Figure 4	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) for the four categories of burglary (n=13)	44
Figure 5	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) for the four categories of rape (n=24)	47
Figure 6	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) and the mean individual sentence (in years) – rape (n=24)	49
Figure 7	Framework for the proportionate sentencing of multiple offenders: relationship between the percentage cumulation and the sum of the secondary sentences by mean individual sentence	78
Figure 8	Framework for the proportionate sentencing of multiple offenders: relationship between the quantum cumulation and the sum of the secondary sentences by mean individual sentence	79
Figure 9	Framework for the proportionate sentencing of multiple offenders: adjustment to percentage cumulation as a function of the mean individual sentence for the secondary sentences	80
Figure 10	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) showing the effect of excessive cumulation – armed robbery (n=27)	96
Figure 11	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) showing the effect of excessive cumulation – burglary (n=13)	102
Figure 12	Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) showing the effect of excessive cumulation – rape (n=24)	107



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Figure 13	Framework for the proportionate sentencing of multiple offenders: relationship between the quantum cumulation and the sum of the secondary sentences by mean individual sentence and degree of connectedness	156
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## List of tables

Table 1	The effects on C and P + S of potential errors in S for armed robbery (n=8)	40
Table 2	Distribution of the means for the offenders' individual sentences for armed robbery (n=27)	41
Table 3	Distribution of the means for the offenders' individual sentences for burglary (n=13)	45
Table 4	The effects on C and P + S of potential errors in S for rape (n=3)	48
Table 5	Distribution of the means for the offenders' individual sentences for rape (n=24)	50
Table 6	Relationship (in frequencies) between the type of concurrency order and the four categories of offence circumstances for armed robbery, burglary and rape	51
Table 7	Comparative percentage cumulation as a function of the sums of sentence for armed robbery, burglary and rape	55
Table 8	Indices of the distributions of sentences (in years) for theft, indecent assault, armed robbery and rape – higher courts (Victoria), 1993–1996	85
Table 9	Indices of the distributions of sentence (in years) for murder – higher courts (Victoria), 1993–1996	87
Table 10	Distribution of the sums of sentence for the secondary offences (in years) for armed robbery (n=27)	92
Table 11	Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of armed robbery – sum of sentences for the secondary offences <3 years (n=15)	93
Table 12	Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of armed robbery – sum of sentences for the secondary offences ≥3 years (n=12)	93

---

Table 13	Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of armed robbery – sum of sentences for the secondary offences <3 years (n=15)	94
Table 14	Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of armed robbery – sum of sentences for the secondary offences ≥3 years (n=12)	95
Table 15	Distribution of the sums of sentence for the secondary offences (in years) for burglary (n=13)	98
Table 16	Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of burglary – sum of sentences for the secondary offences <3 years (n=7)	99
Table 17	Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of burglary – sum of sentences for the secondary offences ≥3 years (n=6)	99
Table 18	Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of burglary – sum of sentences for the secondary offences <3 years (n=7)	100
Table 19	Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of burglary – sum of sentences for the secondary offences ≥3 years (n=6)	101
Table 20	Distribution of the sums of sentence for the secondary offences (in years) for rape (n=24)	103
Table 21	Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of rape (n=24)	104
Table 22	Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of rape (n=24)	106
Table 23	Relationship between the incidence of excessive cumulation – broad criterion – and case characteristics for armed robbery (n=27), burglary (n=13) and rape (n=24)	108
Table 24	Relationship between the incidence of excessive cumulation – strict criterion – and case characteristics for armed robbery (n=27), burglary (n=13) and rape (n=24)	109

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Table 25	Relationship between the incidence of excessive cumulation – strict criterion – and serious sexual offenders for the four categories of rape	109
Table 26	Numerical guidance: relationship between offence connectedness and the percentage contribution of sentence to total seriousness	153
Table 27	Effect on the quantum of cumulation (in years) of the degree of connectedness and the mean secondary sentence (illustrative case)	162

## Executive summary

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The multiple offender is one who has been convicted of at least two offences at the one hearing. The offences may relate to different incidents, for example a series of burglaries over an extended period; or they may relate to one incident, for example a burglary and an assault committed during the burglary; or a combination of the two, for example a burglary and assault committed at the one time and an armed robbery some months later. In Victoria, a sentence is imposed for each of the offences comprising the case and a sentence is imposed for the case. The sentence for the case is known as the effective sentence and, according to the totality principle, it should reflect the seriousness of the offences considered as a whole.

This study sought to answer three empirical questions:

- what is judicial policy, as a matter of principle and practice, for the sentencing of multiple offenders?
- how do judges apply these policies?
- do sentences imposed in these cases conform to the principle of proportionality?

The following normative questions were posed, in addition:

- how should proportionality be understood in respect to the multiple offender?
- can this be expressed as a detailed policy?
- if it can be expressed in detail, can guidelines be developed?

There were three aspects of the empirical part of the study. The first involved qualitative interviews with a group of Victorian County Court judges. The second involved collating sentencing data on rape, armed robbery and burglary from the official records for the Victorian County Court. The final aspect involved a legal review of High Court decisions and Victorian Court of Appeal decisions.

The qualitative analysis of interviews with eight Victorian County Court judges was aimed at understanding how they arrived at their judgments in cases of multiple offending. The judges were individually presented with a large number of factual circumstances representing the range of problems arising when sentencing multiple offenders and asked to think aloud as they determined the sentence in each of the cases. All the cases involved sentences of imprisonment. Thus, a case may have comprised a rape and an indecent assault committed at a later date, for which the appropriate sentences were six and three years' imprisonment. What was of interest is what factors judges take into account and how they take them into account when determining the total effective sentence for a case: in this instance what percentage of the sentence of three years for the indecent assault is

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to be added to the sentence for the rape. It may range from 0 per cent (full concurrency) to 100 per cent (full cumulation) or be some figure in between (partial cumulation/concurrency).

Analysis of the thought processes of the judges found three major factors governed their judgments about the appropriate degree of cumulation of sentence. These were:

- the length of sentence for the principal offence;
- the sum of the sentences for the secondary offences; and
- the need to avoid an inappropriately harsh ('crushing') total effective sentence of imprisonment.

The factors were reconciled as follows:

- the sentences for the secondary offences were not normally made fully cumulative;
- the more serious the case (the greater the sentence for the principal offence and the sum of the sentences for the other offences) the longer was the total effective sentence; nevertheless, the more serious the case, the less the degree of cumulation of the sentences for the secondary offences, so as to avoid a crushing sentence.

There were differences between the judges in their approach, but generally on matters of detail, and differences also in the clarity of their thinking.

The quantitative analysis examined data for the principal offences of rape, armed robbery and burglary from the official records for the Victorian County Court. The purpose of the quantitative analysis was to ascertain what degrees of cumulation were considered appropriate for a range of case circumstances. An examination was also made of these sentencing decisions with the aim of discovering whether the degrees of cumulation considered appropriate satisfied the principle of proportionality.

The data were analysed according to a model representing the judges' general approach to sentencing, discovered in the first part of the study. Accordingly, the results were presented by plotting, for each case, the degree of cumulation as a percentage against the sum of the principal and secondary sentences. There was one graph for each of armed robbery, rape and burglary. Each graph showed the degree of culmination, average and range, considered appropriate for any particular combination of years of imprisonment for the principal and secondary offences. For instance, for a case comprising two armed robberies, the sentence for each being three years, the average cumulation was 32 per

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cent, resulting in a sentence of four years. However, for a case involving five similar armed robberies, the degree of cumulation was 16 per cent, resulting in a sentence of 4.9 years. The data therefore gives a description of current sentencing practice as a statistical guide.

Before the degree of culmination in each case could be calculated, it was necessary to draft a set of rules determining whether an offence in a multiple-offence case represented a separate transaction and thus the sentence imposed required cumulation in principle. This was done by making a detailed analysis of the offence circumstances in the cases in conjunction with the judges' decisions on cumulation, with a view to discerning common practice. It was necessary to draft these rules, as appellate principle on this matter is currently stated so generally as to offer very little guidance.

The method of analysing the data in this study (that is, the data being related to a model representing the way in which judges combine the relevant factors) is to be contrasted with the use of a standard statistical method such as multiple regression. The problem with the latter method is that the way the relevant factors are assumed to be combined differs from the judges' approach. The effect of this is that relevant factors may not be identified as significant and the description of sentencing practice provided by the analysis is therefore not be suitable as guidance.

In respect to case circumstances, the data showed that the degree of cumulation was greater in cases where rape was the principal offence, but generally was not affected by the average sentence for the individual offences. The data also showed that whether the multiple offences related to a single incident or several incidents over an extended period of time did not affect the degree of cumulation.

To determine whether the degrees of cumulation described in the study were producing disproportionate case sentences, it was necessary to derive a numerical standard of proportionality. The problem encountered was that Australian courts have never determined a principled standard, let alone a numerical one. The English courts have developed a principled standard. This standard is an extension of the principle of proportionality for single offences. According to this principle, the severity of the sentence is limited by the seriousness of the offence. For the multiple offender, the limit on the severity of the total effective sentence is determined by the seriousness of classes of offence. For example, the average sentence for armed robbery may set a limit on cumulation for a large number of average thefts. In this study, the numerical standard of proportionality was derived by quantifying statements like this with the data taken from existing official sentencing statistics. These statements were then interpreted in terms of the judges' general approach (that is, cumulation by way of decreasing returns – see above).

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The results showed that on the English standard, calibrated for Victoria, at least one-third of the case sentences imposed could be regarded as disproportionate. The category of offence (rape, armed robbery or burglary) did not appear to affect the incidence of disproportionality, nor was there a difference in disproportionality between cases for which the sum of sentences for the secondary offences was high and those for which it was low. However, disproportionality was far less frequent where the offences constituted a single incident as opposed to a series of offences over an extended period of time. Finally, whether or not the offender was deemed to be a serious sexual offender, for which there is legislative provision for disproportionate sentences, was also unrelated to disproportionality.

A legal review of High Court decisions and Victorian Court of Appeal decisions (reported and unreported) was also undertaken. This was aimed at discerning the legal principles applied to the sentencing of multiple offenders, including:

- the concepts of importance;
- what factors were considered relevant; and
- how this information should be combined to determine the sentencing decision.

Particular attention was given to the coherence, completeness and level of detail of the judicial decisions.

This analysis identified some incoherence in approach as well as inconsistencies between judgments. There was also an overall lack of detail. The courts have expressly stated that there cannot be detailed policy on these matters as the case circumstances vary infinitely and to lay down rules or introduce mathematical precision would invite injustice. There are, however, three areas that were particularly problematic. These are:

- the circumstances under which a sentence should be made at least partly cumulative;
- the meaning of proportionality as it applies to the multiple offender; and
- how to determine an appropriate sentence consistent with the totality principle.

This research has highlighted the need for policy debate over what should be the approach to the sentencing of the multiple offender. Given that a substantial percentage of cases involve a multiple offender and that criminological research has shown that the majority of offences are accounted for by a smaller group of repeat offenders, the sentencing of such offenders is a matter of significant public policy interest. The empirical work undertaken in

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this study indicates that there is a need to develop a more detailed and comprehensive set of sentencing principles and an associated numerical framework for guidance. This is attempted here, as a basis for discussion. The former consists of the sequence of steps to be taken in determining the sentence for a multiple offender, together with the factors which determine whether cumulation is appropriate and, if appropriate, the circumstances affecting the degree of cumulation as a matter of principle.

The numerical framework has two elements. The first is a mathematically precise definition of the proportionate sentence for a case, together with a formula for calculating this with regard to the major factors of the sum of the sentences for individual offences, the average seriousness of these offences and the degree of connectedness of these offences. The second is a framework for exercising discretion in respect of other (principally mitigating) factors thought to be relevant in a particular case. The numerical framework represents an elaboration of the numerical standard of proportionality used in the empirical analysis. As the framework is intended to be a tool for use by the courts, the policy it gives expression to is a matter for appellate deliberation.

Justice in sentencing requires fair, coherent and openly stated policies, and the consistent application of them in sentencing judgments. The present study has attempted to achieve this for the sentencing of the multiple offender, being limited in its consideration of relevant matters by its largely empirical and numerical character.



## Introduction

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# Introduction

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This is a study of the approach of Australian judges to the determination of sentence for an offender convicted of multiple offences considered jointly for the purposes of sentencing. Of particular interest is the case comprising multiple offences, each properly regarded as a separate transaction and of itself warranting a term of imprisonment. Judges, in sentencing an offender in this type of case, fix a sentence for each of the comprising offences and determine a sentence for the case. As an example, consider an offender who commits an armed robbery and two burglaries, all on separate occasions, and upon whom the court imposes respective sentences of imprisonment of four years, one year, and one year for these offences and a sentence for the case of five years. Under investigation here is the determination of this case sentence in the light of the individual sentences; specifically, the degree to which there is cumulation of the individual sentences. This case sentence should accord with what is known as the totality principle: it should be appropriate to the seriousness and circumstances of the case viewed as a whole.

The study comprises an empirical examination of judicial practice and a policy analysis of legal principle. This is done with a view to understanding current practice and to developing existing policy so that it is broader and more detailed and suited to principled numerical guidance. More specifically, there are four parts to the study:

- a quantitative description of the way in which judges apply the totality principle;
- an empirical investigation of whether the case sentences imposed by judges are proportionate;
- a review of case law relating to the totality principle as it is to be found in decisions of the High Court and the Victorian Court of Appeal; and
- a draft elaborated policy comprising a numerical framework and the principle associated with its application for the proportionate sentencing of the multiple offender.

The first part of this study offers a quantitative description of the way judges apply the totality principle. It does this by means of an analysis of archival sentencing data and showing the relationship between the sentence determined to be appropriate to a case and the sentences fixed for the individual component offences. The sample, selected from cases heard primarily in the Victorian County Court in 1995 and 1996, comprises rape, armed robbery and burglary as principal offences. Each of these three offence types is analysed separately. The resulting quantitative picture of judicial practice can be viewed as a form of detailed sentencing statistics. However, since it shows the relationship between case particulars (sentences for offences comprising a case) and the sentence for the case, this quantitative description can also be regarded as a numerical decision aid for

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assisting judges to determine, according to current practice, a sentence for a case from the sentences considered appropriate to the offences comprising the case.

To date, there is no satisfactory system of statistical guidance available to judges for the sentencing of multiple offenders. A feature of the present analysis is that the raw sentencing data are not analysed around the structure of a standard statistical model. Rather, they are analysed in terms of a framework representing a decision model, developed by Lovegrove in a previous study in which judges provided a record of their thinking as they determined sentences. The model takes the form of a decision strategy – a set of working rules – more or less followed by Victorian judges as a means of approach to this sentencing problem. The advantages of this analytic strategy compared with the conventional one are twofold: the quantitative description represents a more complete and less distorted picture of actual practice, and it can be used more accurately and readily as a means of guidance.

What is offered here, then, is description and guidance. Understanding how judges apply general sentencing principles is important, since it is a prerequisite to the evaluation of the soundness and fairness of sentencing practice. Moreover, judges cannot be confident of sentencing according to current practice unless they have reliable information on what that practice is. Guidance, too, is of value. Individualised sentencing, as in Victoria, places extraordinary demands on the cognitive capacity of judges. One would be surprised if at least occasionally the crosscurrents of aggravating and mitigating factors characterising a case did not overwhelm the sentencing judge; when this occurs the outcome will be unreliable sentencing. Simply, in the absence of description and guidance, there is the danger of unjust, idiosyncratic and incoherent sentencing (see Lovegrove 1989, 1997a).

This first part of the present study, then, describes how judges apply an important sentencing principle – namely, the totality principle – to the sentencing of the multiple offender. But are the case sentences imposed according to the totality principle appropriate? In the thinking of many academics a sentence should not be regarded as appropriate if its severity exceeds what is proportionate to the seriousness of the offence, incorporating the harm to the victim and the offender's culpability (see for example, von Hirsch 1993). This is, of course, the principle of proportionality. Moreover, a number of jurisdictions around the world have given statutory recognition to this view (see for example, Clarkson & Morgan 1995). Victoria is one such jurisdiction, although, along with other jurisdictions, the law provides, in certain circumstances, for disproportionately harsh sentences in the interests of public protection (see Fox & Freiberg 1999). While the principle of proportionality seems most commonly to have been thought about in regard to single offences, it has obvious relevance to the multiple-offence case.

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The second part of this study is about the relevance of the principle of proportionality to multiple-offence cases. It begins with Lovegrove's recent prescriptive analysis aimed at setting up a numerical standard for proportionality in this type of case. The product of this work is a formula for calculating what quantum of sentence should be regarded as proportionate in a particular case, the formula taking account of the sentences considered appropriate to the individual offences comprising the case. This numerical analysis is based on the work of two English academic lawyers – David Thomas and Andrew Ashworth – who, relying on legal analyses, attempted to discern appellate thinking on this matter. Their interpretation is that under the totality principle the severity of the case sentence should be proportionate to the seriousness of the class of crime of the offences comprising the case: thus, for example, a common burglar should not receive a sentence of a degree of severity appropriate to a rapist, though there be, respectively, multiple burglaries and a single instance of rape. In order to calibrate the numerical framework, based on this idea, Lovegrove made reference to the sentences for single offences, using the official Victorian statistics. Following the presentation of this prescriptive analysis, the second part of the present study then investigates whether sentences determined according to the totality principle, as described in the first part, accord with the principle of proportionality as it is operationalised in the numerical standard. In view of the importance attributed by many to proportionality as a criterion of just sentencing, this question deserves an answer. And it should be regarded as a pressing question. For it would appear that in Australia, in contrast to England, what is regarded as an appropriate case sentence may exceed the levels of sentence considered proportionate to the class of offence comprising the case.

To appreciate this, it is necessary to understand what Australian courts have said about the totality principle. According to Fox and Freiberg (1999), there are two underlying considerations – proportionality and mercy. Mercy as a concept is clear enough – amelioration of a deserved sentence's harshness, regard being had to the offender's rehabilitation prospects and other circumstances such as state of health – although how the degree of mercy considered appropriate is determined in a particular case is left open. In any case, mercy is not the focus of the present study. Proportionality for the multiple offender requires commensurability between sentence severity and the seriousness of the offences considered singly and together. But this interpretation is critically vague: in respect of the present discussion, it would allow a level of sentence considered appropriate to a case above that which is proportionate to the class of offence comprising the case. Wells (1992), in her Western Australian study, entertained the same possibility when she asked rhetorically why the sentence considered proportionate to a case comprising a number of unrelated offences should be constrained by the level of sentence proportionate to the most serious of those offences as a class of crime.

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Certainly, Australian appellate courts have not expressed the view that they feel so constrained. Indeed, in Victoria at least, the idea of the case sentence not crushing the offender appears historically to have been the express policy consideration limiting cumulation. Not surprisingly, then, proportionality as a component of the totality principle appears in Fox and Freiberg's 1999 edition – the reference is to an unreported 1991 decision of the Victorian Court of Appeal – but not in their 1985 edition. In light of all this, in the sentencing of multiple offenders, there is a real possibility of the sentence imposed in a case lying on the harsh side of proportionality as represented by the seriousness of the class of the individual offences. What is somewhat curious is that in Australia clear expression has not been given to the idea of the seriousness of classes of offence as a basis for constraint on cumulation. In the leading case of *Mill*, the High Court cited Thomas (1979) on the totality principle (with approval and without apparent qualification). In doing this the Court quoted the section in which Thomas makes it apparent that the totality principle may require a case sentence less than the sum of the individual sentences; yet the Court made no reference to adjacent passages in which Thomas introduces the standard for constraint as the seriousness of classes of offence. Indeed, the High Court in its judgment in *Postiglione* seemed primarily to rely on the concept of the crushing sentence as a basis for constraining cumulation.

Parts 1 and 2 of the present study involve empirical studies of judicial practice: a quantitative description of how judges apply the totality principle and an empirical investigation of whether sentences imposed under this principle are disproportionate. An accurate and complete description of practice, it will be recalled, requires that the data be analysed according to a decision framework consistent with the judicial approach to this sentencing problem. This was identified in Lovegrove's earlier study involving judges giving a record of their thinking as they determined sentences. However, although it was possible to develop a framework on the basis of that work, it could be regarded as no more than tentative and incomplete, since Victorian judges are yet to formulate an agreed-upon approach to the sentencing of the multiple offender. Moreover, whether a sentence is disproportionate can be determined only against a standard of what is proportionate. But, as discussed above, this is still open as a matter of law. Clearly, for a greater understanding of this sentencing problem, what is required is a broader and more detailed sentencing policy.

To this end, Part 3 of the present study presents a review of case law as it is to be found in judgments of the High Court and the Victorian Court of Appeal in regard to what is considered correct by way of approach to the sentencing of the multiple offender. This comprises the sequence of decisions to be followed when applying the totality principle, as well as the three sets of concepts/principles to be found in this sequence, namely, sentences for the individual offences, the cumulation of sentences, and the totality principle.

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But it is a review with a particular focus. The relevant principles and concepts are examined in order to understand and interpret their numerical meaning and implications. Then Lovegrove's numerical framework defining proportionate sentencing is examined in the light of this legal review. Some matters will be a part of the framework but not in the law, these arising by virtue of the detail inherent in numerical precision. In this, the framework is more than just offering numerical precision and a decision structure for what is. It is also challenging the law on what should be. Yet there is no presumption here, for the High Court has yet to think through the topic. If it does, as foreshadowed by Kirby J in his judgment in *AB*, the present framework may aid the Court in its understanding of the detail and scope of the problem and in resolving what is correct by way of approach. Nevertheless, let it be clear what this review of sentencing policy does not do: it makes no attempt to address the theoretical underpinnings of that policy. This would be clearly beyond the scope of the present study. Nevertheless, because of the specificity of its conclusions, it will give the penal theorists much to talk about, as in the discussion in Bottoms (1998).

The final part of the present study – Part 4 – takes this review of case law and the numerical framework and offers a draft elaborated policy for the sentencing of the multiple offender. It does this as a means of guidance for consistency of approach. The policy comprises the numerical framework and the principle associated with its application. Since the framework reflects legal principle, it is a numerical statement of what ought to be; it thus would offer prescriptive guidance. (This is to be contrasted with the guidance developed in Part 1 – this was guidance based on current practice – namely, descriptive guidance.) Guidance built on policy brings added burdens. In an individualised system of justice, guidance can never show more than the effect on the quantum of sentence of the major factors and factor combinations, consistent with sentencing principle. Thus it is no more than presumptive. Accordingly, guidance also has to act as a standard against which to consider the effect on sentence of the less common case circumstances according to principle. Guidance as a description of policy must be accurate, and make clear what factors are incorporated in it and their effect in combination. There is no place for the broad brush here. Moreover, guidance as a standard must facilitate the accurate allowance for the extra against the existing.

This raises three matters: what the guidance is to look like; how it is to be used; and what steps need to be taken to introduce it. Each is considered in turn. What the guidance would look like can only be illustrative, of course, since it is based on a draft policy. And since the framework is envisaged as a tool of the courts, the underlying policy awaits judicial evaluation. With these deliberations should come not only an accepted judicial policy but also greater clarity of thought and new insights in respect of the sentencing of multiple offenders according to the totality principle. But the resulting framework does

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something more fundamental than offer a numerical representation of policy and act as a decision aid. It makes available to judges a means of reaching their sentencing judgments by way of a structured approach as against intuition. Thus, its adoption would be contrary to current judicial wisdom: sentencing cannot involve the mechanical application of qualitative and quantitative rules as a means to a precise determination of punishment (see the judgment of the Victorian Court of Criminal Appeal in *McCormack* and the judgment of the High Court in *Ryan*); sentencing cannot but be instinctive because it involves a feeling for the application of the criminal law to the particular circumstances of the case (Phillips 1983). But should these views hold sway? Are they able to withstand critical analysis? Or does the framework have something worthwhile to offer? Perhaps, in fact, it represents better legal decision-making. Indeed, that will be the argument.

Now to the detailed account of the empirical investigation and policy analysis for the sentencing of the multiple offender.

## Part 1: The totality principle in practice

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# Chapter 1

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## Background to the study

Some time ago Lovegrove developed a decision model describing how judges in Victoria attempt to apply the totality principle to determine sentences for cases in which offenders are convicted of multiple offences. In this, the first part of the present study, this model is used as a framework to analyse archival sentencing data in order to show the quantitative relationship between the sentence imposed for a case and the sentences fixed for its comprising offences. The analysis is done separately for cases in which rape, armed robbery and burglary are principal offences. This work offers:

- a description of current sentencing practice for the multiple offender; and
- a prototypal numerical decision aid for judges determining, according to current practice, the sentence in a case from the sentences considered appropriate to its comprising offences.

Before proceeding with these analyses, however, it will be helpful to give a brief overview of the multiple offender as a sentencing problem, of the development and content of Lovegrove's decision model, and of previous attempts to describe judicial practice and develop numerical guidance, especially in regard to the sentencing of multiple offenders. Each of these matters is considered in turn.

## The multiple offender as a sentencing problem<sup>1</sup>

The multiple offender considered here is one who has been convicted of at least two offences (counts) at the one hearing. The offences may be of the same kind (for example, three burglaries) or different in kind (for example, an armed robbery and a burglary). In Victoria, the judge fixes a sentence for each of the offences comprising the case and a sentence for the case; the latter sentence is known as the effective sentence. The sentence for each offence should reflect its seriousness and be appropriate. The present analysis is restricted to considering cases of multiple offending in which the sentences for the comprising offences have been determined by the court to be ones of imprisonment. In order to determine the effective sentence for a case, regard must be paid to the relationship between the circumstances of the offences. If the comprising offences are part of a single transaction (for example, three counts of resisting arrest relating to the offender's being tackled by three people at the one time) then the sentences for the three offences are served concurrently. Under these circumstances the effective sentence is the sentence for the most serious of the offences.

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However, if the comprising offences constitute separate transactions (for example, three armed robberies, each one committed on a different day and against a different victim) then the sentences for the three offences should in principle be served cumulatively. It is to this situation that the totality principle applies (Thomas 1979). This principle states that the effective sentence should be of a degree of severity appropriate to the seriousness of the offender's criminality in the circumstances of the case viewed as a whole; it thus allows considerations of proportionality and mercy to be brought to bear in determining an effective sentence. The High Court has in its decisions referred to the totality principle with approval (see the leading case of *Mill*, and the recent judgment in *Postiglione*). Effective sentences imposed by Victorian judges in accordance with this principle are normally less, sometimes very much less, than the sum of the sentences for the comprising offences as separate transactions. This is achieved by making some of these sentences – sentences that in principle should be fully cumulative – fully or partially concurrent; indeed, in some cases, the circumstances will call for full concurrency as appropriate.

However, the Victorian Court of Appeal has given only limited guidance to sentencing judges as to how they should apply the totality principle when determining effective sentences in multiple-offence cases. In *Grabovac*, the trial judge had first determined the effective sentence he thought was appropriate to the case and, then, in the light of this, set sentences for the individual comprising offences so as to achieve that result. The Court criticised this approach, one reason being that it is all too easy for a sentencing judge to ignore or to underestimate the seriousness of one or more of the comprising offences; therefore, the correct approach is first to fix a (proportionate) sentence appropriate to each comprising offence and only then, in the light of these sentences, fix an effective sentence for the case. Almost certainly the trial judge was, at the time, not alone in his approach to the sentencing of multiple offenders. Moreover, one would not be surprised if this approach still found favour among sentencing judges. This is because the trial judge's approach represents holistic thinking and is a product of intuitive thought. By way of comparison, the above appellate approach is analytic and requires more deliberative thought. The latter would present a difficulty for some sentencing judges, since intuition is well entrenched as a mode of thought for Victorian judges (see Lovegrove 1997a).

In view of the limited appellate guidance in regard to this sentencing problem, clearly what is correct by way of approach has been left largely to the individual judge. Have the judges responded to this challenge? Is the determination of effective sentences characterised by an absence of detailed thought? Or is there evidence of a decision strategy – working rules – for the application of the totality principle in particular cases?

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## Sentencing the multiple offender: a decision model

Lovegrove (1997a)<sup>2</sup> attempted to identify how judges determine effective sentences for multiple offenders according to the totality principle. What follows is a summary of the decision model and its development.

There are two significant contributions to our understanding of the sentencing of the multiple offender, these being by the English academic lawyers Thomas (1979) and Ashworth (1983b, 1992, 1995), who analysed judgments of the English Court of Appeal in an attempt to identify an implicit decision strategy. These contributions are fairly characterised as qualitative and limited in scope. To take these analyses further, Lovegrove considered possible implications of them, including aspects not covered directly by them, and in this way generated a detailed and comprehensive hypothetical decision model. This, then, was used to derive predictions regarding how judges would determine sentence according to the totality principle in multiple-offence cases.

For this purpose approximately 60 hypothetical cases were especially formulated and presented singly or in pairs, these representing various potentially critical aspects of the sentencing of the multiple offender. The cases in this exercise were presented in the form of skeleton descriptions; for example, in one pair of cases, one case comprised an armed robbery for which the appropriate sentence was four-and-a-half years and a three-year arson, and the second case comprised a four-and-a-half-year burglary and a three-year arson. (In each case, the assumption was to be made that the offender had a serious relevant criminal record and little if anything by way of mitigation.) The point of these two cases, of course, was to investigate whether the degree of cumulation of the sentence for a secondary offence is greater where the legal category of the principal offence is more serious.

Eight experienced County Court judges participated. They individually were required to determine effective sentences for the cases and to provide a detailed record of their thinking as they determined a sentence for each case. By this technique, there was an attempt to identify, in Bottoms' (1998) terms, the 'deep structures' developed by judges as a means of solving this sentencing problem. The County Court is at the intermediate level in the court hierarchy. Of the more serious criminal matters, most – all except a few very serious matters – are determined in the County Court. The analysis of the judges' responses showed the hypothesised decision model to be untenable. Nevertheless, in these responses it was possible to discern an alternative decision model describing a strategy for the sentencing of the multiple offender.

This decision strategy for the determination of effective sentences seems best represented as a three-stage process. In the first stage, the scene is set for the cumulation – the offences comprising the case are sorted into separate transactions, and sentences imposed

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for these offences; in the second stage, attention is directed at the effect on cumulation of the sentence for the principal offence (transaction); and the third stage deals with the treatment of the sentences for the secondary offences (transactions). This following strategy should be seen as underlying the judges' attempts, when imposing effective sentences in multiple-offence cases, to moderate what otherwise would be an effective sentence equal to the sum of the sentences for the separate transactions. The idea behind this is the minimisation of the potentially crushing effects of imprisonment. These decision processes are now elaborated.

**Stage 1.** The judge must first group the offences into separate transactions, and impose an appropriate sentence for each of these offences. Where a single offence constitutes a separate transaction, the sentence for that offence represents that transaction. Where two or more offences form a single transaction and together constitute a separate transaction, the highest sentence fixed for those offences represents that transaction. Once this is done, the judge identifies the principal offence (transaction); the principal transaction is the transaction with the highest sentence or, when two or more transactions have equally high sentences, any one of these. The sentence for the principal offence (transaction) is regarded as the foundation for the cumulation in the sense that the effective sentence is built upon this sentence. Consider, for example, a case comprising three armed robberies and an aggravated burglary, for which the respective sentences were five, three, three, and four years; assume also that the first armed robbery and the aggravated burglary formed a single transaction, and that the second and third counts of armed robbery were separate transactions. The former two offences would constitute the principal transaction and there would be two secondary transactions – the latter two offences. The sentences of five and four years would be served concurrently and the two sentences of three years in principle would be served cumulatively. How the judge determines the extent to which these latter two sentences should be served partially cumulatively on the sentence of five years so as not to offend the totality principle is the subject of the next two stages of the decision model.

**Stage 2.** The effective sentence is treated as comprising the full measure of the sentence for the principal offence (transaction) and a proportion (component) of the sentences representing each of the secondary offences (transactions). It follows from this that the sentence for the principal offence (transaction) governs what scope is left for the quantum cumulated upon this sentence to reflect the seriousness of the secondary offences (transactions). Where the sentence for a principal offence (transaction) is higher, so the quantum of sentence cumulated to allow for the seriousness of the secondary offences (transactions) in the effective sentence is a smaller proportion of the sentences appropriate to these other transactions. This stage of the strategy can be illustrated numerically. Consider a case comprising an armed robbery and 10 counts of burglary, all separate

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transactions, for which the respective sentences are 10 years and one year each; little of the 10 years of sentences for the burglaries should be added on to the sentence for the armed robbery (say, two years – 20 per cent of the 10 years for the burglaries, giving an effective sentence of 12 years) because its sentence of 10 years already presents a daunting prospect to an offender. But was the sentence for the armed robbery only three years, then a greater proportion of the 10 years of sentences for the burglaries would be made cumulative (say, 2.5 years – 25 per cent of these 10 years) because concern over the crushing effects of the potential effective sentence would carry less weight.

It is but a small step from these examples to a numerical representation of the process for taking account of the sentence for the principal offence (transaction) in the determination of effective sentences. This can be done by way of a graph, and is shown in Figure 1. It is a plot of the total of the sentence appropriate to the principal offence (transaction) (P) and the sum of the sentences appropriate to the secondary offences (transactions) (S) (in years) against the percentage of these latter sentences made cumulative on the sentence for the principal offence (transaction) (C). The preceding two examples are entered in this graph, and labelled '1' and '2', respectively. (The reason for plotting C against P+S and not against P will be given later.)

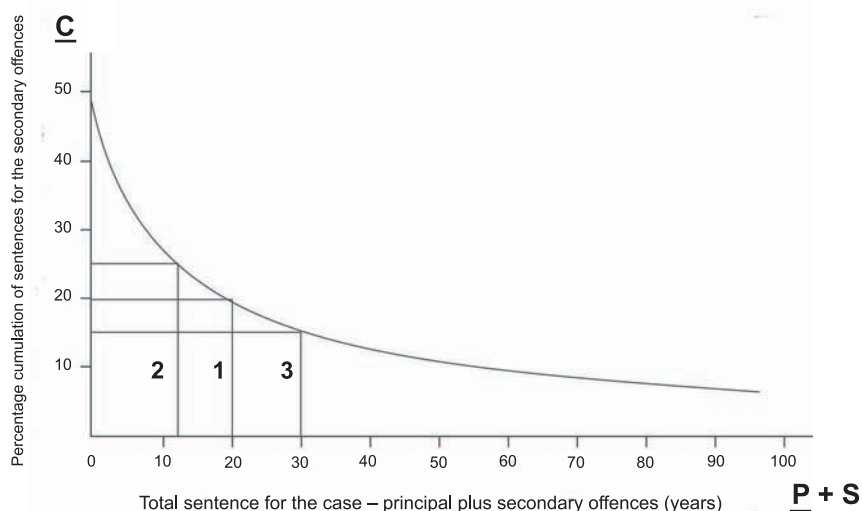
**Stage 3.** The scope for cumulation having been determined by the sentence for the principal offence (transaction), it is then possible to determine the proportion of the sentences for the secondary offences (transactions) to be added on to the sentence for the principal offence (transaction). As the sum of the sentences for the secondary offences (transactions) becomes higher, so the quantum of sentence cumulated to represent the seriousness of these transactions in the effective sentence must be a smaller proportion of their appropriate sentences. Nevertheless, this progressive decrease in the proportion cumulated must be tempered to ensure that the quantum cumulated is greater where the sum of the sentences for the secondary offences (transactions) is higher.

For a numerical example, recall the previous illustration of a case comprising an armed robbery and 10 counts of burglary, for which the respective sentences were 10 years and one year each; the point was made that little of the 10 years of sentences for the burglaries should be added on to the sentence for the armed robbery, because of the concerns about a crushing effective sentence. (In fact, 20 per cent or two years of these sentences were cumulated, making an effective sentence of twelve years.) But if the sum of the sentences for the burglaries was 20 years, then an even lesser proportion of the (20 years of) sentences for the burglaries would be made cumulative (say, 15 per cent of these 20 years – three years, making an effective sentence of 13 years), because concern over the crushing effects of the potential effective sentence would carry greater weight. Nevertheless, in this latter case this lessening of the proportion of these sentences for the

secondary offences cumulated would be moderated to ensure that the quantum actually added on to the sentence for the principal offence was greater and, hence, the effective sentence reached was higher, since it was more serious, there being 20 (cf. 10) years of sentences for the burglaries. This third example is also entered in Figure 1, and labelled '3'. The curve in Figure 1 describes a process of cumulation in which the increase in sentence is progressively less and less the more serious the case.

The representation of this second factor – the sum of the sentences for the secondary offences (transactions) (S) – and the first factor – the sentence for the principal offence (transaction) (P) – on the same curve requires the assumption that the functions describing their effects on the percentage cumulation (C) are for practical purposes the same. This assumption appears to be reasonable for two reasons. First, both must provide for cumulation by way of decreasing gains. Secondly, the range on the sentence for the principal offence (transaction) in a representative sample of cases will be but a fraction of the range on the sum of sentences for the secondary offences (transactions). For example, in the sample of cases used in Lovegrove's (1998b) subsequent archival study – summarised below – the sentence for the most serious principal offence (transaction) was 11.3 years, whereas the highest sum of sentences for the secondary offences

**Figure 1: Graphical representation of the judicial decision strategy for the sentencing of multiple offenders**



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(transactions) was 246.5 years. Consequently, even if the curves representing the effects of P on C and S on C were different, the error associated with the assumption of equivalence would necessarily be negligible. This concludes the statement of the decision strategy.

What must be appreciated is that this decision strategy, as revealed in the sentencing exercise, was no more than adumbrated in the eight judges' thinking. Across the cases, its applicability was not always recognised by the judges and, when it was recognised, it was expressed in varying detail and completeness, and the sentences fixed were not always in accordance with it. Indeed, only two of the judges demonstrated a more than superficial understanding of this sentencing problem, but even they appeared to a significant extent to be formulating on the spot what seemed appropriate by way of approach. It is, therefore, a largely intuitive process. Nevertheless, the judges' statements of the strategy as a general approach were largely coherent when and to the extent it was used to determine an effective sentence for a case. Other decision strategies (or part-strategies) were adopted by the judges to determine effective sentences in particular cases; however, these strategies were specific to those individual cases. The decision strategy presented here was the only discernible strategy offering a general approach in this type of case.

It will be apparent from this summary of the character of the judges' responses that they have not developed an explicit and systematic approach to determining effective sentences for multiple offenders according to the totality principle. Accordingly, the above decision model should be seen as an ordered and rounded-out statement of the judicial decision strategy in this type of case. It is a strategy of which the judges have varying awareness and comprehension and which, despite its apparent precision, cannot be said to more than loosely govern their thinking. Thus, the 'deep structures' of the judges were, as predicted by Bottoms (1998), underdeveloped. Moreover, as proposed by Bottoms, they can serve as a basis for the development of policy. This is demonstrated in the present study, the final draft elaborated policy representing a refinement of this decision model. However, what this also shows, but apparently Bottoms did not envisage, is the judges' narrative accounts of their working rules being represented in numerical terms.

The development and content of Lovegrove's decision model having been outlined, the scene is set to illustrate its application in the context of the present study. It will be recalled that the aim here is to develop a method for analysing archival sentencing data in order to show numerically the relationship between the sentences fixed for the offences comprising a case and the sentence determined to be appropriate to the case. In order to be consistent with the decision model, what is required is a graph of the relationship between the percentage cumulation of the sentences for the secondary offences (transactions) (C) and the total of the sentence appropriate to the principal offence (transaction) (P) and the sum of the sentences appropriate to the secondary offences (transactions) (S), together

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with a curve providing for decreasing returns, as shown in Figure 1. This figure represents a reciprocal function. For illustrative purposes, it was calibrated on the basis of one of the eight judges' responses to (a different) set of hypothetical cases. In this, the second part of the study, these cases were presented not in the form of skeleton descriptions, but as comprehensive summary descriptions for which the judges determined effective sentences and sentences for the comprising offences. What this demonstrates is a numerical representation of the relationship between the effective sentence and the sentences for the comprising offences, it being based on a descriptive decision model of the judges' strategy for determining sentences in multiple-offence cases. In view of this, the numerical representation can be said to be faithful to the structure of judicial thought.

In a subsequent study, Lovegrove (1998b) used archival sentencing data to test the validity of the general form of the decision model and, in doing this, showed the relationship between the effective sentence determined for a case and the sentences fixed for each of its comprising offences. The 69 cases in the sample had all been heard in the Court of Criminal Appeal in Victoria between 1985 and 1994, and armed robbery was the principal offence in each instance. As required by the model, the percentage cumulation of the sentences for the secondary offences (transactions) was the dependent variable and the total of the sum of the sentences appropriate to the secondary offences (transactions) and the sentence appropriate to the principal offence (transaction) was the independent variable. Again, the algebraic model representing these data was found to be the reciprocal function.

This strategy for describing judicial practice – the fitting of data to a decision model determined independently of these data and consistent with the structure of judicial thought – offers a new approach, which has implications for description and guidance. It is, therefore, appropriate to review past research on these two matters.

## **Research on the sentencing of multiple offenders: judicial practice and numerical guidance**

Empirical research relevant to the present study covers both attempts to describe judicial practice and to develop guidance for practice. Although this body of research does not fall neatly in two categories, it will be considered separately for the present purpose.

### *Studies of judicial practice*

Traditional empirical criminological research has greatly increased our knowledge about the general and specific legal factors (for example, respectively, offence seriousness and value of the money stolen in a crime of dishonesty) determining sentence (see for example,



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Ebbesen & Koneèni 1981; Palys & Divorski 1984). But this extensive body of research has left many matters without firm answers. Indeed, in respect of the multiple offender, it has little to offer. Rare are studies examining the relationship between the seriousness of the offences comprising a case and the sentence imposed in that case. Moreover, when multiple offending is recognised as a part of the sentencing decision, case seriousness is often represented by only one factor, such as the number of offences comprising the case. Finally, these sentencing studies of the multiple offender provide no explanation of how the relevant elements of case seriousness are put together to determine an effective sentence. The reason for the third aspect is the reliance of these studies on standard descriptive statistical techniques as a means of representing the relationship between sentence severity and case seriousness. In this work, the representation is in accordance with the structure inherent in the particular statistical technique applied to the data.

Consider, by way of example, the use of the common linear multiple regression to study the sentencing of the multiple offender; and assume that the independent variables are as in the author's decision model above. Such an analysis would represent the determination of the effective sentence as a process in which the linear effect of the sentence for the principal offence and the linear effect of the sum of the sentences for the secondary offences are, as it were, simply added together. Clearly, this represents a quite different, and indeed much simpler, decision structure than that underlying the judges' approach to the determination of effective sentences, as described in the preceding section. Of course, valuable is the finding by researchers both in Victoria (Polk & Tait 1988) and in England (Moxon 1988) that the greater the number of comprising offences the more likely a prison sentence or a longer sentence, not least because it demonstrates the importance of this sentencing problem. However, it tells us little about judicial reasoning or the structure of judicial thought. Moreover, these studies identify correlates of sentence, not necessarily determinants of decisions. For example, if the sum of the sentences for the secondary offences is a determinant, but the number of offences is not, the latter included in an analysis would be found to be significant, nevertheless, because of its correlation with the former.<sup>3</sup>

### *The development of numerical guidance*

Typically, official sentencing statistics provide little guidance, especially for the sentencing of multiple offenders. As an example, take Victoria, where official statistics for the higher courts have been produced annually (see for example, Department of Justice, Victoria 1997).<sup>4</sup> Of especial relevance to judges sentencing individual offenders is Table 4 of the Victorian Department of Justice report. It classifies offences according to the principal offence of individual offenders and, for each of the legal categories of offence (for example, armed robbery), shows the distribution of sentences imposed on the individuals for this

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offence as principal. There is no equivalent table for effective sentences, although in 1996 a table was introduced giving indices (median, etc.) relating to the effective sentence, classified by principal offence (Table 11 of the Victorian Department of Justice report). Unfortunately, the guidance is but rough and incomplete. In Table 4 no distinction is drawn between single-offence and multiple-offence cases and, in respect of the latter, sentences relating to all offences (full concurrency) and those relating to just the principal offence (at least partial concurrency). Moreover, in respect of both tables, an approximate quantum for the upper limit of each range could be ascertained by aggregating the distributions across several years for a principal offence, but these data provide no measures for making gradations within each range according to case characteristics.

Work has been done to make sentencing statistics more detailed. These information systems aim at showing how the distributions of sentence for the various categories of offence (for example, robbery) are affected by particular offence and offender characteristics of the cases underlying each of the distributions. In the classificatory schemes of these systems, therefore, distinctions are drawn; first, between legal categories of offence (or closely related offences) and secondly, between the factors (for example, value of the theft) and their associated categories (for example, monetary amounts) thought to be relevant to sentence. Once the offence categories and the case factors have been agreed on, it is necessary to compile a large database of cases from archival records and to file each case according to its description in the scheme.

For this, the legal category appropriate to a case is determined by its principal offence. This system is computer-based. To use the database for a particular case, the sentencer enters the case description in terms of the classificatory scheme, and the output is the sentences previously imposed in the jurisdiction for cases in that offence category and with that particular combination of offence and offender characteristics. The system incorporates only the more common case factors. In systems characterised by individualised justice as in Australia and in the United Kingdom, where numerous factors are of potential relevance to sentence, it will therefore almost always be necessary for the judge to take account of additional factors in order to do justice in a particular case. In these instances, the system's output – a distribution of sentences – becomes a reference point against which the judge will exercise discretion to allow for the effects on sentence of these other aggravating and mitigating factors. There are two major well-developed information systems, one in Scotland (see Hutton, Tata & Wilson 1994; Hutton et al. 1996; Tata et al. 1998), the other in New South Wales (see Chan 1991; Potas 1997; Potas et al. 1998; and, for an update, the web site of the Judicial Commission of New South Wales at [www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au)).

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In evaluating these systems for the present research, there are two general issues. The first concerns how well their general approach to classification copes with the description of cases comprising multiple offences. 'Not well', must be the conclusion. These systems represent case seriousness as a pattern of offence and offender characteristics; this is the source of the problem. The approach struggles with single offences; it becomes strained to breaking point in many cases of multiple offending. To illustrate this, it is convenient to distinguish between offences as a part of the one incident and those arising from separate incidents, as well as between multiple offences of the same type and those differing in character.

Consider the Scottish system. For single incidents where the offences differ in character (for example, an assault resulting in injury associated with an armed robbery) the approach is conceptually sound and can be made to work in some instances. In regard to this example, what is required is a factor of injury in the classificatory scheme for robbery. There are, however, practical limitations. One is that it falls short to the extent of there being associated offences for which their constituent behaviour cannot be brought within the scope of a factor; false imprisonment of the victims of a robbery may be one. A second limitation is that with more than a handful of factors, many offence–offender combinations will have few cases, rendering their data unreliable. For this reason, where there is individualised justice, the variations in seriousness of one type of offence often cannot be adequately represented, let alone various combinations of different types of offence.

Then there are separate incidents where the offences are of the same type (for example, a series of robberies committed over a number of weeks) or single incidents where the offences are of the same character (for example, the wounding of multiple victims on the one occasion). When applied to these circumstances the approach is on unsteady ground, again. For example, each of the individual factors in the scheme must represent, with respect to harm, the seriousness associated with the case in the aggregate. Now, while this can be readily envisaged for some factors (for example, the total value of the theft) it seems problematic for others (for example, personal injury). Finally, this approach cannot cope with cases comprising offences differing in character and related to separate incidents (for example, a robbery and an unrelated assault). The reason is simple: offence factors and the elements of offence factors vary across legal offence categories; for example, injury is relevant to robbery but not to theft, while organisation considered in specific terms differs between robbery and theft.

In New South Wales, where an offender has been sentenced for more than one offence, the sentence for only the principal offence, generally determined by sentence severity, is included in the database. In respect of multiple offending, there is the facility for judges to distinguish between cases in which there is one count of the principal offence and those in which there is more than one.

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Clearly, the sentence for the principal offence will be the sentence for the case only in those instances where the sentences are fully concurrent. Now, in many multiple-offence cases, the comprising offences represent separate transactions and, on this basis, there is cumulation of sentence. In such instances, no data are provided on the sentence for the case. How many cases fall in this category is anyone's guess, but the number may be substantial. Thus, there will almost certainly be a serious gap in the information provided by the system about sentences for multiple offenders.

And what about the validity of the sentencing data in the system? Consider, first, cases characterised by full concurrency. In general, where a case comprises offences regarded as separate transactions, the sentence for the principal offence will be disproportionately harsh relative to that offence's seriousness. This is because the sentence will have been inflated to cover the additional seriousness associated with the secondary offences. The exception is for offences constituting one incident and differing in character, but the principal offence covers the full seriousness of the case (for example, the false imprisonment is treated as a part of the seriousness of the robbery). In all other types of multiple offending, the sentence for the principal offence must be treated as the sentence appropriate to the seriousness of the case, not that of the principal offence, and thus as a poor indication of the sentence appropriate to the principal offence.

Secondly, there are cases characterised by full cumulation. In such instances the sentence for the principal offence may be disproportionately lenient relative to the seriousness of the principal offence. This is because the sentence for the principal offence may have been reduced so that the overall sentence for the case satisfies the totality principle. Again, the sentence for the principal offence will give a poor indication of the sentence appropriate to that offence. Both these considerations represent factors acting to invalidate the sentencing statistics as a representation of sentences appropriate to the seriousness of offences as principal for the various categories of offence.

The element of this system specific to the multiple offender is the case factor of the number of counts of the principal offence. But in this it offers little to the discrimination between offences. When the option of one count is selected, it will call up cases comprising one offence, one incident (offences differing in character), and separate incidents (offences differing in character). And when the option of more than one count of the principal offence is exercised, in incidents where the offences differ in character there will be multiple counts of the principal offence and one or more other offences. In the former, no distinction is drawn between one or numerous other offences; in the latter, no distinction is drawn between two or numerous counts of the principal offence. This is a significant shortcoming in the system, since multiple offences, especially when serious, can add years to what

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otherwise would be the appropriate sentence. Clearly, the sentence for the principal offence often will be much less than the sentence imposed for the case and bear little relation to it. Hence, the sentencing statistics offer little worthwhile information about the distribution of sentences considered appropriate to cases of multiple offending. Moreover, the distinction in the statistics between one and more than one count of the principal offence adds little to their usefulness in this respect.

There are other factors differentiating the seriousness of cases of multiple offending (for example, the seriousness of the comprising offences) but not included in the scheme. Of course, the reason for only one factor, and for two and not more divisions on this factor, is, as already explained, that with numerous distinctions the cases representing each pattern will be few and the data, accordingly, unreliable.

The approach of the Scottish and New South Wales' systems to the classification of cases by way of patterns of case characteristics leaves the seriousness associated with cases of multiple offending inadequately represented. As a result, at least in regard to the multiple offender, these systems fail to achieve their stated goal of detail in the sentencing statistics. Accordingly, for the purpose of guidance to the sentencing judge, they offer little information on past practice over and above what is to be found in the current official sentencing statistics; indeed, since the number and nature of the offences underlying the distribution of sentences are largely unspecified, the information on sentencing practice has the potential to mislead. In the present study, a different approach is taken to the representation of cases of multiple offending with the result that there is the potential to take account of fine differences in seriousness between cases. It treats the problem for what it is: the cumulation of seriousness across offences, the seriousness of each offence being considered individually, and it does this by way of an aggregation rule reflecting a decision model representing how judges approach the sentencing of the multiple offender.

The second issue in the evaluation of these information systems concerns how well the information it provides on past practice can be used by the sentencing judge to determine sentence in a particular case. To consider this, it will be helpful first to examine the approach of the present study. In this the role of the decision model is also crucial.

The distinctive contribution of the present study to the problem of quantifying the relationship between the effective sentence imposed for a case and the sentences fixed for the offences comprising the case is that the sentencing data are to be analysed in accordance with a decision model faithful to the structure of judicial thought, rather than in relation to the structure inherent in a standard descriptive statistical technique and incompatible with that thought. One advantage of this approach, illustrated in the above section on judicial practice, is that it provides for a more accurate and complete description of judicial decision-

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making. A second advantage is that it facilitates the sentencing judge's use of the statistics as a guide to what is appropriate by way of sentence in a particular case. The fact is that no guideline, including numerical guidance, can be expected to take account of the less important and less common factors and relationships. Accordingly, numerical guidance as a decision aid is to be regarded as providing no more than a standard or reference sentence against which the sentencer must, by way of a discretionary judgment, allow for the additional influence on this quantum of punishment of the rare and less significant matters and of possible new policy considerations bearing upon the particular case. It would be expected that necessary adjustments to the reference sentence when allowing for the effects of these other matters would be made more accurately and readily by judges where the decision aid's statistical information was compiled in a way consistent with the logic underlying their own thinking (see Lovegrove 1989, 1995, 1997a).

Contrast this with the existing information systems. The point has already been made that these systems can show the effect on sentence of only a relatively small number of case factors. As a result, in an individualised system of justice where numerous factors are at once of potential relevance to sentence, the sentencer is left with a wide discretion when using the system. Moreover, as these systems do not organise the representation of the relationship between case fact and sentence around a model of judicial decision-making – indeed, they are avowedly atheoretical with respect to combination (see Weatherburn et al. 1988) – the sentencer is left without a logic – a framework – for estimating the effect on the reference sentence of the factors relevant to sentence in the particular case but not taken account of in the guidance.

In summary, the development of detailed sentencing statistics for the sentencing of multiple offenders requires that a quantitative relationship be established between the effective sentence and the sentences for the comprising offences. Moreover, the representation of this relationship must be compatible with the judicial approach to the determination of effective sentences. The present study attempts to satisfy these two requirements.<sup>5</sup>

## Chapter 2

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### The study

This quantitative description of the judicial approach to the sentencing of multiple offenders covers, separately, the offences of armed robbery, burglary and rape. These offences were chosen for two reasons. First, for these offences high effective sentences of imprisonment are often appropriate, either because of the number of comprising offences or the seriousness of the offences. Secondly, these three offence types vary in terms of their seriousness as categories of offence – rape and armed robbery are very serious, burglary is of moderate seriousness – and in terms of the nature of the offending – armed robbery is violent property, rape is violent sexual, and burglary is non-violent property. It might be that these characteristics are determinative of the degree of cumulation. Armed robbery is included in the present study, even though it was used in Lovegrove's (1998b) study. Towards the end of the period covered by that study – 1985–1994 – judges were required by section 10 of the *Sentencing Act 1991* (Vic) to adjust the levels of sentence they would have previously thought appropriate as a means of allowing for the abolition of remissions.<sup>6</sup> In regard to the cumulation of sentence, it was apparent to the author in his personal communications with judges at about this time that some believed there was a mood in the community for harsher sentences for multiple offenders. This aside, section 8 of the *Sentencing (Amendment) Act 1993* (Vic) introduced the presumption of cumulation for certain types of case: of particular relevance to the present study is the strong presumption of cumulation for serious sexual offenders, this in practice applying principally to offenders convicted of three or more sexual offences. Also of significance is section 5 of the same Act, which allowed disproportionately harsh sentences of imprisonment for serious sexual offenders.<sup>7</sup> Indeed, these factors were responsible for the courts' declaring that in general greater effective sentences were appropriate to multiple sexual offenders (see, for example, the judgments of the Victorian Court of Appeal in *Lakeland*, *Cowburn*, *Higham* and *Mantini*).

### The database

The sample comprised individual multiple offenders upon whom, at the one hearing, sentences of imprisonment had been imposed for at least two offences, each representing a separate transaction, one of the sentences being made to some extent cumulative.<sup>8</sup> The study's focus gives these sample characteristics their relevance.

To determine whether the principal offence was one of armed robbery, burglary or rape, the following criteria were invoked, as required, in order: length of the term of imprisonment; number of instances of the offence; and seriousness of the category of offence, according to the statutory maximum penalty.

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Only offenders whose sentence was passed in 1995 or 1996 in one of the higher courts (that is, Supreme Court or County Court) in Victoria were included in the sample. Nevertheless, an appeal against sentence by the prosecution or defence subsequent to this period did not disqualify the offender. Most were sentenced in the County Court, although for a few sentencing was in the Supreme Court.

Where two or more offenders were sentenced for the same offences arising from a common enterprise, each individual could be included in the sample as long as either their sentences for the individual offences or their effective sentences were different. And where two or more presentments were determined jointly, and they related to the one individual, the present analysis treated them as a single instance. But where an individual was sentenced while still serving a sentence, only information relating to the offences and sentences in the later (that is, present) presentment were included in the study.

Finally, in some instances it was clear from the judge's remarks that one or more of the sentences imposed on the offender were not appropriate to the immediate facts of the case. The reason given for this was to do justice in the case, having regard to matters lying outside the immediate circumstances; for example, when sentencing for one or more of a series of closely related offences crossing interstate boundaries, the sentence of imprisonment imposed may be less than it would have been otherwise, to allow for the time spent in custody interstate. Clearly, such instances could not be included in the sample, since the present study requires the assumption that the sentences for the individual offences are appropriate to the seriousness of those offences and that the effective sentences were determined according to the totality principle.

Both quantitative and qualitative data were recorded in relation to the sentencing of each of the offenders in the sample. The former included a list of the offences in the presentment, the sentences imposed for the individual offences, the concurrency orders and the effective sentence, as well as a list of other offences, if any, admitted and taken into account in determining the effective sentence. Included, to the extent available, in the qualitative data were: a description of the circumstances of the offences sufficient to determine for each offence whether it should be regarded as a separate transaction or as a part of a single transaction with one or more of the other offences; the judge's view of the relatedness of the offences; the reason given by the judge for the degree of cumulation ordered; comments by the judge on the appropriateness of the sentences for the individual offences; and any other information relevant to the above.

Sentencing judgments were the primary source of information. For most offenders in the sample, they were from the court sentencing in the first instance; however, where there was an appeal the primary source was the appellate court judgment. Sometimes relevant



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information, particularly details necessary to determine the relatedness of the offences, was not covered fully in the judgments. In these instances, the data were taken from other documents in the file; for example, the formal statements of the particulars of the offences.

The information on each of the offenders in the sample came from their case files. The principal means of identifying potentially relevant files was case lists generated from computer records held in the Office of Public Prosecutions. These lists showed cases involving one of the three offences of interest – not necessarily being the principal offence – and determined in the time frame of the study. There was a separate list for each of the offences of armed robbery, burglary and rape. Sometimes co-offenders were listed together for a case, although often a co-offender would be listed as a separate case. For each offender there was a record of offences, sentences, and hearing dates relating to that case. An offender's file was traced by means of the case number on the list. It should be noted that each of the three lists generated a very large number of cases; to make the study manageable, only every third case was followed up. An inspection of the more up-to-date case cards and, particularly, the files themselves revealed that many of the cases did not satisfy the selection criteria. Sometimes this was due to errors or gaps in the case lists; other times it was because some of the selection criteria could not be applied in the absence of detailed information contained only in the files.

For many of the cases, a transcript of the sentencing judgment was not in the file. This document, of course, is essential to the study. For appellate judgments this was easily made good, because unreported and reported appellate judgments are readily available. However, in regard to the first-instance judgments, their unavailability was generally because one had never been made. Fortunately, for those cases heard in Melbourne – the vast majority – a tape recording was available from which the Victorian Government Reporting Service could make a transcript. Every attempt was made to obtain the files that were not available when they were first requested.

Just prior to the analysis of the data and once due time had elapsed for any appeal to be determined, the cumulative index of *Current Criminal Cases Supreme Court of Victoria* (1997), together with the *Victorian Reports* and the *Australian Criminal Reports* were checked to ensure that account had been taken of the results of all successful appeals.

Matters of general importance to an understanding of the database having been outlined, information specific to each of the three offences is presented now.

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### *Armed robbery*

On application of the selection criteria, the sample comprised sentencing data for 27 offenders. All were male. One female did qualify, but was excluded because she was a part of a common enterprise with a male offender who was charged and sentenced similarly.

Following Lovegrove (1998b), each individual's data were classified according to the circumstances of his offending. There are four categories in the classification, cases across the categories appearing to differ in character and in a way that might be thought to affect the degree of cumulation considered appropriate. In this way, the classification provides a description of the sample. The categories are: single event (n=8); escapade (n=4); multiple event (n=6); single-multiple event (n=9). The following definitions vary only slightly from the original classification.

The single event was subdivided into two categories: simple (n=5); complex (n=3). The simple and complex are alike in that there is only one armed robbery, with one or more victims, but in the former the one or more connected offences are committed at the same time as the robbery (for example, a false imprisonment), whereas in the latter, one or more of the connected offences occur some time before or after the robbery (for example, the theft of a motor car for the robbery, or the offender's resisting arrest in respect of the robbery), the location and victim/s being different. An offence is connected in the sense that it is committed to further the enterprise.

To qualify as an escapade, there has to be at least two separate armed robberies (one offence may be an attempted armed robbery) and (normally) locations/victims, or at least one armed robbery and a separate unconnected offence (for example, an armed robbery and a separate burglary), it being immaterial whether or not there are connected offences, and, for both, all the offences have to be committed on the one day and/or night.

For multiple events, there are two subdivisions. They share the characteristic of offence separateness for at least two of the offences in respect of days and victims/locations, and in both there are no offences connected with the armed robberies. The distinction is that in one sub-group there are only armed robberies (one may be an attempted armed robbery) (n=3) and in the other sub-group there is at least one armed robbery and one unconnected offence (n=3).

The definition of a single-multiple event follows from the above: offences satisfying the 'multiple event' category except that at least one armed robbery, if considered alone, would fall in either the 'simple' or the 'complex' sub-category.

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In most instances the character of the set of circumstances was clear so that there was little opportunity in the application of the rules for unreliability to have distorted the picture painted by the classificatory scheme.

It is important to stress that these categories are no more than a convenient means of describing the circumstances of the offences comprising the cases in the sample. They are not definitions with legal significance.

### *Burglary*

On application of the selection criteria, the sample comprised sentencing data for 13 offenders. All were male; there were no eligible females. As for armed robbery, each individual's data were classified according to the circumstances of the offences comprising the case. Again, the categories are: single event (n=2); escapade (n=0); multiple event (n=7); single-multiple event (n=4). The following definitions vary only slightly from those for armed robbery.

The single event was sub-divided into two categories: simple (n=1) and complex (n=1). The simple and complex are alike in that there is only one burglary, with one or more victims, but in the former the one or more connected offences are committed at the same time as the burglary (for example, a false imprisonment), whereas in the latter, one or more of the connected offences occur some time before or after the burglary (for example, the theft of a motor car for the burglary, or the offender's resisting arrest in respect of the burglary), the location and victim/s being different. An offence is connected in the sense that it is committed to further the enterprise (for example, obtaining property by deception in realising the value of the stolen goods).<sup>9</sup>

To qualify as an escapade, there has to be at least two separate burglaries (one offence may be an attempted burglary) and (normally) locations/victims, or at least one burglary and a separate unconnected offence (for example, a burglary and a separate theft), it being immaterial whether or not there are connected offences, and, for both, all the offences have to be committed on the one day and/or night.

For multiple events, there are two sub-divisions. They share the characteristic of offence separateness for at least two of the offences in respect of days and victims/locations, and in both there are no offences connected with the burglaries. The distinction is that in one sub-group there are only burglaries (one may be an attempted burglary) (n=1) and in the other sub-group there is at least one burglary and one unconnected offence (n=6).

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The definition of a single-multiple event follows from the above: offences satisfying the 'multiple event' category except that at least one burglary, if considered alone, would fall in either the 'simple' or the 'complex' sub-category.

In most instances the character of the set of circumstances was clear so that there was little opportunity in the application of the rules for unreliability to have distorted the picture painted by the classificatory scheme.

### *Rape*

On application of the selection criteria, the sample comprised sentencing data for 24 offenders. All were male; there were no eligible females.

As before, each individual's data were classified according to the circumstances of the offences comprising the case. Again, the categories are: single event (n=17); escapade (n=0); multiple event (n=2); and single-multiple event (n=5). The following definitions, although based on those for armed robbery and burglary, nevertheless vary in significant respects, so as to reflect differences in the circumstances surrounding the commission of these offences.

The single event was sub-divided into two categories. Both involve only one incident. The difference lies in whether there is one victim or two or more victims. In the former there will be one offence of rape and at least one other (associated) offence, including rape, other sexual offences (for example, indecent assault), and non-sexual offences (n=17). In the latter there will be at least one rape of each victim or at least one rape of one victim and another sexual offence and/or a non-sexual offence against the other victim/s (n=0).

In these cases non-sexual offences generally relate to the sexual offence either directly (for example, false imprisonment of the victim) or indirectly (for example, assaulting an associate of the victim) or to the offender's modus operandi (for example, burglary).

To qualify as an escapade, there has to be at least two separate incidents involving different victims and (normally) locations, and all the offences have to be committed on the one day and/or night. In one incident there will be at least one rape; this incident may involve offences other than rape and more than one victim. In the other incident/s there will not necessarily be a rape.

For multiple events, there are two sub-categories. Both involve at least two separate offences on different days and/or nights and (normally) locations. In each incident there will be only one offence and one victim. On one of the occasions the offence will be a

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rape, but the other incident/s may involve offences other than rape. The difference between the two 'multiple event' categories lies in whether all the offences relate to the same victim ( $n=1$ ) or at least one of the offences involves a second (different) victim ( $n=1$ ).

The definition of the single-multiple event follows from the above: offences satisfying one of the two 'multiple event' sub-divisions except that at least one incident, if considered alone, would fall in one of the 'single event' sub-categories. In respect of the two 'multiple event' categories, the 'n's for single victims and multiple victims were 0 and 5, respectively.

In most instances the character of the set of circumstances was clear so that there was little opportunity in the application of the rules for unreliability to have distorted the picture painted by the classificatory scheme.

## The analysis of the data

### *Armed robbery*

Before examining the relationship between the effective and the individual component sentences for each of the 27 offenders in the sample, it was necessary to determine whether each of the offences associated with an effective sentence should be treated as a separate transaction or as a part of a single transaction with one or more of the other comprising offences. It is only sentences relating to separate transactions for which in principle there should be some degree of cumulation and, consequentially, to which the court is required to apply the totality principle.

Herein lay a problem. The courts in sentencing judgments do not routinely express a view on the relatedness of comprising offences. Nor can the concurrency orders alone be used to address this problem, since there are numerous examples where, for a series of patently separate offences, only one or two of the sentences are made (to some degree) cumulative; this is done, of course, as a means of satisfying the totality principle. Moreover, there is not a body of appellate principle ready to be applied. Indeed, Fox and Freiberg (1999), in a review covering Australian jurisdictions, could no more than conclude thus: concurrency should be ordered when the offences relate largely to the '...same act, circumstances, or series of occurrences' (p 714); cumulation is to be preferred when the offences relate to '...truly two or more separate incursions into criminal conduct' (p 719). Yet, as Fox and Freiberg comment in regard to the former rule, there appear to be as many cases illustrating as negating it. Of course, a part of this incoherence may be to some extent apparent rather than real, and arise because the two rules are so general and their analysis is not offence- or jurisdiction-specific.

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Lovegrove (1998b) faced this problem in his archival study of multiple offenders whose principal offence was armed robbery. For that study to proceed there was no alternative but to draft rules for the purpose of determining the relatedness of comprising offences. They were formulated from the author's examining cases in the sample. To this end, he read the factual circumstances surrounding the comprising offences relating to each effective sentence in the sample, noting the court's concurrency orders and any views expressed on the relatedness of the offences. In this respect, rules could be formulated where one of two conditions held. First, where a court expressly stated that it regarded an offence as a separate transaction or as a part of a single transaction, the circumstances surrounding the offence/s were taken as a basis for defining relatedness. Secondly, where a court had ordered at least some degree of cumulation for an offence the reasonable assumption was made that the court had treated it as a separate transaction. In this, appellate decisions were given precedence over first-instance judgments. Where the court had ordered full concurrency and not commented on the relatedness of the offences, it was not possible to use the circumstances as a basis for rule formulation. For the purpose of this exercise, some cases did not present any clues; other cases provided clues, but only for some of the comprising offences.

Nevertheless, there was a sufficient number of indications under one of the above two conditions to permit an apparently comprehensive set of rules to be formulated. These rules were then used to interpret the relatedness of offences where full concurrency had been ordered and the court had not stated whether they were separate or a part of the one transaction. The rules derived from this analysis represent what appeared to be common practice; nonetheless, there were certainly a few instances of apparent disparate behaviour. Of course, since it was not possible to test the rules in all instances in the sample – concurrency being far more common – and cumulation for at least one offence was a criterion for selection in the sample, real doubt must hang over their validity as a description of current practice. Clearly, the analysis here was legal and qualitative, in the manner of Thomas's (1979) approach to his review of judgments for the purpose of formulating the underlying principle. A quantitative analysis was neither profitable nor warranted: not profitable, in view of the courts' failure to rule on the relatedness of the offences in many instances; not warranted, because these rules were offered as draft policy and, in this sense, their validity does not turn on their accuracy as a description of current practice, but rather awaits judicial authority. Finally, let it be appreciated that no rule's content can be fully appreciated independently of the set/s of factual circumstances from which it was derived. As a consequence of this, a particular rule is not necessarily valid in all the circumstances to which it apparently applies. With these explanatory and cautionary remarks, the transaction rules formulated in Lovegrove's (1998b) study are presented, with only minor modification for greater clarity. These rules are as follows:

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- offences arising from the one act, whether there be one or more victims (for example, two injury offences when two victims are injured from the firing of one shot; offences of armed robbery and aggravated burglary relating to a break-in immediately followed by an armed robbery at a private house) were regarded as one transaction;
  - offences arising from separate acts of the same nature done at more or less the same time and location and on the same victim/s (for example, multiple offences of armed robbery or false imprisonment covering several victims of the one armed robbery; three offences of resisting arrest relating to the offender's being tackled by, say, three people at the one time) were regarded as one transaction; however, an exception was made to this rule for personal injury, so that two offences relating directly to the infliction of injury, whether they be on the same victim or on two victims, were regarded as separate transactions;
  - offences arising from separate acts of a different nature done at more or less the same time and location and on the same victim/s (for example, offences of armed robbery and false imprisonment of the victim) were regarded as separate transactions; however, where an offence immediately followed or preceded the armed robbery and could be regarded as coming within its scope (for example, theft), the two offences were regarded as one transaction;
  - offences arising from separate acts of a different nature done at different times (usually not the same day) and (normally) different locations, the victim/s being (normally) different, whether the offences be connected (for example, offences of armed robbery and theft, the latter being of a motor car used in the armed robbery) or unconnected (for example, offences of armed robbery and burglary), were regarded as separate transactions;
  - offences arising from separate acts of the same nature done at different times (usually not the same day) and (normally) different locations, the victim/s being (normally) different, whether the offences be connected (for example, two offences of reckless conduct endangering life as the offender was attempting to escape after the armed robbery) or unconnected (for example, multiple offences of armed robbery) were regarded as separate transactions.

The sample in Lovegrove's (1998b) study, in which these rules were formulated, and the sample relating to the present data both comprise multiple offenders whose principal offence is armed robbery. Accordingly, the above rules were applied to the present data in order to determine whether an offence relating to an effective sentence should be treated as a separate transaction or as a part of a single transaction with one or more of the other

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offences. Even though the scope and detail of these rules were not greater than that required to deal with the circumstances arising in the original sample, they were readily applied to the current data. And in most if not all instances the correct classification of the relatedness of offences according to the rules seemed apparent. Disparity between the application of these rules and the approach of the court occurred in two cases. In one, two sentences for the false imprisonment of two victims in the one armed robbery were both made cumulative and, in the other, the sentence for an aggravated burglary preceding the armed robbery in the victim's home was made cumulative. In these two cases, for the purpose of determining the relatedness of offences in the following analysis, the judge's orders, not the author's rules, were followed.

It is now appropriate to turn to the analysis of the quantitative relationship between the effective sentences and the sentences for the individual component offences for the 27 offenders in the armed robbery sample. So as to be consistent with Lovegrove's (1997a) decision model, the relationship between the effective and component sentences was examined by investigating how the percentage of the sentences for the secondary offences (transactions) made cumulative on the sentence for the principal offence (transaction), as the dependent variable, is affected by the sentence for the principal offence (transaction) and the sum of the sentences for the secondary offences (transactions), as the two independent variables. Accordingly, for the comprising offences associated with the effective sentence for each offender in the sample, it was necessary to:

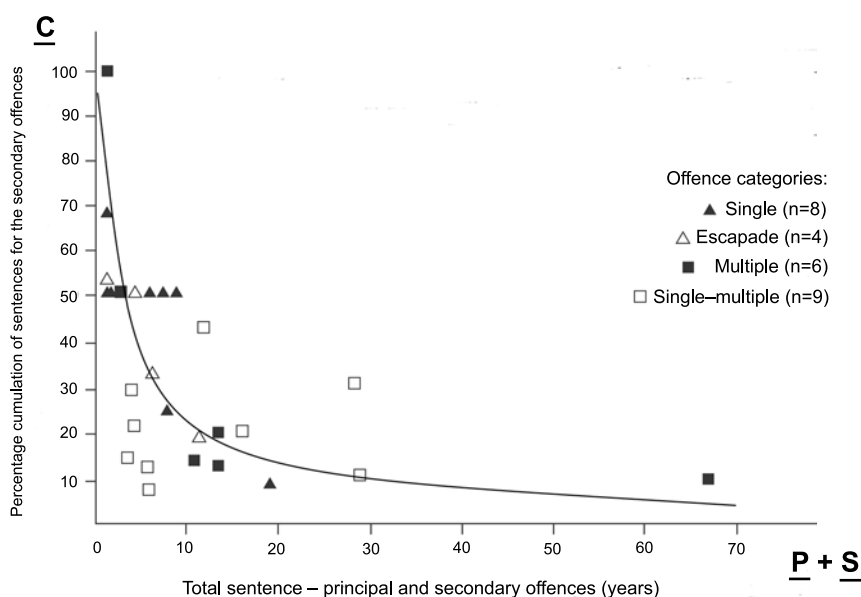
1. identify the offences constituting separate transactions and those forming a part of a single transaction with one or more of the other comprising offences;
2. determine the principal (armed robbery) offence (transaction) on the basis of sentence severity – the sentence for this offence (transaction) is the value of the first independent variable;
3. sum of the sentences for the secondary offences (transactions) – one sentence (the most severe) for each group of offences forming a single transaction and one sentence for each single offence constituting a separate transaction – this is the value of the second independent variable;
4. find the difference between the effective sentence and the sentence for the principal offence (transaction); and
5. calculate the result in '4' as a percentage of the result in '3' – this is the value of the dependent variable.<sup>10</sup>



Figure 2 is the graphical representation of the relationship between the dependent variable – the degree of cumulation of the sentences for the secondary offences (transactions) (C), as a percentage – and the sum of the independent variables – sentence for the principal offence (transaction) (P) and the sum of the sentences for the secondary offences (transactions) (S), in years – for the 27 offenders.

The data are differentiated according to the circumstances of the comprising offences. It would not have been unexpected to find that this factor affected the degree of cumulation and, in particular, that there was a lower degree of cumulation where there was one armed robbery and the secondary offences were all connected (that is, the 'single event' category), or where at least one of the secondary offences, itself perhaps being an armed robbery, was unconnected to the (principal) armed robbery, but all the offences occurred on the same day/night (that is, the 'escapade' category). Figure 2 shows evidence of something different. The points representing the 'single event' and 'escapade' categories are, as would be expected, at the lower end of the composite independent variable but, compared with the points representing the other categories and falling in the same range (that is,  $\leq 10$  years), clearly tend to a higher (mean) degree of cumulation (47.8 cf. 34.0).

**Figure 2: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) for the four categories of armed robbery (n=27)**



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The line in Figure 2 is the curve best fitting these data. To accord with the above theoretical analysis, this curve had to be consistent with Lovegrove's independently determined decision model. In respect of this, it had to:

- be asymptotic on the P + S axis, so that there is always some degree of cumulation of sentence for the additional seriousness associated with extra secondary offences (transactions);
- provide for cumulation by way of decreasing gains to ensure that the additional cumulation under the preceding point is moderated; and
- cross the C axis at a value of not more than 100 per cent, since the effective sentence cannot exceed the sum of the sentences for the comprising offences.

An algebraic model with the potential to satisfy these three theoretical criteria is the reciprocal function, defined by the following formula:

$$C = \frac{a}{1 + b(P + S)}$$

where:

C is the proportion of the (sum of the) sentences appropriate to the secondary offences (transactions) made cumulative on the sentence for the principal offence (transaction), as a percentage;

P is the sentence appropriate to the principal offence (transaction), in years;

S is the sum of the sentences appropriate to the secondary offences (transactions), in years; and

a and b are constants, determined in the process of fitting the model to the data.

This model was fitted to the data points in Figure 2 with the constraint  $C \leq 100$ ;<sup>11</sup> for this, the values of the constants a and b were found to be 96.3 (standard deviation = 25.9) and 0.334 (standard deviation = 0.175), respectively. The measure given of R-square showed that the curve accounted for 49 per cent of the variance; accordingly, this curve could be said to provide a moderate fit to the data.<sup>12</sup>

There is in this process a sense in which the data are fitted to the model (cf. the model discovered in the data). It is proposed that this is a necessary strategy for the veridical representation of decision-making where there are *a priori* (data-independent) grounds for regarding a factor as relevant, its relationship taking a particular form, and the data are seriously limited (Lovegrove 1997a, 1999b). Now, these conditions hold here: sentencing

is policy-based; the principle judges are attempting to apply to the present sentencing problem is known; and the application of this policy by judges is subject to the limitations of human information processing. Put another way, the archival data here are being used not to discover a decision strategy but rather to quantify a decision model for which there is independent empirical support.

There is potential for error in the data in Figure 2 for some of the offenders. It is where all or some of the offending comprised a single event and the sentence for a separate transaction connected with an armed robbery (for example, false imprisonment) was made concurrent with the sentence for the armed robbery. Under these circumstances, it is not clear whether concurrency was ordered to avoid excessive cumulation or because the seriousness associated with the connected offence was taken account of in the sentence for the armed robbery. Where the latter alternative represents the judge's thinking, the sentence/s for the connected offence/s should not be incorporated in the calculation of the sum of the sentences for the secondary offences. This will affect the values of both C and P + S. Since in none of the relevant instances did the sentencing judge remark on this aspect of sentence determination, it cannot be known whether the data carry this error. Accordingly, the calculations for the points in Figure 2 were redone for those offenders whose sentences are potentially subject to this error. (The adjustment could apply to one or more connected offences and one or more armed robberies for a particular offender.) There were eight such offenders; see Table 1. First to be noted is that the absolute values of P + S remain largely unchanged; this would be expected since the sentences imposed for connected offences tend to be low. In contrast, for five of the offenders, the value of C increases significantly, markedly so in two of these instances (an asterisk in Table 1 indicates these five). The effect of this on Figure 2 is that three of the four most extreme

**Table 1: The effects on C and P + S of potential errors in S for armed robbery (n=8)**

Values		Recalculated values	
C	P + S	C	P + S
25	8.0	33*	7.0
31	28.5	33	27.0
20	16.3	21	15.5
11	29.0	11	28.0
15	3.7	25*	3.0
22	4.3	33*	3.5
30	4.2	54*	3.4
13	6.0	50*	4.5

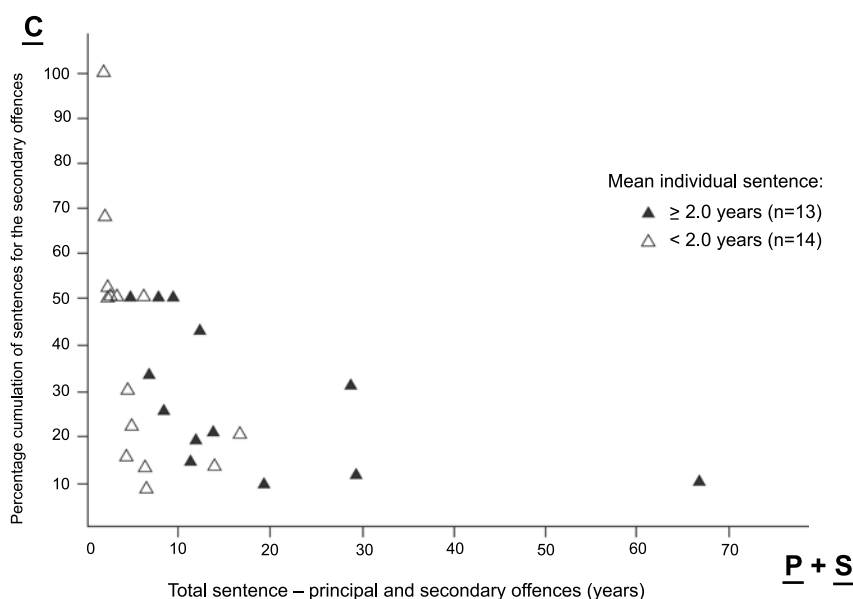
**Table 2: Distribution of the means for the offenders' individual sentences for armed robbery (n=27)**

Mean individual sentence (years)	Frequency
<0.5	1
≥0.5	5
≥1.0	4
≥1.5	4
≥2.0	2
≥2.5	1
≥3.0	3
≥3.5	3
≥4.0	1
≥4.5	2
≥5.0	
≥5.5	1
≥6.0	

points in the bottom left-hand corner move towards the body of the distribution; with this change the curve represents a somewhat better overall fit to the data, and the points falling in the 'single event' and 'escapade' categories now just tend to a higher (mean) degree of cumulation (48.6 cf. 45.7).

In examining the relationship between the effective sentence and the sentences for the component offences, also of relevance is the effect of the seriousness (as reflected in the mean) of those individual sentences. It might be that the degree of cumulation is greater where this mean is higher. To this end, offenders were divided into two categories in respect of the mean of their individual sentences: <2 years, ≥2 years; this particular cut-off point was chosen because it resulted in an approximately equal number in each category (n=14 and n=13, respectively) (see Table 2). The mean for the former category is 1.1 years, for the latter 3.7 years—a difference appropriate to a significant variation in offence seriousness – and the overall mean is 2.3 years. Figure 3 shows that the (mean) degree of cumulation tended to be greater for those offenders whose mean individual sentence was higher, for that part of the range on P + S common to the two categories (that is, 2.5–20.0 years) (31.3 cf. 24.6); however, this difference does not hold if the recalculated (mean) values of C from Table 1 are substituted (32.1 cf. 33.7).<sup>13</sup>

**Figure 3: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) and the mean individual sentence (in years) – armed robbery (n=27)**



## Burglary

Before examining the relationship between the effective and the individual component sentences, for each of the 13 offenders in the sample, it was again necessary to determine whether each of the offences associated with an effective sentence should be treated as a separate transaction or as a part of a single transaction with one or more of the other comprising offences.

The rules used for this purpose for the burglary sample are largely based on those formulated above for armed robbery. Variations between the two almost exclusively lie in the examples, and arise from differences in the circumstances surrounding the commission of armed robbery and burglary. The rules are as follows:

- offences arising from the one act, whether there be one or more victims (for example, two injury offences when two victims are injured from the firing of one shot; two theft offences arising from the theft of a motor vehicle and its contents) were regarded as one transaction;

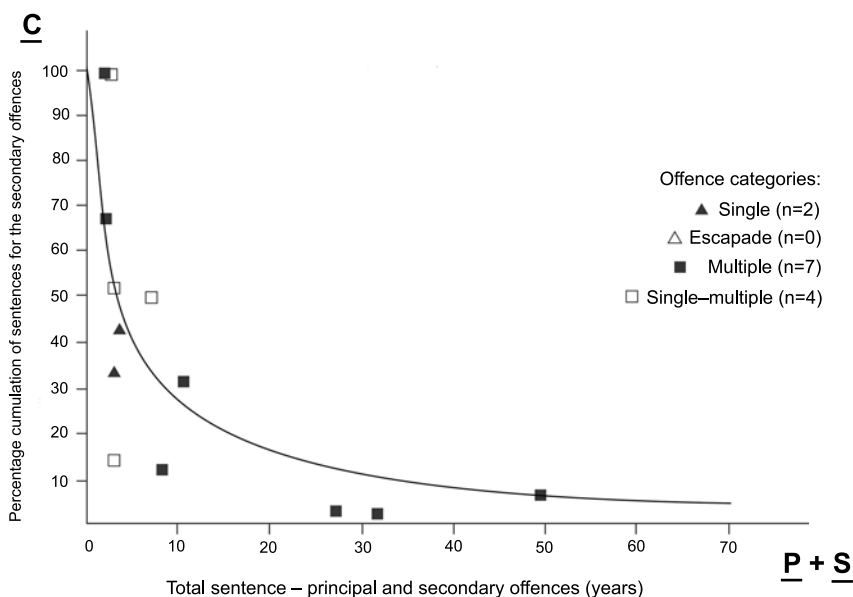
- 
- offences arising from separate acts of the same nature done at the more or less the same time and location and on the same victim/s (for example, multiple offences of false imprisonment covering several victims of the one burglary; three offences of resisting arrest relating to the offender's being tackled by, say, three people at the one time) were regarded as one transaction; however, an exception was made to this rule for personal injury, so that two offences relating directly to the infliction of injury, whether they be on the same victim or on two victims, were regarded as separate transactions;
  - offences arising from separate acts of a different nature done at more or less the same time and location and on the same victim/s (for example, offences of burglary and false imprisonment of the victim; offences relating to the kidnapping of one victim and the false imprisonment of another) were regarded as separate transactions; however, where an offence immediately followed or preceded the burglary and could be regarded as coming within its scope (for example, theft), the two offences were regarded as one transaction;
  - offences arising from separate acts of a different nature done at different times (usually not the same day) and (normally) different locations, the victim/s being (normally) different, whether the offences be connected (for example, offences of burglary and theft, the latter being of a motor car used in the burglary) or unconnected (for example, offences of burglary and an unrelated theft) were regarded as separate transactions;
  - offences arising from separate acts of the same nature done at different times (usually not the same day) and (normally) different locations, the victim/s being (normally) different, whether the offences be connected (for example, two offences of reckless conduct endangering life as the offender was attempting to escape after the burglary) or unconnected (for example, multiple offences of burglary), were regarded as separate transactions; separate drug-related offences were treated as separate transactions whether they could be thought of as the same in nature (for example, trafficking relating to different substances) or not (offences relating to cultivation and possession of the same substance).

When applying these rules to the burglary sample, in most, if not all instances, the correct classification of the relatedness of offences seemed apparent. Disparity between the application of these rules and the approach of the court occurred in four cases. In one, the sentence for a robbery as a part of a residential burglary was made cumulative on the burglary sentence and, in the other three, sentences for thefts as a part of a burglary were made cumulative. In these four cases, for the purpose of determining the relatedness of offences in the following analysis, the judge's orders, not the author's rules, were followed.<sup>14</sup>

It is now appropriate to turn to the analysis of the quantitative relationship between the effective sentences and the sentences for the individual component offences for the 13 offenders in the burglary sample. For this, as for armed robbery, following Lovegrove's decision model, Figure 4 is the graphical representation of the relationship between the dependent variable – the percentage of the sentences for the secondary offences (transactions) made cumulative on the sentence for the principal offence (transaction) (C) – and the sum of the independent variables – sentence for the principal offence (transaction) (P) and the sum of the sentences for the secondary offences (transactions) (S), in years – for the 13 offenders.

The data are differentiated according to the circumstances of the comprising offences. It would not have been unexpected to find that this factor affected the degree of cumulation and, in particular, that there was a lower degree of cumulation where there was one burglary and the secondary offences were all connected (that is, the 'single event' category), or where at least one of the secondary offences, itself perhaps being a burglary, was unconnected to the (principal) burglary, but all the offences occurred on the same day/night (that is, the 'escapade' category). Figure 4 shows a hint of this, but the numbers are too small to be of significance.

**Figure 4: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) for the four categories of burglary (n=13)**



**Table 3: Distribution of the means for the offenders' individual sentences for burglary (n=13)**

Mean individual sentence (years)	Frequency
<0.5	2
≥0.5	3
≥1.0	5
≥1.5	1
≥2.0	1
≥2.5	1
≥3.0	

The line in Figure 4 is the curve best fitting these data, yet consistent with Lovegrove's decision model. Again this was done by fitting a reciprocal function with the constraint  $C \leq 100$ ; <sup>15</sup> for this, the values of the constants a and b were found to be 100 and 0.282 (standard deviation = 0.084), respectively. The measure given of R-square showed that the curve accounted for 56 per cent of the variance; accordingly, this curve could be said to provide a moderate fit to the data.

There is potential for error in the data in Figure 4 for some of the offenders. It is where all or some of the offending comprised a single event and the sentence for a separate transaction connected with a burglary (for example, false imprisonment) was made concurrent with the sentence for the burglary. As explained for armed robbery, under these circumstances it is not clear whether concurrency was ordered to avoid excessive cumulation or because the seriousness associated with the connected offence was taken account of in the sentence for the burglary. Where the latter alternative represents the judge's thinking, the sentence/s for the connected offence/s should not be incorporated in the calculation of the sum of the sentences for the secondary offences. This will affect the values of both C and P + S. Since in none of the relevant instances did the sentencing judge remark on this aspect of sentence determination, it cannot be known whether the data carry this error. There was one offender whose sentences were potentially subject to this error. The effect of this on Figure 4 is that the point (43, 3.4) would become (100, 2.8).

In examining the relationship between the effective sentence and the sentences for the component offences, also of relevance is the effect of the mean of those individual sentences. It might be that the degree of cumulation is greater where this mean is higher. To this end, offenders were divided into two categories in respect of the mean of their individual sentences: <2 years, ≥2 years; this particular cut-off point was chosen to accord with that for armed robbery (see Table 3 for the distribution). The mean for the former



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category is 0.9 years, for the latter 2.5 years, and the overall mean is 1.2 years. The points for the two offenders whose mean individual sentences were higher (10.5, 31; 7.0, 50) were not consistent with this expectation, but the numbers are too small to be reliable (see Figure 4).

## *Rape*

Before examining the relationship between the effective and component sentences for each of the 24 offenders in the sample, it was again necessary to determine whether each of the offences associated with an effective sentence should be treated as a separate transaction or as a part of a single transaction with one or more of the other comprising offences.

The rules used for this purpose for the rape sample are largely based on those formulated above for armed robbery and burglary. Variations between the two almost exclusively lie in the examples, and arise from differences in the circumstances surrounding the commission of armed robbery and burglary as against rape. The rules are as follows:

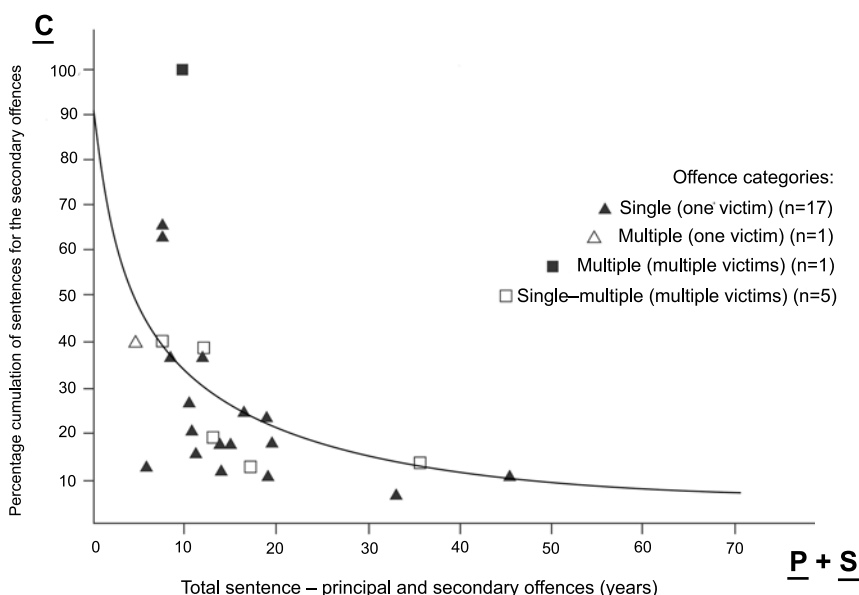
- offences arising from the one act, whether there be one or more victims (for example, two injury offences when two victims are injured from the firing of one shot) were regarded as one transaction;
- offences arising from separate acts of the same nature done at more or less the same time and location and on the same victim/s (for example, three offences of resisting arrest relating to the offender's being tackled by, say, three people at the one time) were regarded as one transaction; however, an exception was made to this rule for sexual or injury-related offences, so that two offences of rape whether they be on the same victim or on two victims, were regarded as separate transactions;
- offences arising from separate acts of a different nature done at more or less the same time and location and on the same victim/s (for example, offences of rape and false imprisonment; rape and indecent assault of the victim; rape and burglary relating to a break-in immediately followed by a rape at a private house; the rape of one victim and the indecent assault of another) were regarded as separate transactions;
- offences arising from separate acts of a different nature done at different times (usually not the same day) and (normally) different locations, the victim/s being (normally) different (for example, offences of rape and theft) were regarded as separate transactions;

- offences arising from separate acts of the same nature done at different times (usually not the same day) and (normally) different locations, the victim/s being (normally) different (for example, two offences of rape) were regarded as separate transactions.

When applying these rules to the rape sample, in most if not all instances the correct classification of the relatedness of offences seemed apparent. There were no instances of disparity between the application of these rules and the approach of the court.

It is now appropriate to turn to the analysis of the quantitative relationship between the effective sentences and the sentences for the individual component offences for the 24 offenders in the rape sample. For this, as for armed robbery and burglary, following Lovegrove's decision model, Figure 5 is the graphical representation of the relationship between the dependent variable – the percentage of the sentences for the secondary offences (transactions) made cumulative on the sentence for the principal offence (transaction) (C) – and the sum of the independent variables – sentence for the principal offence (transaction) (P) and the sum of the sentences for the secondary offences (transactions) (S), in years – for the 24 offenders.

**Figure 5: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) for the four categories of rape (n=24)**



**Table 4: The effects on C and P + S of potential errors in S for rape (n=3)**

Values		Recalculated values	
C	P + S	C	P + S
40	7.5	67*	6.5
13	35.5	14	33.5
38	12.2	57*	9.2

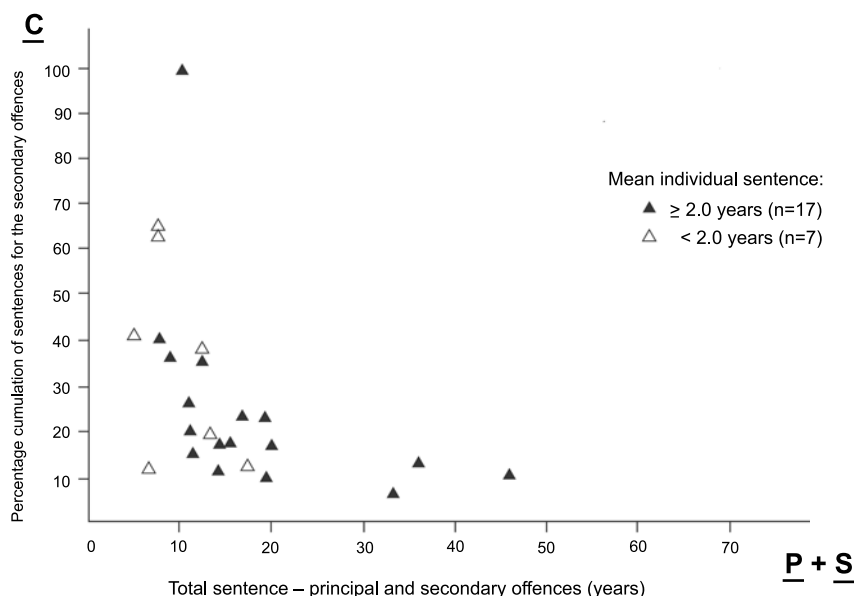
The data are differentiated according to the circumstances of the comprising offences. It would not have been unexpected to find that this factor affected the degree of cumulation and, in particular, that there was a lower degree of cumulation where there was one incident involving one victim (that is, the 'single event' category). Figure 5 shows evidence of this. The points representing the 'single event' category are distributed across the composite independent variable and, compared with the points representing the other categories, clearly tend to a lower (mean) degree of cumulation (24.0 cf. 37.6).

The line in Figure 5 is the curve best fitting these data, yet consistent with Lovegrove's decision model. Again this was done by fitting a reciprocal function with the constraint  $C \leq 100$ ; <sup>16</sup> for this, the values of the constants a and b were found to be 90.4 (standard deviation = 71.5) and 0.176 (standard deviation = 0.223), respectively. The measure given of R-square showed that the curve accounted for 27 per cent of the variance; accordingly, this curve could be said to provide no more than a poor fit to the data.

There is potential for error in the data in Figure 5 for some of the offenders. It is where all or some of the offending comprised a single event and the sentence for a separate transaction associated with the (principal) rape (for example, false imprisonment) was made concurrent with the sentence for that rape. As explained for armed robbery and burglary, under these circumstances it is not clear whether concurrency was ordered to avoid excessive cumulation or because the seriousness associated with the connected offence was taken account of in the sentence for the rape. Where the latter alternative represents the judge's thinking, the sentence/s for the connected offence/s should not be incorporated in the calculation of the sum of the sentences for the secondary offences. This will affect the values of both C and P + S. Since in none of the relevant instances did the sentencing judge remark on this aspect of sentence determination, it cannot be known whether the data carry this error. Accordingly, the calculations for the points in Figures 2 and 4 were redone for those offenders whose sentences are potentially subject to this error.

For these two data sets, it was the case that if only one of two or more connected offences was made concurrent, the adjustment was made for this one sentence. In fact, in only one instance was the sentence for one connected offence made cumulative when the sentence for a second connected offence associated with the same armed robbery (or burglary) was made concurrent; overwhelmingly, where there were multiple offences connected to an armed robbery (or burglary), either all or none of the sentences were made concurrent. This is probably due to the nature of the offending for these offences: typically, one armed robbery (or burglary) per incident with few, if any, connected offences. Not so for rape, whose character is often very different. For an incident involving a single victim there will often be multiple offences (possibly multiple rapes) and it is common for only one or some of the sentences for these associated offences to be made cumulative on the sentence for the (principal) rape. Under these circumstances it would seem quite reasonable to assume that concurrency of sentence was ordered for the other associated offences to avoid excessive cumulation, not because their seriousness had been taken account of in the sentence for the (principal) rape. If this be correct, concern about this potential error for rape is better left to those instances for which none of the sentences for the associated offences (including rapes other than the principal rape) was made cumulative. Accordingly, the calculations for the points in Figure 5 were redone for those offenders whose sentences satisfied this criterion. There were three such offenders; see Table 4. First to be noted is

**Figure 6: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) and the mean individual sentence (in years) – rape (n=24)**



**Table 5: Distribution of the means for the offenders' individual sentences for rape (n=24)**

Mean individual sentence (years)	Frequency
<0.5	
≥0.5	1
≥1.0	3
≥1.5	3
≥2.0	3
≥2.5	3
≥3.0	
≥3.5	1
≥4.0	1
≥4.5	3
≥5.0	2
≥5.5	2
≥6.0	1
≥6.5	
≥7.0	
≥7.5	1
≥8.0	

that the absolute values of P + S remains largely unchanged. In contrast, for two of the offenders, the value of C increases markedly. (An asterisk in Table 4 indicates these two.) The effect of this on Figure 5 is that the curve takes on a more definite form in the top left-hand corner. Moreover, the lower (mean) degree of cumulation for the points representing the 'single event' category is maintained (24.0 cf. 44.3).

In examining the relationship between the effective sentence and the sentences for the component offences, also of relevance is the effect of the mean of those individual sentences. It might be that the degree of cumulation is greater where this mean is higher. To this end, offenders were divided into two categories in respect of the mean of their individual sentences: <2 years, ≥2 years; this particular cut-off point was chosen to accord with that for armed robbery (and burglary) (see Table 5 for the distribution). The mean for the former category is 1.4 years, for the latter 4.2 years – a difference appropriate to a significant variation in offence seriousness – and the overall mean is 3.4 years. Figure 6 shows, contrary to expectation, that the (mean) degree of cumulation tended to be less for those offenders whose mean individual sentence was higher, for that part of the range on P + S common to the two categories (that is, ≤20.0 years) (35.7 cf. 28.0); this difference holds if the recalculated (mean) values of C from Table 4 are substituted (38.4 cf. 29.9).<sup>17</sup>

## Chapter 3

### Concurrency and the multiple offender: a parallel study

A quantitative description of the way judges apply the totality principle was the focus of the preceding study. The critical defining feature of the samples of sentences used there is that for each of the offenders in these samples there was at least two sentences of imprisonment of which one was made to some extent cumulative on the other. And it will be recalled that when this criterion, along with the other criteria, was applied in the selection process, the number of offenders in each of the three samples of armed robbery, burglary and rape was, respectively, 27, 13 and 24. These offenders were, of course, the primary subject of the present research. Yet a study of judicial practice in respect of the multiple offender would be deficient indeed if it did not examine cases for which full concurrency had been ordered. Accordingly, at the time of selecting the above three samples a second set of three – one each for armed robbery, burglary and rape – was constituted. This was done by putting to one side those offenders who met the same selection criteria as the first set, save that their two or more sentences of imprisonment had been made fully concurrent. Comparatively few offenders might have been expected to satisfy this modified set of criteria, since in each case at least two of the sentences of imprisonment were for offences representing separate transactions. Of interest, therefore, are the number and offence circumstances of cases characterised by concurrency. This information is given in Table 6.

**Table 6: Relationship (in frequencies) between the type of concurrency order and the four categories of offence circumstances for armed robbery, burglary and rape**

Offence	Type of concurrency order	Single	Escapade	Multiple	Single-multiple	Sub-total
Armed robbery	Cumulation	8	4	6	9	27
	Concurrency	18*	3	2	0	23
Burglary	Cumulation	2	0	7	4	13
	Concurrency	6	2	4	1	13
Rape	Cumulation	17	0	2	5	24
	Concurrency	15	1	1	1	18

Note. 'Cumulation' includes full and partial cumulation; 'Concurrency' means full concurrency.

\* includes two female offenders.

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Fifty-four offenders comprised the three samples of armed robbery, burglary and rape, in which the individual sentences were made fully concurrent. This is to be contrasted with the 64 offenders in the three samples for which cumulation was a criterion. Contrary to expectation, therefore, it is to be observed that full concurrency of sentences for separate transactions is very common. Indeed, of a total study sample of 118, this group represents almost one-half, a proportion quite constant across the three offences.

The second point to be observed is that for armed robbery and rape, of the offenders whose sentences were made fully concurrent, most fell in the 'single event' category and comparatively few fell in the 'multiple event' and 'single-multiple event' categories; for burglary, however, offenders are almost equally divided in respect of this contrast. Of course, how reliable these figures are in view of the small numbers must be regarded as uncertain.

Finally, some degree of cumulation is generally to be expected where the comprising sentences relate to separate transactions. This expectation would be particularly strong for those offenders in the 'multiple event' and 'single-multiple event' categories. Yet, putting these two categories together for the 'cumulation' and 'concurrency' samples, it can be seen that this expectation was not met for nine of the 42 offenders. This is a not-insignificant proportion, especially since for only three of these offenders was a reason given for concurrency or did circumstances acting to lessen the expectation of cumulation arise. In one case – an armed robbery – the judge determined that the presumption of cumulation was outweighed by the demands of mitigation; and each of the two other cases involved several offences of rape by a relative against the one child over a period of time, perhaps for this reason better dealt with globally. For the 'escapade' category there too would be an expectation of cumulation, although perhaps less strong than for the previous two categories, since some judges may be inclined to deal with seriousness globally where the circumstances of the offending can be construed as a spree. Yet full concurrency was the courts' approach in a majority (six) of the 10 cases. In two instances, the judge gave reasons for the orders of concurrency. One of these cases involved matters pre-dating the offender's last sentencing hearing; had these matters been dealt with then, the judge believed, they would have been dealt with by way of concurrency. In the other case, the judge offered two grounds for concurrency. One was that it was not appropriate to fix a head sentence and a non-parole period since the offender was unlikely to be released on parole; the other was that the time the offender had spent in custody due to a breach of parole could not be reckoned as having been served. Circumstances justifying concurrency were not apparent in any of the four other cases.

## Chapter 4

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### **Description, guidance and the cumulation of sentence: a discussion of the analysis**

What has been offered here is a quantitative description of the way Victorian judges applied the totality principle to the sentencing of multiple offenders in the mid-nineties. It is based on an analysis of archival data and shows the relationship between the sentence of imprisonment determined to be appropriate to a case and the sentences (of imprisonment) fixed for those comprising offences constituting separate transactions. In order to do this, the author had to formulate a set of rules for determining whether each of the offences in the cases should be regarded as a separate transaction or a part of a single transaction. All this was done separately for armed robbery, burglary and rape as principal offences. For these offences, Figures 2, 4 and 5, respectively, are the quantitative representations of the three relationships between the effective and individual component sentences. Moreover, the equations describing the curves of best fit for these three sets of data can be used to calculate the sentence to be considered appropriate for an offender from the sentences imposed for the offences comprising the case.

These products of the analysis can be regarded in two ways. Viewed as descriptions of judicial practice, they can be treated as detailed sentencing statistics for the use of judges who want to consider the appropriateness of a contemplated sentence against those considered appropriate to similar cases in the past. Considered as a numerical decision aid, they can be used as a device for assisting judges in aggregating relevant component case information (here, sentences considered appropriate to the offences comprising a case) in a coherent manner and consistent with the general judicial approach to this sentencing problem (that is, the decision model outlined in the introduction and the product of earlier research by the author – Lovegrove 1997a, 1997b). Both are important outcomes, since the review of the literature revealed that past research has not dealt adequately with description and guidance in regard to the sentencing of the multiple offender. This discussion now turns to reflect on the study from these two perspectives.

### **The description of sentencing**

The present description is of the Victorian judges' application of the totality principle to the determination of effective sentences. It is specifically in terms of the relationship between the sum of the sentences for the component (principal and secondary) offences and the percentage of the sentences for the secondary offences made cumulative on the sentence for the principal offence. (The effective sentence being the sum of the sentences for the principal offence and of the quantum of sentence that is the percentage.) The description



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in each of Figures 2, 4 and 5 showing this relationship takes two forms. The first is a plot of points, each point representing the judgment in respect of this relationship for one of the offenders in the sample. The second is the line best fitting these points; it crudely could be regarded as the average degree of cumulation considered appropriate across the various levels of the sum of the sentences for the secondary offences and consistent with a curve providing for progressively decreasing gains in cumulation. In the following discussion, matters relating to the substance and nature of the description are followed by those relating to the problems attending it.

### *Substance and nature of the description*

These three lines of best fit all belong to a family of curves known as the reciprocal function. Their general effect in this context is one of rapidly decreasing cumulation with small increases in the sum of the individual component sentences until a comparatively low degree of cumulation is reached, at which level the decrease in cumulation moderates substantially with moderate increases in the sum of sentences, and thereafter declines gradually. Accordingly, for example, for two three-year armed robberies, burglaries or rapes, the determined degree of cumulation would be 32, 37 and 44 per cent, making for effective sentences of 4.0, 4.1 and 4.3 years (see, respectively, Figures 2, 4 and 5). By way of comparison, for five three-year armed robberies, burglaries or rapes, the degree of cumulation would be 16, 19 and 25 per cent, the corresponding effective sentences being 4.9, 5.3 and 6.0 years (see Table 7).

As Figures 2, 4 and 5 and Table 7 show, cumulation is manifestly greatest for rape, clearly the most serious of these three offences as categories of crime, whether the criterion be the statutory maximum<sup>18</sup> or the average (mean) court sentence.<sup>19</sup> In line with this, the mean of the individual component sentences was found to be substantially less for the burglary (1.2 years) and the armed robbery (2.3 years) samples than for the rape (3.4 years) sample (see, respectively, Tables 2, 3 and 5). The lower degree of cumulation for burglary and armed robbery, therefore, could have been due to the difference in intrinsic seriousness (as reflected in legislation and court practice) or the difference in the seriousness of the actual component offences (as reflected in the present data). Then, perhaps the circumstances of burglars and armed robbers as offenders raise more mitigating matters or have greater potential to be seen as mitigating in the context of their offending. Finally, greater weight may be given to mitigation in the concurrency orders because of the less serious nature of burglary and armed robbery. Behind at least three of these four factors – intrinsic seriousness, mean sentence and weight of mitigation – lies the concept of proportionality defined in terms of the seriousness of classes and sub-classes of offence.

**Table 7: Comparative percentage cumulation as a function of the sums of sentence for armed robbery, burglary and rape**

Offence	Sums of sentence (years)						
	0	4	8	15	30	60	90
Armed robbery	96.3	41.2	26.2	16.0	8.7	4.6	3.1
Burglary	100	47.0	30.7	19.2	10.6	5.6	3.8
Rape	90.4	53.1	37.5	24.8	14.4	7.8	5.4

Accordingly, differences in the degree of cumulation for rape as against burglary and armed robbery, particularly for high levels of the sums of sentence, in part may be evidence of proportionality in one way or another acting as a powerful limiting factor on cumulation.<sup>20</sup> By way of contrast, in the development of the author's decision model based on judges' accounts of how they approached the sentencing of the multiple offender (Lovegrove 1997a, 1997b), it will be recalled that their justification for constraint was the need to minimise the potentially crushing effects of imprisonment on offenders. Of course, the two justifications are not incompatible. In fact, both are relevant considerations under the totality principle (see Fox & Freiberg 1999).

Also worthy of comment in regard to Figures 2, 4 and 5 is the variation of the points around the curves of best fit for armed robbery, burglary and rape. For each offence the variation is significant but is manifestly greater for rape than for armed robbery and burglary. These observations are reflected in the percentage of the variance accounted for by each of the curves, the values for the armed robbery, burglary and rape samples being, respectively, 49, 56 and 27. In respect to this, the legislative changes in the early nineties providing for harsher sentences applied to the last of these offences. Now, if there was disparity between the judges in their preparedness to depart from (then) current practice – and from the observations of the Victorian Court of Appeal in *O'Rourke*, this may have been so – then these figures would not come as a surprise. In any case, substantial variation around the lines of best fit is to be expected. The reason is simple. The curve represents an algebraic model not incorporating a number of aggravating and mitigating factors potentially material to the degree of cumulation considered appropriate. In respect of aggravation, these may include *inter alia* the commission of a series of offences over a prolonged period of time, the presence of serious offences, and variation in the nature of the criminality of the offences (for example, variation in the type and circumstances of a series of sexual offences). In regard to mitigation, these may include multiple offences committed as a part of a spree, and an offender's rehabilitation prospects (see Lovegrove 1998b).

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Nevertheless, even if all of these matters were incorporated in the decision model underlying the quantitative description, it cannot be assumed that the variance in the three figures would be significantly lessened. For the complexity of the often competing considerations bearing upon sentence is so great as to almost certainly overwhelm the judges' thinking, the inevitable result being sentences characterised by noise and hidden systematic error. Indeed, there is some evidence in the present data favouring this line of thinking. To describe the circumstances of the offending of the individuals comprising each sample, it will be recalled, four categories were created: namely, 'single event', 'escapade', 'multiple event', and 'single-multiple event'. Cases falling in the first two categories could be described as sprees and what could be regarded to a greater or lesser extent as campaigns of offending would come within the latter two categories. This potential mitigation and aggravation might be expected to be reflected in less cumulation in the former categories and greater in the latter. The evidence adduced showed that this was so for the rape sample but not for armed robbery. Similarly, the degree of cumulation for those individuals for whom the mean of their individual component sentences was low was compared with those cases for which it was high. Now, cases comprising serious offences would fall in the latter category, and with this aggravating feature would be expected greater cumulation. But the evidence tended against this: the figures were consistent with the expectation for armed robbery<sup>21</sup> but not for rape. This evidentiary digression was made to investigate whether a more complex decision model incorporating these potentially aggravating and mitigating factors might account for a greater percentage of the variance in each of Figures 2, 4 and 5.

From the present analysis, this would appear unlikely.<sup>22</sup> This conclusion is intended to apply to the more usual variation in respect of these factors across cases. However, where the comprising offences were uncommonly serious or the period of offending particularly protracted (or there was striking variation in the constituent criminality<sup>23</sup>), cumulation might actually be greater and demonstrably so. But such instances are by definition rare and, consistent with this, judges in their reasons for sentence appear not often to think of these factors as worthy of comment. Not so for rehabilitation prospects. Matters at the heart of this factor are commonly canvassed in judgments, and from judges' sentencing remarks the stated allowance for it is sometimes substantial.<sup>24</sup> If, in fact, this is reflected in practice, the inclusion of this mitigating factor in the model might pay dividends.

What, then, can be said about this description of judicial practice when these two aspects of quantitative description – curve of best fit and plotted points – are considered together? This question is best answered in the light of several considerations. As has already been stated, the model underlying the curve of best fit does not incorporate a number of aggravating and mitigating factors potentially material to the degree of cumulation. Some

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of these factors may have been taken into account by a majority of judges in a largely principled manner and, accordingly, be systematically represented in the distribution of points. Others of these factors might not have been taken into account properly and be represented in the distribution as systematic error (for example, a predilection for excessive cumulation) or unsystematic (random) error (for example, information overload). The balance between the two is unknown but may well favour error. In respect of the former, considering the cases as a whole, there may be a preponderance of aggravating or mitigating factors. In respect of the latter, the error variance is unknown.

All this has a number of consequences relevant to the description of judicial practice. One is that the curve may not represent the degree of cumulation appropriate to cases where either there is no aggravation or mitigation, or the two are in balance. A second is that the plot cannot be assumed to show the appropriate upper and lower limits on cumulation. Nevertheless, it may well be that an imaginary, smooth band covering the denser areas of the plot would represent the normal limits on cumulation according to practice. (In view of the very substantial variation in the plot of points for rape, this latter consequence may not apply to this offence.)

But there is more to this description of judicial practice. What has been illustrated here is a quantitative description built upon and expressed in terms of an independently formulated qualitative description. And just as this quantitative description is essential to the full description of judicial practice so is the underlying qualitative description. This qualitative description refers, of course, to the author's decision model covering how judges attempt to apply the totality principle. It takes the form of a series of systematic steps to be followed and matters to be considered when determining what is appropriate by way of cumulation. What are incorporated in the model are not only major relevant factors but also a framework for aggregating them in a coherent fashion. It covers, therefore, process, content and structure. Ideally, this model should be derived from sentencing policy as it is to be found in sentencing law. But in the absence of such policy, its source is data from the author's empirical study of what judges understood to be their approach to this sentencing problem. For the purposes of the present study, this decision model provided the foundation for the algebraic model used to analyse the archival data on judicial practice. However, considered independently of this study, the model can be seen as offering an orderly approach to thinking about the sentencing of the multiple offender.

To the qualitative description there is a second aspect. It is a set of rules for determining whether each of the offences in a multiple-offence case should be regarded as a separate transaction or as part of a single transaction along with one or more of the other offences. Since sentencing law does not provide the necessary detail in this respect, their derivation was imperative, the data source being archival. The original set was formulated from

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Lovegrove's (1998b) armed robbery sample, and the rules were then fine-tuned using the present armed robbery sample, and then modified in the light of the data for the burglary sample and, following this, for the rape sample. Considered in detail, these rules are offence-specific, but share much in common, being distinguished largely by the offence-specific circumstances used to illustrate each set. These rules are of significance because the totality principle applies only to the cumulation of sentences for offences constituting separate transactions. Clearly, without these rules, the present study could not have proceeded. Considered more generally, they, along with the decision model, are the qualitative elements essential to describing a rational and consistent approach to the sentencing of the multiple offender.

### *Problems attending the description*

The strength of this quantitative description of judicial practice is that it is by way of a statistical model consistent with the structure of judicial thought, this being reflected in the independently derived qualitative decision model. As a consequence, the quantitative representation of the relationship between the degree of cumulation and the sentences for the secondary offences accords with the judicial approach to this sentencing problem. And it has the potential to offer a more accurate and comprehensive description of that approach with respect to process and content. This strategy is and remains fundamental to the strength of the present description of judicial practice. Nevertheless, as the strategy has been executed here, there are potential theoretical and empirical problems.

The theoretical matters relate to the qualitative decision model underlying this quantitative description. There are four: one bears on the decision model's development; the three others are relevant to the model's content as a statement of principle. To the first: this strategy for the quantitative description of practice ideally requires that the model be derived from sentencing policy as sentencing law, a policy known and understood by judges, and which they accept and attempt to apply. Now, if all judges applied the one policy coherently and consistently, then policy and practice would be one, and the model as quantified on the basis of practice would be a true quantitative representation of sentencing policy. The strategy as implemented here necessarily fell short of this ideal. The difficulty arises because there is not a comprehensive stated policy for judges to apply to this sentencing problem. There was no alternative, therefore, to the source of the model being an empirical study of judges' thoughts as they sentence multiple offenders. In respect of this, the potential problem is to be found in the summary of this earlier study, given by way of introduction to the present study: most of the judges – but not all – appeared to have no more than a superficial understanding of this sentencing problem, their expressions of what they thought to be correct by way of a general approach lacking detail and being incomplete; moreover,

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other strategies (part-strategies) were adopted by the judges in particular cases, and these varied across judges. These features represent a substantial departure from the ideal, but not sufficient to invalidate the strategy, for there are saving graces. The judges' stated approaches were largely consistent with the model, when and to the extent their thoughts represented a general approach; and the disparate part-strategies had limited applicability, tending to be case-specific in their relevance.

More importantly, the judicial decision strategy represented in the model was the only discernible one offering a general approach to the sentencing of multiple offenders. Thus the judges could be said to be applying a more-or-less common and general policy badly. As a result, data generated in the application of that policy (that is, sentencing practice) will be noisy. For the purpose of the present project, this is a nuisance, but not fatal to validity. By way of contrast, it would have been fatal to the integrity of the present approach to the quantitative description of judicial practice had the judges been reliably applying different approaches to the sentencing of multiple offenders. This is so because an averaging process generates the line of best fit – the quantitative manifestation of policy. Averaging (disparate) practice generated by the application of a common policy can be used as a quantitative estimate of that policy. But if collective practice represents the application of disparate policies, it makes no sense to think of average practice as a reflection of (a common) policy.

Now to the first of the three theoretical matters representing limitations bearing on the content of the decision model as a basis for description. Whether a sentence of imprisonment is appropriate in a multiple-offence case depends on the seriousness of the comprising offences considered individually and in the aggregate, so said the Victorian Court of Criminal Appeal in *Tutchell*. Yet the decision model does not have the concepts to handle the aggregation of seriousness across offences individually not warranting a term of imprisonment, as required by this prescription. How many cases are not covered by the model because of this theoretical hole is not clear, but it may be significant, especially for offences of moderate seriousness (for example, burglary), spanning, as they do, the boundary between custodial and non-custodial sentences. This omission was not due to an oversight, nor can it readily be made good. For it raises the vexed and yet-to-be-solved problem of how to scale sanction severity within and across non-custodial sanctions and between these and the sanction of imprisonment.<sup>25</sup>

Further, by way of limitations, there are those factors, alluded to already, of potential relevance to the degree of cumulation considered appropriate. Judges, in their sentencing remarks, are given to devoting much thought to matters broadly bearing on an offender's rehabilitation prospects and are, so they say, prepared to give them substantial weight in some circumstances. If this is indeed a true reflection of their practice, then the factor of

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rehabilitation prospects should be formally incorporated in the decision model. This is because the model represents a statement of what judges understand to be correct by way of approach to the sentencing of the multiple offender. Lovegrove's (1989) attempt to assess rehabilitation prospects is one approach. He identified individual case factors thought to be relevant to rehabilitation, and these were then aggregated as they applied to a particular case to determine the offender's rehabilitation potential. But the validity of what is an analytic approach is open to question. In particular, it may be that for this judgment the significance of case factors is better considered holistically as indicators of strong, weak or no rehabilitation potential. This, of course, would have implications for how the evaluation of an offender's prospects is related to those factors already in the model.<sup>26</sup>

Finally, this matter also relates to factors of potential significance – the finding in the current results of greater cumulation for rape than for armed robbery and burglary, at first blush might be taken as evidence of the seriousness of the legal category of offence as relevant to the degree of cumulation and, accordingly, a factor that should be incorporated in the decision model. This, of course, could be readily handled by there being a separate curve for each offence distinguishable by way of the degree of cumulation. But, recall from the above discussion, the matter is not so clear-cut. For the seriousness of the category of offence and the seriousness of the individual component offences were confounded in the present samples, the consequence being that the greater cumulation may not have been for the greater seriousness of the offence category *per se* but for the greater seriousness of the comprising offences independent of offence type. However, the findings in the present study must be regarded as against this alternative proposition; recall, across the three categories of offence the mean individual sentence of the offences comprising a case did not appear to be a determinant of the degree of cumulation. In any case, whether or not one or both of these exercised the minds of the judges here, the latter would appear to offer a sounder justification as a basis for policy. This is based on the view, illustrated as follows: two-and-a-half-year sentences of imprisonment imposed on a burglary and an armed robbery indicate that the two are seen as equally serious, with the former being a more serious instance of a less serious offence category and the latter a less serious instance of a more serious offence category. Therefore, is a case comprising (say) three five-year armed robberies not to be treated more seriously than a case comprising one five-year armed robbery and 10 one-year thefts? If this be so, then, as a matter of principle, separate curves would not be required for the various legal categories of offence (that is, there would not need to be a separately calibrated model for each offence type). Nevertheless, there would have to be in the decision model a modifier to adjust the degree of cumulation to accord with the seriousness of the individual component offences as indicated by the sentences considered appropriate to them.

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Having considered the theoretical problems associated with the approach to describing judicial sentencing practice, and formulated for the present study, this discussion now turns to the attendant potential empirical problems. These relate to both the decision model used to represent judicial practice (what constitutes the qualitative description) and the graphical representation of judicial practice (what constitutes the quantitative description). In addition, there is the question of the validity of the rules for determining the separateness or otherwise of offences as transactions.

Since the quantitative description of judicial practice is structured around the qualitative decision model, the validity of this model is pivotal to the validity of that description. The answer to the question of validity lies, of course, in an evaluation of the methods used to develop the model. These matters have been canvassed in detail in Lovegrove (1997a). From that discussion, the principal threats to validity emerged as the absence of a cross-validation study and the unavailability of standardised techniques for tapping judges' thoughts on what is correct by way of approach to the multiple offender.

The problem of cross-validation arose in the following circumstances. The hypothesised decision model was formulated on the basis of a legal analysis, as explained in the earlier summary. Its validity was tested in the light of the judges' responses to hypothetical cases representing critical aspects of this decision model. This showed the model to be untenable. Nevertheless, in the judges' responses it was possible to discern an alternative general decision strategy. This was the model used in the present study. Clearly, its derivation cannot be said to be rigorous. For it is based on the judges' thoughts on the relevance and effects of factors not necessarily represented or isolated in the hypothetical cases. In these circumstances the scope and generality and even relevance of the matters raised in the judges' responses must be regarded as somewhat uncertain. Moreover, matters considered by judges to be relevant as a matter of principle may nonetheless be overlooked and not find their way into their responses. What is required ideally, then, is a second set of hypothetical cases, specifically formulated to represent critical aspects of the alternative model as it applies to the multiple offender.

In any case, before the decision model can be used as a basis for describing practice, it must be accepted by the judiciary as a valid representation of what is appropriate by way of approach to this sentencing problem. Herein lies the second threat to validity relating to the unavailability of standardised techniques. This arises because for this decision problem there cannot be external and independent criteria against which to validate the model, for the following reason. To the extent that there is a sentencing policy, it is what judges hold it deliberatively and intuitively to be. The problem of validity, therefore, turns on whether this policy is distorted or not fully elaborated by the techniques used to elicit it. Herein lies



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the present difficulty. There are suggested protocols for obtaining records of thinking in relation to problem-solving, but their validity is far from firmly established, they do not come with an error theory, and, in any case, they may – as in the present study – require adaptation to the particular requirements of the empirical problem.

How, then, in the light of these considerations, is the validity of the decision model used here for the description of practice to be regarded? With a more complex model – complexity indicated by numerous constituent factors and their detailed application – so the threat to validity is greater. Since the present model can be regarded as simple, there can be considerable confidence in it within its present limited scope and detail. Nevertheless, it almost certainly requires the incorporation of other factors for completeness.

The quantitative description of judicial practice also suffers from potential empirical problems specific to the present study. Remember, there are two aspects of the quantitative description – one is the plots of the points in the figures showing the relationship between the degree of cumulation and the sum of the (principal and secondary) sentences, each point representing a judgment in respect of this relationship for one individual; the other is the lines of best fit for these sets of points.

Data for the years 1995 and 1996 provide the basis for the present description which, therefore, can be regarded as a snapshot of the courts' approach to cumulation of sentence at that time. Two questions arise: how true a picture is it of then? And is it of now? First, 'then', followed by 'now'.

Small numbers lessen the confidence that can be had in the accuracy of the description. Across offences this applies particularly to burglary, and within offences this applies particularly to high levels on the sums of sentences for the three offences. With respect to the line of best fit, it probably falls near the true path for armed robbery and rape, but may well not for burglary. In regard to the distribution of points, the true variation around the line of best fit – that is, what should be regarded as the appropriate upper and lower limits on cumulation – must be regarded as problematic for all three. What strengthens this latter uncertainty in light of the small numbers is the wide variation around the curves of best fit.

There is the possibility of error in the accuracy of the description to the extent that judicial practice departed from principle. Of particular concern, in regard to this, is the critical assumption underlying the present analysis: namely, the sentences imposed for the offences comprising a case be appropriate to those offences considered individually. However, evidence – albeit weak – casting doubt on this is to be found in the second part of the author's study in which the decision model was developed (again, see the earlier

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summary). There judges imposed sentences for fictitious cases presented in the form of comprehensive summary descriptions; some of the cases were single-count cases of armed robbery or burglary and others were multiple-count cases comprising combinations of these single offences. The data were open to the interpretation that there might have been a tendency among some judges to attempt to offset the potentially crushing effects arising from the cumulation of sentence not only by means of orders of partial cumulation but also by imposing somewhat less than appropriate sentences for the individual component offences. If this practice was common among the judges whose sentences comprise the present three samples, the description of judicial practice offered by this study would be seriously in error. The effect would be to elevate the curve, showing cumulation to be greater – the points being perhaps significantly greater in some instances – than it would be were the sums of sentences for truly appropriate sentences. (This assumes that the effective sentences in these samples are appropriate; at a crude level this is reasonable, since the analysis incorporates the results of appeals.)

A second source of error may arise from judges not giving full and clear accounts of their reasoning relevant to the degree of cumulation. One concern here is of a case being included in the sample when fuller reasons for sentence would have revealed that it did not satisfy the criteria. These reasons will be for matters lying outside the immediate circumstances of the case; for example, the ordering of a lesser degree of cumulation because the offender was currently undergoing a sentence of imprisonment. Certainly, reasons of this type are given in judgments, and it is perhaps reasonable to assume that their omission, when they are seen as relevant, is the exception.

The final threat to the validity of the quantitative description of the judicial approach to cumulation relates to the rules formulated for determining the separateness or otherwise of offences as transactions. This too arises from the possibility of judges not always giving a full account of their reasoning when determining sentence. Where the sentences for offences are falsely assumed to represent one transaction, the sum of sentences will be an underestimate of the true value and, hence, the degree of cumulation an overestimate.

Similarly, where an offence is incorrectly treated as a separate transaction, the sum of sentences will be overestimated and cumulation underestimated. Uncertainty, it will be recalled, does not arise from those sentences made to some extent cumulative, since this may be taken to imply separateness. Nor does it centre on all instances of full concurrency, because it may reasonably be assumed that many of these were thought of as separate, as for armed robberies of different victims and well separated in time. The real uncertainty lies where the offences are more closely related, for example, the false imprisonment of multiple victims during the one armed robbery. It is this sub-set for which the author's

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rules may be in error, but probably not in a significant number of cases. Recall, the claim to validity for the rules lies in their source. They were formulated so as to comport with the Court of Appeal's general principle for what constitutes separateness, although for some, contrary interpretations would not have been unreasonable, such is the generality of the Court's principle from which they were derived.

Moreover, they were based on what appeared to be common practice in the present samples of cases and, in line with this, held in most instances where cumulation had been ordered and the offences could be assumed to be separate. To the extent that within and between cases there is systematic error in the rules as applied, the effect will be on the line of best fit and it will be to misplace it somewhat. In fact, the major impact will be on the degree of cumulation, and this may be significant particularly for low values of the sum of sentences.<sup>27</sup> To the extent that this error is unsystematic, the effect will be on the plot of the points, each representing a judgment about cumulation, and it will be to greater error variance. The balance in error might be expected to lie with the latter. It is for these reasons that the effect of this potential error on the validity of the current description of the judicial approach to cumulation of sentence would not be expected to be great.

However, the point has already been made in this present discussion of the results that these rules are an integral part, along with the decision model, of the qualitative description of judicial practice. In regard to the rules viewed from this perspective, the comments made about the decision model's validity and its validation process apply here also: the rules as policy must be what judges hold them to be. What is required, therefore, is that the judges reflect on these empirically derived rules, treating them as a draft statement of what is appropriate by way of policy. The validity of the product of this process as a representation of this policy, then, will turn on whether this policy is distorted or not fully elaborated by whatever techniques are used in assisting the judges to reflect on the draft rules.

But would the present picture of the judicial approach to the cumulation of sentence be expected to apply today? The answer is, 'probably', for the following reasons.<sup>28</sup>

In recent years, there have been no statutory changes applying directly to what is considered appropriate by way of concurrency or cumulation for rape, armed robbery and burglary. Nevertheless, legislative amendments having the potential to affect the sentencing of these multiple offenders have been passed in recent years. Changes to statutory maximum penalties fall in this category. This is because a significant increase (or decrease) in a maximum may lead the courts to conclude that current sentencing levels should be raised (or lowered) for that offence. For cases involving multiple instances of the offence, this may mean higher effective sentences by way of greater cumulation (see, for example,

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the judgment in the Victorian Court of Criminal Appeal of Cummins J in *Ramage*). In fact, there have been changes to the statutory maximum penalty for two of these three offences – armed robbery, up from 20 to 25 years, and burglary, down from 12.5 to 10 years.<sup>29</sup> The courts probably regarded the latter change as insignificant, no more than fine-tuning, and not a parliamentary prompt. This conclusion of 'insignificant' is less clear for armed robbery, but would be expected to apply also, since the change was to an already high level. Consistent with this, the Court of Appeal has not intimated that it has modified its approach to sentencing for these offences. Although for rape, sentencing law has remained unchanged, there may be some tendency to harsher sentences. This is because around the end of the period of the present study the Court of Appeal was still attempting to impress on some judges the need for more severe sentences in the light of the legislative changes in the early nineties (see the judgments in *O'Rourke* and *Higham*).

Also of relevance here is the newly created statutory category of the continuing criminal enterprise offender, for it has the potential to apply to multiple offenders whose principal offence is armed robbery.<sup>30</sup> The legislation provides for higher maximum penalties – but not in effect for armed robbery, in view of its 25-year level – and by this means can be taken to give a clear signal to the courts that sentences should be more severe for this type of offender. However, the qualifying monetary value is so high, few cases would be expected to qualify; in fact, it appears none has to date.<sup>31</sup>

## Guidance for sentencers

The present quantitative description of the Victorian judges' application of the totality principle to the sentencing of multiple offenders was to an end, namely, the development of guidance in respect of current practice (that is, descriptive guidance). This has been done separately for offenders whose principal offence was armed robbery, burglary or rape. Lovegrove (1989) used the term detailed sentencing statistics for this when archival data are analysed in terms of case characteristics and sentence. In the present study the analysis is of the relationship between the sum of the sentences for the component (principal and secondary) offences (case characteristics) and the percentage of the sentences for the secondary offences made cumulative on the sentence for the principal offence (sentence). This takes two forms. One is of a plot of the points representing judgments in regard to this relationship for individual offenders. The other is of the line best fitting these points. The algebraic equation describing this line can be used to calculate the effective sentence considered appropriate according to current judicial practice and in the light of the sentences imposed for the offences comprising the case. In these two ways the description can act as a decision aid.

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Two conclusions from the discussion of the results as description apply also to their use as guidance: the curve may not represent the degree of cumulation appropriate where there is no (or there is a balance of) aggravation and mitigation; an imaginary, smooth band covering the denser areas of the plot perhaps can be taken roughly to represent the upper (and lower) limits on cumulation where there is a preponderance of aggravating (or mitigating) factors, and in the absence of exceptional circumstances. In view of the small sample sizes, particularly for burglary, the guidance provided by the present analyses must be regarded as weak, little more than indicative. Since the degree of cumulation considered appropriate varied across the three categories of (principal) offence, each of the data sets cannot be applied outside the offence category it represents.

The strength of the present quantitative description of judicial practice as a basis for guidance is that it is by way of a decision model consistent with the structure of judicial thought, this being reflected in the independently derived qualitative decision model (see Lovegrove 1997a, 1997b). By this means, what it offers as guidance is not a degree of cumulation necessarily to be considered in isolation. Rather, the guideline cumulation is presented within a structure determined by the major relevant factors affecting cumulation and, in this way, framing the appropriate effect on cumulation of relevant factors not a part of that structure. This is important since judges must use the guidance as a standard against which to consider the effects on cumulation of factors not incorporated in the decision model. Accordingly, it has the potential to offer more accurate and ready guidance (see generally, Lovegrove 1989, 1997a).

What the guidance states to be correct by way of cumulation is not without threats to its validity. These threats are, of course, the very same ones besetting the description; the discussion in regard to these, other than the conclusions, need not be rehearsed here. There were several factors, probably unsystematic in their effects, each of which would be expected to increase error variance somewhat. These were not thought to be a cause for concern, although in conjunction with the small numbers they render the plots of points an uncertain description of the normal limits on cumulation. None of this, however, seriously undermines the integrity of the description as a source of guidance. Nevertheless, there is one matter for concern. It is that there may be a tendency among at least some judges to impose somewhat less than appropriate individual component sentences in the sentencing of multiple offenders. If this was in fact the case in the present samples, and it was widespread, then the curves of best fit as a guideline would represent an overestimate of what in effect is appropriate by way of cumulation for truly appropriate sentences. Clearly, the description as guidance should not be regarded as otherwise than unsatisfactory unless it is largely based on truly appropriate sentences for the individual component sentences.

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## Concluding observations

The present study has produced a description of judicial practice in the sentencing of multiple offenders according to the totality principle. For this, the goal was that the numerical picture be accurate and complete, and lend itself to ready and precise guidance. In order to achieve this, so it was proposed, the data reflecting that practice (case facts and sentences) should be analysed according to the structure of judicial thought. In this study it was how judges attempt to aggregate sentences fixed for offences comprising a case in order to determine the effective sentence for that case, and this included the rules for determining which comprising offences are to be treated as separate transactions. What follows is that the quality of the quantitative description of practice is limited by the level of the judges' current understanding of this sentencing problem. (This is, of course, a theoretical upper limit, because there will be research errors in ascertaining that policy, judicial errors in applying that policy, and further research errors in capturing that practice.)

Since in the development of the author's decision model (Lovegrove 1997a, 1997b), judicial policy with respect to the multiple offender was found to be wanting – it being characterised by disparity, incompleteness and a lack of detail – steps must be taken to rectify this before there can be any improvement in the quantitative description of practice. Consequently, the present description should be seen as little more than a first step towards detailed sentencing statistics as a means to guidance, showing how they should be compiled and what they would look like.

But policy, as formulated to date and reflected in the decision model (and as practised), weighs heavily on description in another respect. To the extent policy is poorly founded and unjust, so these flaws will be reflected in the description and in the guidance. Indeed, a number of problematic matters are raised in the present study. Cumulation as described was influenced by the seriousness of the legal category of the principal offence, but not apparently by the seriousness of the individual component offences as reflected in their sentences. One may ask whether it should be like this. A serious attempt to answer this question would raise matters non-numerical in character, and hence falls outside the scope of the present analysis. Nevertheless, how the seriousness of the individual component offences as determinants of cumulation could be incorporated in the decision model is taken up in Part 2 of the present study.

Another matter raised in the present study relates to the upper limit on cumulation. In the development of the author's decision model, the stated judicial policy consideration found to be applying to this, it will be recalled, was that the effective sentence be not crushing upon the offender. As a matter of practice, this applied not just at the upper levels of imprisonment, but was said to act as a moderating influence on the cumulation of all

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sentences of imprisonment. A question relating to justice is thereby raised: do these sentences as constrained explicitly in the interests of mercy, also comport with the requirements of proportionality? This does raise matters in keeping with the character of the present analysis: namely, formulating a numerical standard of what may be regarded as a proportionate quantum of cumulation; and applying this as a criterion to test whether the effective sentences are proportionate. Part 2 of the present study addresses these matters, the effective sentences being those in the description in this first part of the study. Before this there is a brief discussion of the results of the parallel study on the incidence of concurrent sentences in the samples of armed robbery, burglary and rape.

## Chapter 5

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### The phenomenon of concurrency

In cases where two or more sentences of imprisonment are imposed for offences representing separate transactions there is in appellate policy a general presumption of some degree of cumulation for at least one of these separate offences. Yet in just under half of the cases – a proportion reasonably constant across the armed robbery, burglary and rape samples – all the sentences were made fully concurrent.

This is a significant percentage, indeed. In view of this it is important to attempt to identify the reasons underlying this high use of full concurrency. Do they largely represent clearly sound or at least arguable justifications? Or do they reveal a significant flouting of sentencing policy, or perhaps bad practice in the interests of lazy thought?

As a means of addressing this issue, the classification used to describe the circumstances of the offending constituting a case is most helpful. Table 6 shows that concurrency was ordered in 39 of the 66 cases<sup>32</sup> falling in the 'single event' category. In this type of case, the offending lends itself to being seen as a single incident and, accordingly, a secondary offence can be thought of as representing behaviour aggravating the principal offence. By way of illustration, in an armed robbery the false imprisonment of a second victim, and in a rape a second count of rape of the one victim, can be treated as a part of their respective principal offences. This represents global sentencing. In this approach the sentence for the principal offence is made appropriate to the full circumstances of the case (that is, the circumstances relevant to the principal offence together with those relevant to the secondary offence) and the sentence for the secondary offence is therefore necessarily made fully concurrent. This is to be contrasted with analytic sentencing. In this approach sentences individually appropriate to the principal and secondary offences are fixed and the latter sentence is cumulated on the former sufficient to achieve an effective sentence appropriate to the full circumstances of the case. Of course, the two approaches should achieve the same result, but they may not. The global approach may leave the judge's decision open to the error of not giving sufficient weight to the various component circumstances of seriousness. By way of contrast, in the analytic approach there is the danger of the judge giving too much weight to the aggravating circumstances charged and sentenced. If (say) a sentence of two-and-a-half years is fixed for an armed robbery and one year for the false imprisonment of the victim of the armed robbery, and six months of the latter sentence is made cumulative, it is easy to understand how this could be. Which of these two approaches is less susceptible to its attendant potential error appears an open question. In respect of this discussion the conclusion must be thus: for cases falling in the 'single event' category, full concurrency cannot be taken necessarily to indicate that the sentence has not been enhanced to cover the multiple offending or that the judge has adopted a sloppy approach to sentence determination.



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Nevertheless, there are grounds for preferring cumulation in certain circumstances constituting a single event. One is where cases involve multiple victims; for example, an armed robbery and the prior theft of a motor vehicle. Another is where the case involves several serious offences committed against the one victim; for example, the victim's being raped and indecently assaulted as a part of a single incident. This makes it clear to the victims that the court has recognised the separate wrongs against them. Moreover, in such cases it may be appropriate that the additional seriousness count for more because it involves multiple victims. The analytic approach would appear to lend itself to this outcome. In regard to the utility of cumulation but the not infrequent use of concurrency, the Victorian Court of Appeal in *O'Rourke* – a case involving rape and other violent and sexual offences against the one woman – observed that cumulation was necessary to recognise the individual contribution of the multiple offences to the trauma of the victim; the Court also was inclined to the view that not infrequently judges had been remiss in this regard in the past.<sup>33</sup>

That some judges would favour a global approach for cases falling in the 'escapade' category is to be expected. This is because the circumstances of the offending can be construed as a spree, representing a single incident. And, true to expectation, six of the 10 cases falling in this category were dealt with by way of full concurrency (see Table 6); the percentage here being similar to that for the 'single event' category. But, as a general approach in this type of case, there would appear to be an error in this construction of the case circumstances. For although the offending can be seen as a single incident in the life of the offender, the offending as a series of offences does not represent a single incident, not least because there are multiple victims separated in time and location. Thus, it is suggested, the additional offending should be reflected in an enhanced sentence; and it should be seen to be enhanced by way of a degree of cumulation, although it may well be less than otherwise would be considered appropriate so as to allow for the limited period of the offending.<sup>34</sup> This would appear to strike a balance between the interests of the community and victim as against those of the offender.

In regard to the main point of the discussion, then, for cases falling in the 'escapade' category, full concurrency represents bad practice, unless this approach can be justified by the circumstances of the case. Accordingly, a judge adopting this course should give express reasons for this decision. Indeed, the analysis of the results showed that in two of these six instances this was the case. But in the four others, no express reasons were given. Moreover, in the circumstances of these four cases it was not possible to discern factors warranting full concurrency. Certainly, there was an arguable reason in two of the cases for full concurrency; namely, the offender was currently in custody. But, if this were the reason, a better approach would have been to construct the current sentence properly, whether or not it was made partially cumulative on the sentence being served at the time.

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Consequently, in four of the 10 cases in the ‘escapade’ category, the sentencing approach and the explanation of the decision-making is a cause for concern. (It does not necessarily follow, of course, that these effective sentences were wrong, since they may have been enhanced to cover the multiple offending.)

The remaining two categories in the classification of offending – the ‘multiple event’ and the ‘single-multiple event’ categories – can be considered together for the purposes of the present discussion, since they both involve offences separated across time, locations and victims. Few, if any, of these cases would be expected to lend themselves to a global approach, since generally the circumstances would not be able to be construed as a single incident from the perspective of either the offence or the offending.<sup>35</sup> As a consequence, the additional seriousness associated with the multiple offences should be dealt with by way of cumulation of sentence. In fact, Table 6 shows that for nine of the 42 cases falling in the ‘multiple event’ and ‘single-multiple event’ categories there was full concurrency. This represents about 20 per cent of cases, well down on the 60 per cent levels for the ‘single event’ and ‘escapade’ categories, yet not an insignificant level. This, then, prompts the question: did the circumstances of these nine cases justify full concurrency against the general presumption of cumulation? The answer, from the analysis of the results, is that in one instance the judge justified full concurrency – namely, the strength of the offender’s mitigation – and that in two cases the circumstances of both cases – namely, multiple sexual offences against the one child – offered what could be regarded as a reasonable justification for a global approach. Again, there was an arguable reason in two of the cases for full concurrency, namely, the offender was currently in custody, and the presentment covered 35 separate transactions involving burglaries. The inappropriateness of the first has been dealt with above. In regard to the second, awkwardness in the making of cumulation orders does not hold weight in a case deemed by the court to warrant an effective sentence of four years. In regard to the use of concurrency, then, there is a cause for concern in six of the 42 cases in the ‘multiple event’ and ‘single-multiple event’ categories.

Overall, full concurrency was ordered for 54 of the 118 offenders in the present study; of these 54 instances, there was no stated or apparent justification in 10 of them, a not-insignificant proportion in view of the generally serious nature of the offending and, because of its importance, warranting further investigation. These 10, of course, are in addition to the likely inappropriateness of concurrency in cases in the ‘single-event’ category, perhaps particularly for rape.

This analysis is not apparently subject to significant error arising from the method. One possible error lies in the determination of whether or not the offences comprising the cases were properly regarded as separate transactions. Yet this decision seemed wholly

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uncontentious in the 10 cases for which the sentencing approach seemed to be either sloppy or erroneous. There is a second error, of greater potential significance. It is possible that in some of these cases the circumstances of the offender warranted full concurrency but they were not either elaborated by the judge or expressly stated to be determinative. While this would not be expected to be a general problem across the sample, since the judgments tended to be well reasoned, its actual significance among these 10 cases must remain open.

## Notes

1. See generally, Fox and Freiberg (1999).
2. For a less detailed and non-technical account, see Lovegrove (1997b).
3. For a comprehensive review of the study of judicial practice, see Lovegrove (1989, 1999b).
4. However, they have not been produced annually since 1997 but have been updated recently and now cover the period 1997–98 to 2001–02 (see Department of Justice, Victoria 2003). Nevertheless, the information in the updated and earlier series is not directly comparable due to differences in the method of collecting the data and of classifying and representing these data for the purposes of description. For the present discussion, the type of information and the level of detail may be regarded as generally similar in the two series.
5. For a comprehensive review of statistical information systems for sentencing, see Lovegrove (1999a).
6. For details of these statutory changes, see Fox and Freiberg (1999).
7. For details of these provisions and relevant amendments, see Fox and Freiberg (1999).
8. A sentence of imprisonment for a summary offence could satisfy this criterion. Sentences of youth training and fully or partially suspended sentences of imprisonment were not taken to be sentences of imprisonment for this purpose.
9. A charge of theft arising from the stealing of money or goods from premises in a burglary was disregarded for the purposes of this classification. One reason is that there is not always a charge of theft even though property has been stolen in the burglary. A second reason is that no cases in which theft also was charged could qualify for the 'multiple event' category. Finally, a theft (compared with, say, an assault) is typically the point of a burglary and, consequently, is usually thought of as coming within its scope.
10. For two offenders included in this armed robbery sample, the judge lessened the degree of cumulation otherwise considered appropriate to allow for the time which had been spent in custody but, due to the offending involving a breach of parole, was not able to be reckoned as having been served. However, in each case, the judge specified what the sentences would have been had this factor not been a relevant consideration. The otherwise appropriate sentences were used in the present study.

For another offender, the court took into account admitted but unprosecuted offences. This is a formal procedure where an offender, having been convicted of one or more offences, requests the court when determining sentence for the offences of conviction to take into account pending charges filed in court by the prosecution (see generally, Fox & Freiberg 1999). In this case, these other offences comprised six separate transactions – five armed robberies and one attempted armed robbery. Included in the offences of conviction were seven armed robberies. A reading of the circumstances surrounding the prosecuted and admitted robberies showed them to be substantially similar. Moreover, the judge described them in equal detail, made no attempt to distinguish between them in his description of their gravity and, in fact, imposed equal sentences for the seven prosecuted armed robberies despite some potentially significant differences in their circumstances. Accordingly, it was considered a reasonable assumption that the sentences fixed for the prosecuted robberies were also considered by the court to be appropriate to the unprosecuted offences. In sentencing, the judge remarked that the effective sentence must be more severe than it would have been had these other offences not been taken into account but that any increase must be moderated in accordance with the totality principle. It seemed, therefore, not invalid to include the sentences for this offender in the database and, in doing this, treat the prosecuted and unprosecuted armed robberies alike. This offender is represented in Figures 2 and 3 by the point  $C = 10$ ,  $P + S = 67$ . To the extent that the assumed seriousness of the unprosecuted robberies overestimates the judge's view, so the calculated percentage cumulated is an underestimate; however, in view of the high value of  $P + S$ , the percentage error in  $C$  would be small.
11. This curve was fitted by Professor Pip Pattison, Department of Psychology, University of Melbourne, using least squares and the modified Gauss-Newton algorithm in the BMDP 3R program; see Dixon (1990).
12. The negative exponential is the other algebraic model with the potential to satisfy the three theoretical criteria listed above. However, it provides a much poorer fit to the data than the reciprocal function. The main reason for this is that the curve approaches the  $P + S$  axis too steeply; this appears to be its inherent weakness as a mathematical representation of the judges' decision strategy for the sentencing of the multiple offender (see Lovegrove 1997a, 1998b).
13. The values of the mean individual sentences also change, but not so as to affect their membership of these two categories.
14. In two of the latter three exceptions, the sentence for only one of multiple thefts was made cumulative – in fact, this sentence was the only one made cumulative. For these two instances, all of the thefts constituting a part of a burglary were treated as separate transactions in this analysis, it being presumed that concurrency for the other thefts related to considerations of totality.

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15. See note 11.
  16. See note 11.
  17. See note 13.
  18. At the time of the study, the statutory maxima for armed robbery, burglary and rape were, respectively, 20, 12.5 and 25 years. See Schedule 1 of the *Sentencing and Other Acts (Amendment) Act 1997* (Vic).
  19. See Table 8 for armed robbery and rape and the equivalent figures for burglary in the official sentencing statistics of the Department of Justice, Victoria (1994, 1995, 1996, 1997).
  20. In the present study there was either no relevant data or not sufficiently reliable data to discriminate between these factors as they relate to proportionality.

In this discussion no distinction has been drawn between the degree of cumulation for armed robbery and burglary, even though it was apparently greater for burglary. To do so would have been hazardous, in view of the small numbers, especially for burglary, and the difference between armed robbery and burglary not being substantial. In respect of this, as an aside, let it be noted that only a minority of burglaries are determined in the higher courts and these will typically be the more serious cases; in such cases, features (for example, poor rehabilitation prospects) favouring more rather than less cumulation may predominate.
  21. This was true for the unadjusted figures but not the adjusted figures.
  22. The empirical tests underlying this conclusion were not as rigorous as is desirable. In each of these two comparisons, the variances were substantial and the numbers small. Moreover, although the sum of the sentences for the secondary offences was controlled, due to small numbers, offence circumstances and mean individual component sentence were unavoidably confounded. Finally, in respect of the second comparison, average sentence might be thought of as too crude a measure in those cases characterised by marked variation in the seriousness of the comprising offences.
  23. The factor of variation in the nature of the offending does not lend itself readily to operationalisation and, accordingly, was not tested.
  24. Information relating to an offender's rehabilitation prospects was not routinely recorded in the present study.
  25. For a view on the scaling of sanction severity and which could handle the aggregation of the seriousness of offences not individually warranting imprisonment, see Lovegrove (2001a).
  26. For the purpose of building the qualitative decision model based on the judges' responses to hypothetical cases, the factor of rehabilitation prospects, it will be recalled, was held constant, it being set at 'little if anything by way of mitigation'; rehabilitation, therefore, did not have the opportunity to emerge as a relevant factor.
  27. See Tables 1 and 4 and the associated discussion.
  28. For a detailed account and analysis of more recent changes in sentencing policy and their impact on imprisonment in Victoria, see Freiberg and Ross (1999).
  29. *Sentencing and Other Acts (Amendment) Act 1997* (Vic); see Schedule 1.
  30. The *Confiscation Act 1997* (Vic) introduced this amendment to the *Sentencing Act*; see section 148.
  31. The recently updated official sentencing statistics for Victoria (see note 4) shed some light on this. Of relevance to this are the following indices: the median and maximum sentences of imprisonment for single offences and the median and maximum effective sentences of imprisonment. From these data it appears reasonable to conclude that for armed robbery, rape and burglary, sentence lengths generally have remained unchanged and stable. The possible exception to this is to be observed in the figures for the maximum effective sentences which more recently in some instances (particularly for rape) are very high. This may be evidence of a now greater preparedness by the courts to impose swingeing sentences for what they regard as very serious cases of rape, armed robbery and burglary. Clearly, however, because of differences in method between the earlier and current series, these conclusions must be tentative; in any case, uncertainty particularly applies to the maximum effective sentence, since it represents no more than one case in any one year, and in the earlier series was given for only the last year (1996).

The figures produced by the Australian Bureau of Statistics (2002) also show that for Victoria sentence lengths (cf. rates of imprisonment) have remained relatively stable.
  32. That is, in about 60 per cent of the cases.
  33. For other grounds favouring cumulation, see Fox and Freiberg (1999).
  34. See Lovegrove (1998b).
  35. See Fox and Freiberg's (1999) review of case law.

## **Part 2: Proportionality in principle and practice**

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## Chapter 6

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### Background and the numerical standard of proportionality

The first part of this study offered a quantitative picture of judicial practice in Victoria for the sentencing of multiple offenders according to the totality principle. What is shown is the relationship between the effective sentence imposed for a case and the sentences fixed for the individual offences comprising the case. This second part of this study investigates whether the judicial practice observed in the first part accords with the principle of proportionality as it applies to the multiple-offence case. As intimated in the general introduction to this study, this is a significant matter. This is because the appellate courts in Australia have not articulated a standard for proportionality as it applies to the sentencing of multiple offenders. Moreover, the idea underlying proportionality of commensurability between seriousness and severity not particularised in respect of the multiple offender allows a level of sentence above that which is proportionate to the class of offence constituting the case. Yet this idea is fundamental to Thomas's (1979) statement of the totality principle and appears to be entrenched in the English courts' understanding of it (see Ashworth 1995).

To achieve this aim, it is first necessary to develop a numerical prescriptive standard for what is a proportionate effective sentence in a particular case involving multiple offending. 'Numerical', because the essence of a sentence is a quantum of severity, and quanta are expressed in numbers; 'prescriptive', because it states what ought to be, at least to the extent that it represents legal principle. Fortunately, there was some legal principle that could be used to give the present analysis a jurisprudential foundation. Thomas (1979) and Ashworth's (1983b, 1992, 1995) legal analyses of the English Court of Appeal's practice gives meaning to the idea of proportionality as it relates to the multiple offender. According to Ashworth, elaborating on Thomas's work, the core of the problem is how to integrate the seriousness of two or more offences of the same or of a different kind into a system of proportionality based on the seriousness of single offences.

Their analyses represent an interpretation of the Court's practice. But the principle they discern is neither specific in its expression nor precise in its application. Because of this, as it stands, the legal judgments necessary to operationalise the principle are not apparent, and there is no standard with which to test empirically to what extent courts apply this principle as a matter of practice. Accordingly, on the basis of this legal work alone, any evaluation of the principle underlying their idea of proportionate sentencing for the multiple offender and of its application in a particular case cannot be rigorous. Hence the need for Thomas and Ashworth's contribution to be extended and, with this, to be translated into quantitative terms. Recently, Lovegrove (2000) tackled this problem; what follows is a summary of that work, comprising the framework underpinning the quantitative standard defining proportionality, a justification of its formulation, and the potential limitations of this approach.

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The framework applies to multiple offenders where the offences comprising the case represent separate transactions and each of itself would warrant a term of imprisonment; and the calibrating data are taken from the official sentencing statistics for the jurisdiction of Victoria, Australia, for the years 1993–1996.<sup>1</sup> Since the framework defining proportionate effective sentences is founded on what are considered to be appropriate sentences for individual offences, the numerical standard derived from it is jurisdiction-specific and may vary over time within the jurisdiction. Accordingly, the framework as calibrated here represents a standard for Victoria at the time of this study. Once the framework has been outlined, justified and evaluated, it is used to investigate empirically whether sentences imposed under the totality principle as appropriate can be regarded as proportionate. For this purpose what is evaluated is the judicial practice described in the first part of this study. The framework has the same general structure as the numerical representation of this practice (Figure 1) and thus can be directly related to it for the purpose of identifying disproportionality.

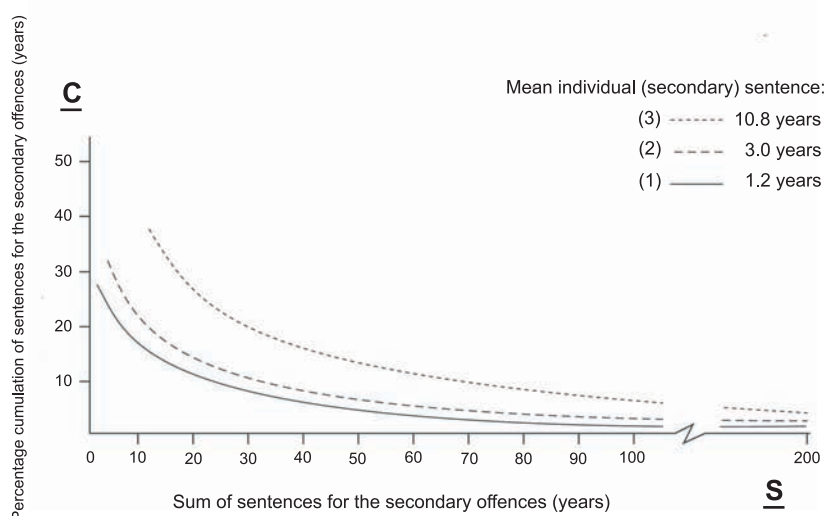
## Outline of the framework

In multiple-offence cases, for the purpose of cumulation, one of the offences is regarded as the principal offence and the other counts are classified as secondary offences. The purpose of the framework is to provide an answer to the following question: for a particular offender, for those offences properly regarded as separate transactions, what proportion of the sentences appropriate to the secondary offences should be added to the (whole of the) sentence appropriate to the principal offence so that the sentence for the case is proportionate to the seriousness of that case viewed as a whole? In the framework, two factors are considered to determine the answer, namely, the sum of the sentences for the secondary offences and the average of the sentences for these offences.

The numerical framework for the proportionate sentencing of multiple offenders is represented in Figure 7. It shows the relationship between the sum of the sentences for the secondary offences in years (S) and the percentage of this sum to be added to the sentence for the principal offence (C). Actually, this relationship is shown for three levels of seriousness of the secondary offences – where the mean of these individual sentences is 1.2 years (curve 1), 3.0 years (curve 2) and 10.8 years (curve 3). These curves do no more than illustrate the effect on cumulation of variations in the average individual sentence for the secondary offences; they are three of a potentially infinite number of curves, since each level of seriousness of the secondary offences requires its own representation. The significance and interpretation of the curves illustrating this factor will be discussed further.



**Figure 7: Framework for the proportionate sentencing of multiple offenders: relationship between the percentage cumulation and the sum of the secondary sentences by mean individual sentence**



Although the framework may at first blush seem daunting, its application is quite simple. Consider a case comprising an armed robbery and 10 thefts, for which the appropriate sentences are 5 years and 1.2 years (approximately 14 months) each, respectively. According to curve 1 in Figure 7, 14 per cent of the (12 years of) sentences for the thefts (that is, 1.7 years) should be added to the sentence of five years for the armed robbery, making an effective sentence for the case of 6.7 years. But if the case had comprised not 10 but 50 1.2-year thefts, then 4.3 per cent of these sentences (that is, 2.6 years) would have been added to the five years for the armed robbery. Two points should be noted about the second example compared with the first: there was a smaller percentage cumulation, but a larger quantum of sentence cumulated so as to reflect greater seriousness; the additional 40 offences added only 0.9 years to the 1.7 years for the first 10 secondary offences. (The quantum of sentence to be cumulated, Q, for a particular sum of sentences for the secondary offences is shown in curves 1, 2 and 3 of Figure 8; they are derived directly from the corresponding curves in Figure 7.)

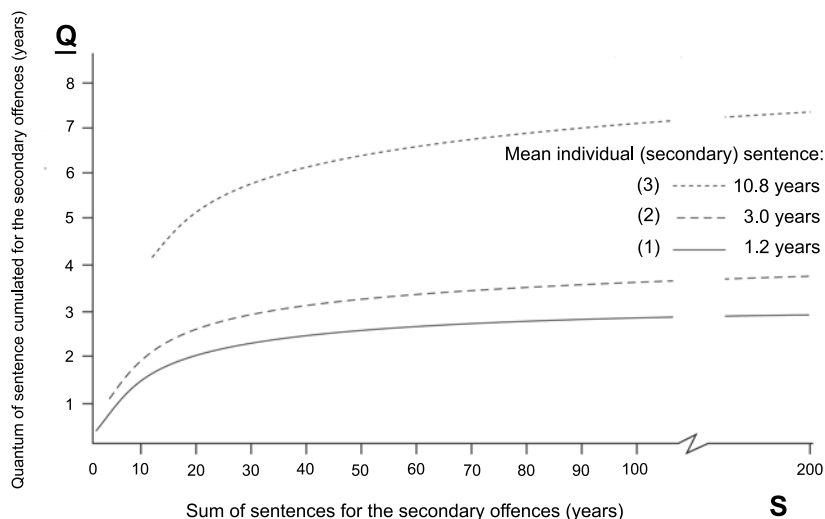
In fact, the percentage cumulation proportionate to a given sum of sentences for the secondary offences, where the average of these sentences is 1.2 years, can be calculated using the equation defining curve 1; the equation, representing a reciprocal function, is:

$$P = \frac{31.1}{1 + 0.104 S}$$

where P is the percentage cumulation for the sum of the sentences for the secondary offences, and S is the sum of the sentences for the secondary offences (in years).

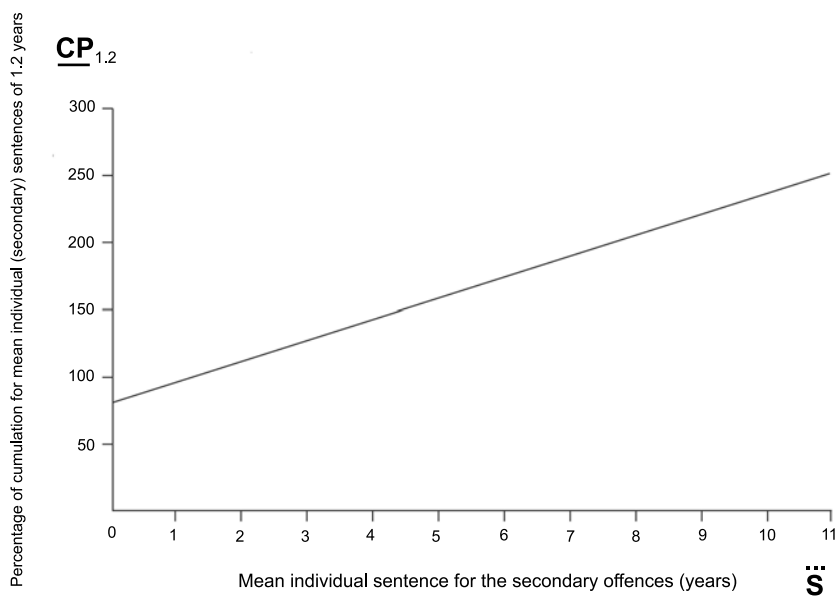
The features of curve 1 – and, indeed, each of the two other curves – in Figure 7 are that it is a curve of decreasing returns. Accordingly, as the sum of the sentences for the secondary offences increases so there is a progressive decrease in the percentage cumulation, this decrease being tempered so that the quantum cumulated will always be greater. Moreover, the curve ever approaches but never reaches a value of zero per cent cumulation; as a result, for additional secondary offences there will always be some increase, however small, in the sentence for the case.

**Figure 8: Framework for the proportionate sentencing of multiple offenders: relationship between the quantum cumulation and the sum of the secondary sentences by mean individual sentence**



To date, what has been dealt with is the effect on cumulation of the sum of the sentences for the secondary offences. This description of the framework now turns to the second of the two factors, namely, the mean individual sentence for the secondary offences. In regard to this, the relevant question is: using as the touchstone the degree of cumulation appropriate to secondary offences of mean individual sentence 1.2 years (curve 1 in Figure 7), what percentage increase (or decrease) in the degree of cumulation is necessary to maintain proportionate cumulation where the mean individual sentence for the secondary offences is greater (or lesser)? The answer is to be found in Figure 9. It shows the relationship between the relevant dependent and independent variables. The former is the degree of cumulation as a percentage of the degree of cumulation considered proportionate for secondary offences of mean individual sentence 1.2 years ( $CP_{1.2}$ ); the latter is the mean individual sentence for the secondary offences (in years) for which the degree of cumulation is to be determined ( $\ddot{S}$ ).

**Figure 9: Framework for the proportionate sentencing of multiple offenders: adjustment to percentage cumulation as a function of the mean individual sentence for the secondary sentences**



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Consider now an illustration of its application. Take the first example above as the starting point: the case of the armed robbery and 10 thefts for which the appropriate sentences were 5 years and 1.2 years each; the sum of the sentences for the secondary offences is 12 years and the degree of cumulation for these offences was shown by curve 1 in Figure 7 to be 14 per cent, giving a quantum of cumulation of 1.7 years. If instead of ten 1.2-year secondary offences there were four 3-year secondary offences (note, these again sum to 12 years), what would be the proportionate degree of cumulation? Figure 9 shows that it would be 130 per cent of the degree of cumulation considered proportionate where the secondary offences averaged 1.2 years (14 per cent), that is, 18 per cent, giving a quantum of cumulation of 2.2 years. In comparing the first and second examples, the effect of the greater mean sentence for the individual secondary offences is an increase in the degree of cumulation reflecting the greater seriousness of those offences; the greater mean seriousness of 1.8 years increased the degree of cumulation by four per cent, adding an extra 0.5 years to the quantum cumulated for a sum of sentences for the secondary offences of 12 years.

Putting this comparison aside, turn back to the second of the original two examples above: the case comprising not 10 but 50 1.2-year thefts, the sum of the sentences for the secondary offences being 60 years, and the degree of cumulation determined from curve 1 in Figure 7 to be 4.3 per cent, giving a quantum of cumulation of 2.6 years. Now, instead of 50 1.2-year secondary offences let there be 20 three-year secondary offences. Again, the degree of cumulation for proportionality will be 130 per cent of the cumulation where the secondary offences averaged 1.2 years (4.3 per cent), that is, 5.6 per cent, giving a quantum of cumulation of 3.4 years. Three points should be noted in regard to the preceding two pairs of comparisons. First, the percentage increase in the degree of cumulation corresponding to the mean individual sentence for the secondary offences increasing from 1.2 to 3.0 years is constant across all sums of sentence for the secondary offences; this, of course, must be so, since it is not a function of this factor. Secondly, where the sum of sentences for the secondary offences is 12 years the difference in the percentage cumulation is four per cent (18 cf. 14), but where this sum of sentences is 60 years the percentage difference is only 1.3 per cent (5.6 cf. 4.3). Thirdly, the difference in the quantum to be cumulated actually increases with greater sums of sentence for the secondary offences, the difference being 0.5 years (2.2 cf. 1.7) at 12 years and 0.8 years (3.4 cf. 2.6) at 60 years; this is because the decrease in cumulation with greater sums of sentence is tempered to ensure a greater quantum of cumulation.

In fact, these sets of calculations demonstrate how curve 2 in Figure 7 was derived, and how curves representing other values of the second factor could be derived (curve 3 representing a mean individual sentence for the secondary offences of 10.8 years is an

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instance). Instead of referring to Figure 9, the change in the percentage cumulation as a function of the mean individual sentence for the secondary offences can be calculated using the equation defining the line. It is:

$$CP_{1.2} = 16.6 \ddot{S} + 80.1$$

where:

$CP_{1.2}$  is the degree of cumulation as a percentage of the degree of cumulation considered proportionate for secondary offences of mean individual sentence 1.2 years, and

$\ddot{S}$  is the mean individual sentence for the secondary offences (in years) for which this degree of cumulation is to be determined.

The feature of the effect of the line in Figure 9 on the curves in Figure 7 is that as the mean sentence for the secondary offences increases (that is, as the seriousness of the secondary offences as individual offences increases) so there is a directly proportional increase in the percentage adjustment to cumulation. Now, this proportion is constant across the variation in the sums of sentence for the secondary offences. However, since with increasing sums of sentence there is a decreasing percentage cumulation, the difference in the percentage cumulation between the curves diminishes. But recall, this decrease in percentage cumulation is tempered so that the quantum cumulated will always be greater; hence the difference in the quantum cumulated increases with increasing sums of sentence.

## Legal justification of the framework

The numerical framework defining proportionality in multiple-offence cases is represented in Figures 7 and 9 (Figure 8 containing no new information, being derived directly from Figure 7 by way of Figure 9). In respect of Figure 7, it will be recalled that each curve has the following consequential features for cumulation: (1) as the sum of the sentences for the secondary offences increases so there is a progressive decrease in the percentage of these sentences added to the sentence for the principal offence; (2) notwithstanding this, with greater sums of sentence the quantum actually cumulated will be greater to reflect the greater seriousness; (3) the curve is asymptotic with respect to the sum of sentences, thus providing for some cumulation, however small, for additional secondary offences. To what extent do these characteristics comport with Thomas's (1979) and Ashworth's (1983b, 1992, 1995) interpretation of appellate court practice? To a brief summary and review of their work, this justification turns.

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It was Thomas (1979) who introduced the idea of proportionality in multiple-offence cases as cumulation within limits set by the ranges of sentence proportionate to classes and sub-classes of single offences. Ashworth (1995) extended this concept with his observation along the lines that no number of certain less serious offences (say, car thefts, each warranting a sentence of four months) together should be regarded as reaching a level of seriousness corresponding to that of a four-year rape. Ashworth's second contribution came in his consideration of how the individual sentences for the comprising offences in a multiple-offence case are in effect cumulated in order to arrive at the sentence for the case.

The problem for the sentencer is at once to maintain proportionality between sentence severity and the seriousness of different classes of crime but to impose greater punishment for the additional seriousness associated with multiple offences of a particular class of crime. His solution: each additional offence adds a quantum of sentence to the running case sentence, but the cumulative effect of each successive offence's sentence is less than that made by the preceding one. The features of the curves in Figure 7, outlined above, meet the second part of Ashworth's interpretation of what is the proper approach to the sentencing of multiple offenders. But do they satisfy the first part, namely, the maintenance of proportionality between classes of offence? Clearly, they do constrain cumulation, but to a greater or lesser degree than is required by Ashworth's standard? In truth, an answer cannot be found in Ashworth's work, because it is not sufficiently developed. From his contribution follows no more than the general form of the curves in Figure 7. To calibrate these curves as they are to be found in Figure 7, it was necessary to deal with the following three matters: selection of pairs of classes/sub-classes of offence to be used as a basis for establishing proportionality; determination of quanta of sentence to represent their seriousness; and operationalisation of the term 'no number of' (offences) in the statements of proportionality between the pairs of offences.

Before proceeding with these matters, the justification for the role of Figure 9 – the second part of the framework defining proportionality in multiple-offence cases – requires a brief explanation. As the mean seriousness of the secondary offences as individual offences increases, so there is a directly proportional increase in the percentage adjustment to cumulation for these offences; this is the effect of Figure 9 on Figure 7. Ashworth ignores this potential feature of proportionate cumulation. What is the argument for its relevance? The following two cases illustrate the underlying thinking: one comprises a serious armed robbery and thirty 6-month thefts; the other case consists of a similar armed robbery and three 5-year armed robberies. In each instance, there is 15 years of sentences to be cumulated on the sentence for the (principal) armed robbery. One's sense of justice would seem to require that a much greater percentage of the sentences for the secondary offences

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be added on in the second case than in the first, since in respect of these offences, the former offender is a petty thief and the latter a serious robber. Figure 9 takes care of this.

With this legal background to the justification of the proposed numerical framework for constraining cumulation of sentence according to the principle of proportionality, this discussion now turns to the calibration of the line in Figure 9 and the three curves in Figure 7. To this end, the above matters left open or ignored by Ashworth (1995) are taken up and developed.

First, curve 1 in Figure 7. Consider the selection of the pairs of offence. For this, Ashworth uses, apparently arbitrarily, rape as the touchstone for the constraint on cumulation of sentences for car theft. But this choice without a rationale must be regarded as an uncertain foundation. The problem is thus: if the two offences lie close together on the scale of seriousness, cumulation may be inadequate; if they lie too far apart, cumulation will be excessive. Perhaps an appropriate degree of constraint would be set where the constraining offence represented a clearly different level of seriousness than that of the offence to be constrained, but was no more than one step up in seriousness. This would appear to be established where two offences shared a gravamen, but one of the offences had a second gravamen. Theft and armed robbery provide a clear illustration of the point: both involve appropriating someone else's money or possessions, but in the latter the theft is accompanied by a clear threat of immediate violence and injury.

Now turn to consider how the seriousness of the classes or sub-classes of offence are to be defined. Ashworth used the ranges of sentence for the various offences; accordingly, in one of his examples, a series of mid-range burglaries is related to a mid-range rape. How, then, is range to be construed? It is suggested that the appropriate database for a particular class of offence is all the sentences of imprisonment determined in the higher courts for all offences – principal and secondary – in that class, not least because this study is concerned with the cumulation of sentences of imprisonment, and sentences imposed in magistrates' courts are more likely to reflect factors personal to the offender. An analysis of current sentencing practice supported this. The relevant data are to be found in the official sentencing statistics for the higher courts (supreme and county) in Victoria for the years 1993–1996 (Department of Justice, Victoria 1994, 1995, 1996, 1997).<sup>2</sup> For the various statutory classes of offence, the ranges defined by the 25th and 75th percentiles<sup>3</sup> are comparatively narrow, stable and for many comparisons between categories of offence show little or no overlap. These features are significant: they suggest that the sentences are determined to a significant extent by the facts of the offence, and that the various statutory offence categories have different characteristic levels of seriousness.

In regard to the offence that is to be constrained, what is wanted are offences typically warranting comparatively low quanta of sentence in relation to the range of imprisonment, but the sentences being substantial enough to reach significant levels of imprisonment in multiple-offence cases. Offences whose range lies between 0.5 and 1.5 years have the potential to fulfill this role. Constraining offences satisfying the step-up criterion were found for two of these offences: armed robbery for theft and rape for indecent assault. There were no other pairs meeting all the requirements. The ranges of sentence for these four offences are narrow and stable; the ranges for theft and indecent assault show substantial overlap, as also do the ranges for armed robbery and rape; against this, theft and armed robbery are well separated, as also are indecent assault and rape (see Table 8).

**Table 8: Indices of the distributions of sentences (in years) for theft, indecent assault, armed robbery and rape – higher courts (Victoria), 1993–1996**

Index	Theft					Indecent assault				
	'93	'94	'95	'96	Av.	'93	'94	'95	'96	Av.
Highest	10	4	4.5	3.5		3.5	8	4	5	
75th percentile	1	1	1	1	1.0	1.3	1.3	1.5	1.5	1.4
Median	0.8	0.8	0.8	0.8	0.8	1	0.8	1	1	1.0
25th percentile	0.5	0.5	0.5	0.5	0.5	0.7	0.5	0.7	0.5	0.6
Index	Armed robbery					Rape				
	'93	'94	'95	'96	Av.	'93	'94	'95	'96	Av.
Highest	12	9	9	10	10.0	12	11	9	14	11.5
75th percentile	5	5.5	4	5	4.9	5	7	6	5	5.8
Median	3	3	3	3.5	3.1	4	5	5	4.5	4.6
25th percentile	2.5	2	2	2	2.1	3.3	3.5	3.3	3	3.3

What levels of seriousness, and following from this, sentence, are to represent these offences? The problem was solved by formulating a statement of proportionality consistent with the approach underlying the selection of the pairs of offences, thus: no number of all but the most serious thefts (or indecent assaults) together could be regarded as serious as a mid-range armed robbery (or rape). The 75th percentile sentence could be used to mark 'all but the most serious', and the 50th percentile clearly defines 'mid-range'. When the percentile values averaged across the means for theft and indecent assault and (separately) armed robbery and rape are inserted into the statement of proportionality it becomes: for a case comprising a principal offence warranting a sentence of 1.2 years and a very large number of secondary offences of similar seriousness, not more than 2.7



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years should be added to the sentence for the principal offence for the purpose of punishing the seriousness associated with the secondary offences (that is, the upper limit on the sentence for such a case is 3.9 years).<sup>4</sup>

Finally, the sum of sentences representing the seriousness of a 'very large number' of 1.2-year secondary offences was set at 100. The first constraint on the curve, therefore, is that it should pass through the point 2.7 (per cent cumulation) for a sum of sentences (for the secondary offences) in years of 100 (that is, 2.7 years cumulation for 100 years of secondary offences). And since this point represents a working upper limit, the additional increase in cumulation for even very much greater sums of sentence should be small. Accordingly, the second constraint on the curve was taken to be 1.5 per cent cumulation for a sum of sentences of 200 years.

What can be said about the curve at the lower levels of seriousness? This can be answered by determining what constraint on cumulation there should be for a moderate number of 1.2-year offences. Four and eight such offences seem to define the lower and upper bounds, respectively, of what could reasonably be regarded as a moderate number of secondary offences. 'Eight' provides the more parsimonious criterion for cumulation, and for this reason was preferred as the basis for calibrating the curve.<sup>5</sup> And perhaps the average of the mean 25th percentile sentences for the constraining offences should set the progressive constraint on cumulation, this level marking all but the least serious offences in a particular offence category. This translates into a statement of proportionality, thus: for a case comprising a principal offence warranting a sentence of 1.2 years and eight secondary offences of similar seriousness, not more than 1.5 years should be added to the sentence for the principal offence for the purpose of punishing the seriousness associated with the secondary offences (that is, the upper limit on the sentence for such a case is 2.7 years). It follows that the curve should pass through the point 15.6 (per cent cumulation) for a sum of sentences for the secondary offences of 9.6 years (that is, 1.5 years cumulation for 9.6 years of secondary sentences). This is the third constraint on the curve.

The above discussion explains the calibration of curve 1 as it is to be found in Figure 7: why for a particular sum of sentences for the secondary offences one particular percentage cumulation for these sentences rather than another is considered proportionate. In fact, this curve represents the line satisfying the requirements of unlimited cumulation of sentence and by way of decreasing gains and, simultaneously, passing as closely as possible to the three constraining points – (100, 2.7) (200, 1.5) and (9.6, 15.6) – derived in the above analysis. In respect of the sums of sentence for the secondary offences of 9.6, 100 and 200, it provides for respective percentage cumulations of 15.6, 2.7 and 1.4. This curve clearly is an excellent fit to the calibrating points.<sup>6</sup>

This justification closes with some comments on the generality of this analysis. The framework for the constraint on cumulation is based on a principal offence of theft/indecent assault warranting a sentence of 1.2 years and multiple secondary offences also of theft/indecent assault and of the same degree of seriousness. There appears to be good reason why the framework should not be confined to theft/indecent assault; it is that seriousness is defined by sentence and is independent of the class of the offence. Nor should this analysis be restricted to cases for which the sentence for the principal offence is 1.2 years. The framework relates to the constraint on cumulation of secondary offences and, on the ground of proportionality, should this not be independent of the seriousness of the principal offence?<sup>7</sup> Finally, rare will be the case where a sentence of 1.2 years is fixed for each of the secondary offences comprising the case. However, it would seem not too great an approximation to use this framework for determining cumulation in cases where the mean sentence for the individual secondary offences is 1.2 years. Nevertheless, the analysis is limited to secondary offences of this average level of seriousness.

This raises the matter of how much more or less cumulation there should be where the mean sentence for the individual secondary offences is greater or less than 1.2 years. Figure 9 quantifies this, and to the calibration of the line this discussion turns. Again, what is wanted is a pair (or pairs) of offences, one providing the standard for constraint on cumulation of the other. The difference here is that the offences must be significantly more serious; only in this way can there be the contrast necessary for the calibration of the line. Accordingly, the most serious offence of murder was chosen to act as the constraint on cumulation. Recall, the 50th percentile sentence of the constraining offence marks the limit on cumulation. For murder this is 17.8 years (see Table 9). In regard to the selection of the constrained offence, the interpretation of a step down in seriousness is difficult to apply here, the problem arising because murder is so serious.

Rather, the step down in seriousness was defined by the sentences imposed for the worst instances of the most serious offences involving personal violence, murder aside. For this, two offence categories were found, apparently of appropriate seriousness – the highest

**Table 9: Indices of the distributions of sentence (in years) for murder – higher courts (Victoria), 1993–1996<sup>8</sup>**

Index	1993	1994	1995	1996	Average
Highest	Life	Life	Life	20	
75th percentile	Life	20	Life	18	
Median	20	18	16	17	17.8
25th percentile	15	15	14	15	14.8

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sentence imposed for each offence in at least one of the four years was in excess of 10 years – and for which the highest sentence imposed showed reasonable stability, namely, rape and armed robbery. The average of the mean highest sentences imposed for these two offences is 10.8 years (see Table 8). So the statement of proportionality for the constraint on cumulation becomes: for a case comprising a principal offence warranting a sentence of 10.8 years and a very large number of secondary offences of similar seriousness (these secondary offences together totalling 100 years), not more than 7.0 years should be added to the sentence for the principal offence for the purpose of punishing the seriousness associated with the secondary offences (that is, the upper limit on the sentence for such a case is 17.8 years). Again, this applies to cases where the mean individual sentence for the secondary offences is 10.8 years.

There are now two statements of proportionality for limiting the quantum of cumulation, one applying to more serious secondary offences and the other to less serious secondary offences. The final task is to link these in an internally consistent way, and in doing this provide a limit for secondary offences of any level of seriousness. There would appear to be no basis for regarding the effect of the mean individual secondary sentence on the adjustment to the degree of cumulation as otherwise than linear. Accordingly, the problem can be addressed in terms of simple proportions. Now, as the mean individual sentence for the secondary offences increases from 1.2 years to 10.8 years, so the limit on cumulation for 100 years of secondary offences rises from 2.7 to 7.0 years. Clearly, the degree of cumulation where the mean individual sentence is 1.2 years is (by definition) 100 per cent of the 2.7; and the degree of cumulation where the mean individual sentence is 10.8 years is 259<sup>9</sup> per cent of the degree of cumulation for mean individual sentences of 1.2 years. This explains the calibration of Figure 9: it is the line passing through the points (1.2, 100) and (10.8, 259). And since the percentage increase or decrease in the degree of cumulation where the mean individual sentence for the secondary offences is greater or less than 1.2 years is not a function of the sum of the sentences for the secondary offences, this line (and the associated formula) applies to all levels of this factor.

## Potential limitations of the framework

There are a number of potential limitations of the proposed framework defining proportionate effective sentences. The first is the idea of proportionality between the seriousness of single classes of offence as a foundation for the framework. The challenge to this is to be found in Wells' (1992) rhetorical question: why the sentence considered proportionate to a case comprising a number of unrelated offences should be constrained by the level of sentence proportionate to the most serious of those comprising offences as a class of

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offence. However, there is no conceptual basis for the alternative (namely, a harsher criterion of proportionality) implicit in Wells' question; indeed, it is so critically vague as to make it difficult to envisage how it could be used to derive a standard for the constraint of cumulation. Yet, perhaps there is an alternative to proportionality as a constraint on cumulation? In Victoria, judges do not infrequently rely on the notion of the crushing sentence as a justification for the constraint on cumulation in multiple-offence cases (see Lovegrove 1997a, 1997b), and it has been applied by the High Court in this type of case (see the judgment in *Postiglione*). But it would not be helpful in developing a standard for appropriate effective sentences. One reason is that proportionality relates to offence seriousness, whereas the crushing sentence finds its justification in the welfare of the offender. Moreover, it is not apparent what concept could be invoked as a means of quantifying what is crushing for the purpose of calibrating the framework.

The second potential limitation concerns the assumption underpinning the analysis that the current sentencing practice of the courts is a valid indicator of the seriousness of the single offences in each of the pairs defining relative seriousness. Whatever the wisdom of the judges' view of the relative seriousness of single offences, it is intuitive and, viewed more broadly, it must be considered to have a theoretically weak basis.

Then there are technical matters. (1) The derived numerical standard for proportionality would have been surer had there been a greater number of (pairs of) offences underlying the scaling of relative seriousness. (2) It had to be assumed that these ranges of sentence were based on cases in which the sentences were determined largely by the facts of the offence rather than matters personal to the offender. For reasons given in the discussion, neither of these matters appears to represent a serious threat to the framework presented here.

Finally, there are matters relating to the scope of the analysis. Factors in addition to the seriousness of the comprising offences, considered individually and together, might be thought to bear on case seriousness and, hence, the proportionate effective sentence. For example, perhaps there should be greater cumulation where the gravamens of the unrelated offences comprising the case cover a range (for example, a theft and an armed robbery as against two armed robberies); and the timing of the comprising offences might be a factor: the greater the period covered by the offending, the more serious the case. These factors have been identified as relevant to sentence by judges in Victoria (Lovegrove 1998b). But, in general, they would be expected to carry far less weight than the factors of the sum of the sentences for the secondary offences and the mean of the individual

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sentences for the secondary offences; the latter characterise all cases and are appropriate as elements of the framework; the former would be seen as features of a case only when manifest in the extreme and are thus more properly treated as variations within the framework.

The numerical standard for the proportionate sentencing of multiple offenders having been established, this standard is now applied to assess the appropriateness of judicial practice.

## Chapter 7

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### The analysis of the data

Does judicial practice in regard to the cumulation of sentence, and described in Part 1, comport with the principle of proportionality, as it has just been operationalised above for the multiple offender? The following analyses, presented separately for armed robbery, burglary and rape address this question.

### General analysis

#### *Armed robbery*

This sub-sample, it will be recalled, comprises 27 offenders. To assess whether or not the cumulation of sentence in a particular case was disproportionate, the actual degree of cumulation was compared with the degree of cumulation defined as proportionate. There are two measures of the degree of cumulation. These are:

- the quantum of sentence added to the sentence for the principal offence; and
- this quantum as a percentage of the sum of the sentences for the secondary offences.

Data relating to actual cumulation were taken directly from the analyses in Part 1. Proportionate cumulation was calculated using the two formulae derived in the theoretical analysis above. Since the criterion of proportionality depends on the sum of the sentences for the secondary offences and the mean of the individual sentences for these secondary offences, it varies with the particular case and, for this reason, must be calculated separately for each of the 27 cases.<sup>10</sup> The relevant data are presented in terms of a two-way classification. One follows the categories of the circumstances of the offences comprising a case – ‘single event’, ‘escapade’, ‘multiple event’, ‘single-multiple event’ (see Part 1). The second is by way of the sum of the sentences for the secondary offences – <3 years, ≥3 years; this particular cut-off point for these two categories was chosen because it represented a natural division in the distribution of cases for this variable (see Table 10) and the sums of sentence of less than three years could reasonably be regarded as short. This two-way classification was adopted because cases varying across it would appear to differ in character and in a way that might be thought to affect the degree of cumulation considered appropriate.

**Table 10: Distribution of the sums of sentence for the secondary offences (in years) for armed robbery (n=27)**

Sums of sentence (years)	Frequency
<1	4
≥1	8
≥2	3
≥3	
≥4	2
≥5	
≥6	
≥7	3
≥8	
≥9	1
≥10	
≥11	2
≥12	1
≥13	3 (19, 25, 61)

With these prefatory remarks, now turn to the data in Tables 11 and 12 showing how frequently and to how great an extent the cumulation of sentence for the 27 cases of armed robbery exceeds the calculated criterion of proportionality. Cases for which the actual degree of cumulation exceeds the proportionate degree are marked with an asterisk (the figures in brackets will be dealt with later).

Consider, first, cases for which the sum of the sentences for the secondary offences is low (<3 years) (see Table 11). Cumulation can be seen to be disproportionately harsh in 12 of these 15 cases (the three exceptions being in the 'single-multiple event' category), and but for two of the 12 cases (the two exceptions being in the 'escapade' category) the excessive cumulation can be reasonably thought of as generally not insubstantial. This is, of course, a subjective judgment, and in making it account must be taken simultaneously of both indices – per cent and quantum – of the degree of cumulation. For example, a difference of two months between the actual and proportionate degrees of cumulation might be regarded as significant for very low values of the quantum cumulated but not for higher values. For the 10 cases where the actual degree of cumulation clearly exceeded the proportionate degree, the mean percentage difference was 29 (55 cf. 26) and the mean quantum difference was 3.2 months (6.2 cf. 3.0).

**Table 11: Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of armed robbery – sum of sentences for the secondary offences <3 years (n=15)**

Single				Escapade				Multiple				Single-multiple			
A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>
*50	25	12	6	*50	27	6	3.2	*50	27	6	3.2	15 (25)	24 (27)	3	4.8 (3.2)
*50	27	6	3.2	*33	28	6	5	*100	25	12	3	22 *(33)	25 (28)	6	6.7 (5.0)
*68	25	2	0.7	*52	26	2	1.1					*30 *(54)	24 (25)	6	4.8 (2.8)
*50	25	3	1.4									13 *(50)	23 (25)	3	5.6 (1.6)
*50	26	3	1.6												
*50	27	6	3.2												

Note: A% actual percentage  
P% proportionate percentage  
A<sub>m</sub> actual quantum (in months)  
P<sub>m</sub> proportionate quantum (in months)

**Table 12: Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of armed robbery – sum of sentences for the secondary offences ≥3 years (n=12)**

Single				Escapade				Multiple				Single-multiple			
A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>
25 *(33)	25 (31)	12	12 (11)	19	19	20	20.4	13	14	18	19.2	8	19	4	9.4
9	20	12	26.4					20	21	18	19.2	*31 *(33)	17 (25)	72	38.4 (54.0)
								14	25	12	20.4	*20 *(21)	14 (15)	30	21.6 (21.6)
								*10	6	72	44.4	*43	25	36	20.4
												11 (11)	11 (13)	33	33.6 (37.2)

Note: A% actual percentage  
P% proportionate percentage  
A<sub>m</sub> actual quantum (in months)  
P<sub>m</sub> proportionate quantum (in months)



**Table 13: Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of armed robbery – sum of sentences for the secondary offences <3 years (n=15)**

Single			Escapade			Multiple			Single-multiple		
PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$	PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$	PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$	PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$
*46.0	6.0	13	45.2	2.8	6	*27.2	2.8	10	–	–	–
									(–)	(–)	(–)
99.2	2.8	3	65.0	1.0	2	*9.0	9.0	100	–	–	–
									(29.0)	(1.0)	(3)
12.7	1.3	10	19.1	0.9	5				34.8	1.2	3
									*(32.8)	(3.2)	(10)
16.4	1.6	10							–	–	–
									(49.6)	(1.4)	(3)
19.6	1.4	7									
81.2	2.8	3									

Note: PES<sub>m</sub> proportionate effective sentence (in months)  
 EC<sub>m</sub> excessive cumulation (quantum in months)  
 $\frac{EC}{PES}$  excessive cumulation as a percentage of the proportionate effective sentence

Now, there is a second, a stricter, criterion against which to assess the degree of injustice. What matters here is the degree of cumulation in relation to the effective sentence. So, for example, an excessive quantum of cumulation of three months could result in an effective sentence of 18 months instead of 15 months, or 90 months instead of 87 months; the former might be thought of as troubling, the latter not. It is important, therefore, to examine the data in Table 11 from this perspective. The relevant data are presented in Table 13; they are: the quantum of excessive cumulation ( $A_m - P_m$  in Table 11); the proportionate effective sentence, that is, the total of the sentence for the principal offence (taken directly from the analysis in Part 1) and the proportionate quantum of cumulation ( $P_m$  in Table 11); the quantum of excessive cumulation as a percentage of the proportionate effective sentence. This information is given in the table for each of the 12 cases for which the immediately preceding analysis revealed excessive cumulation. (To facilitate comparisons across Tables 11 and 13, data relating to a particular case are located in the corresponding positions in both tables.)

In determining whether the excessive cumulation is significant or not, account should be taken simultaneously of both the proportionate effective sentence and the quantum of

excessive cumulation as a percentage of this. The reason: justice is not measured in scruples. By way of example, consider an excessive quantum of cumulation resulting in a 10 per cent increase, in one case on a proportionate effective sentence of 10 months and, in another case, on a proportionate effective sentence of 10 years. Now, were these sentences for individual offences, only the latter difference is likely to be regarded as sufficiently great so as to be outside the range for that offence and therefore a sentencing error. From this perspective, then, cumulation would perhaps be regarded as excessive in as few as three of the 15 cases. (The three are marked with an asterisk.) This is to be compared with the findings for the same cases considered from the first perspective, where cumulation was thought to be clearly excessive in 10 of the 15 cases.

This analysis now turns to consider the findings for those cases for which the sum of sentences for the secondary offences is high ( $\geq 3$  years). Referring to Table 12, cumulation can be seen to be disproportionately harsh in four of the 12 cases, one being in the 'multiple event' category<sup>11</sup> and three being in the 'single-multiple event' category. And the excessive cumulation is very substantial indeed: the mean difference between the actual and the proportionate degrees of cumulation being 10 (26 cf. 16) per cent, representing a quantum of 21.3 (52.5 cf. 31.2) months. But what about the degree of cumulation in relation to the effective sentence? Turning to Table 14, it can be readily apprehended that the

**Table 14: Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of armed robbery – sum of sentences for the secondary offences  $\geq 3$  years (n=12)**

Single			Escapade			Multiple			Single-multiple		
PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$	PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$	PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$	PES <sub>m</sub>	EC <sub>m</sub>	$\frac{EC}{PES}$
–	–	–	–	–	–	–	–	–	–	–	–
(59.0)	(1.0)	(2)									
–	–	–				–	–	–	*146.4	33.6	23
									*(162.0)	(18.0)	(11)
						–	–	–	*63.6	8.4	13
									*(63.6)	(8.4)	(13)
						*104.4	27.6	26	*80.4	15.6	19
									–	–	–
									(–)	(–)	(–)

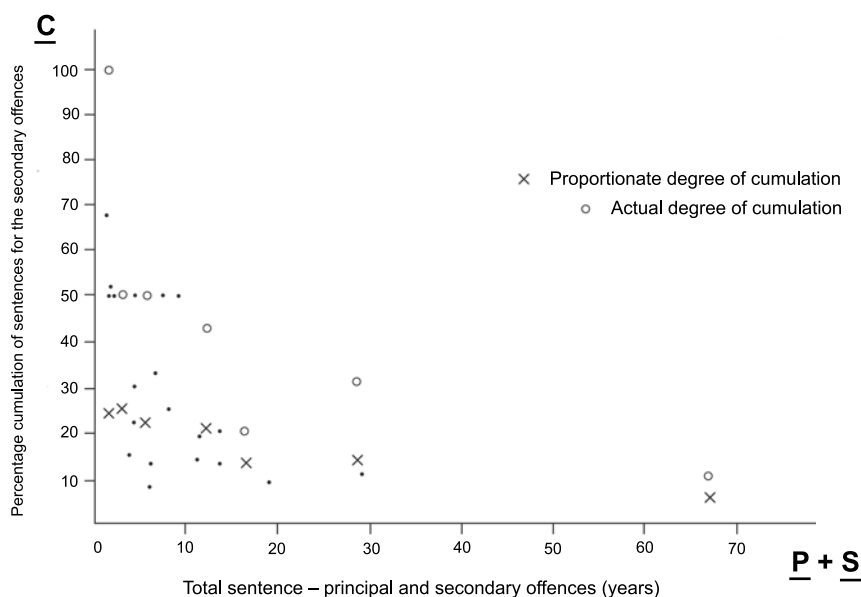
Note: PES<sub>m</sub> proportionate effective sentence (in months)  
 EC<sub>m</sub> excessive cumulation (quantum in months)  
 $\frac{EC}{PES}$  excessive cumulation as a percentage of the proportionate effective sentence

relevant data do not warrant a change in the conclusion of excessive cumulation of a very substantial degree in four (of the 12) cases.

For the record, the quantitative relationship between the effective sentences and the sentences for the individual component offences for the 27 offenders in the armed robbery sample, and shown in Figures 2 and 3, is re-presented in Figure 10. However, here the graphical representation of judicial practice is modified somewhat: the points for the seven offenders, for whom cumulation was determined to be excessive, are plotted as in Figures 2 and 3 (that is, according to the actual degree of cumulation ordered by the judge) but in addition according to the degree of cumulation defined as proportionate in this analysis.<sup>12</sup> (These points appear in Figure 10 as circles for the actual degree of cumulation and as crosses for the proportionate degree of cumulation.)

It will be recalled from Part 1 that there was the potential for error in the armed robbery data for some of the offenders. (This problem also arose, *mutatis mutandis*, for burglary and rape.) The precondition occurred where all or some of the offending comprised a single event and the sentence for a separate transaction connected with an armed robbery (for example, a false imprisonment) was made concurrent with the sentence for the armed

**Figure 10: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) showing the effect of excessive cumulation – armed robbery (n=27)**



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robbery. Under these circumstances, it is not clear whether concurrency was ordered to avoid excessive cumulation or because the seriousness associated with the connected offence was taken account of in the sentence for the armed robbery. Where the latter alternative represents the judge's thinking, the sentence for the connected offence should not be incorporated in the calculations of the sum of the sentences for the secondary offences or of the mean of the individual sentences for these secondary offences.

Since in none of the relevant instances did the sentencing judge remark on this aspect of sentence determination, it could not be known whether the data carried this error. Accordingly, for the indices in Tables 11, 12, 13 and 14 it was necessary to redo the calculations for those offenders whose sentences are potentially subject to this error. (The adjustment could apply to one or more connected offences and one or more armed robberies for a particular offender.) The resulting figures are shown in brackets. In fact, the above conclusions require little modification. Consider first those cases for which the sums of sentence for the secondary offences are less than three years. With respect to the degree of cumulation, cumulation is potentially excessive in an additional two cases – both are in the 'single-multiple event' category – but in only one of them would the difference be regarded as not insubstantial. And from the perspective of the degree of cumulation in relation to the effective sentence, for these two cases the excessive cumulation could not be thought of as significant. However, from this perspective, there is one additional case (again in the 'single-multiple event' category) for which there is the possibility of the excessive cumulation being significant. In respect of those cases for which the sums of sentence for their secondary offences are high ( $\geq 3$  years), there are no potential changes worthy of especial comment.

### *Burglary*

This sub-sample, it will be recalled, comprises 13 offenders. To assess whether or not the cumulation of sentence in a particular case was disproportionate, the actual degree of cumulation was compared with the degree of cumulation defined as proportionate. There are the same two measures of the degree of cumulation:

- the quantum of sentence added to the sentence for the principal offence;
- this quantum as a percentage of the sum of the sentences for the secondary offences.

Data relating to actual cumulation were taken directly from the analyses in Part 1. Proportionate cumulation was calculated using the two formulae derived in the theoretical analysis above. Since the criterion of proportionality depends on the sum of the sentences

for the secondary offences and the mean of the individual sentences for these secondary offences, it varies with the particular case and, for this reason, must be calculated separately for each of the 13 cases.<sup>13</sup> The relevant data are again presented in terms of a two-way classification. One follows the categories of the circumstances of the offences comprising a case – ‘single event’, ‘escapade’, ‘multiple event’, ‘single-multiple event’ (see Part 1). The second is by way of the sum of the sentences for the secondary offences – <3 years, ≥3 years; this particular cut-off point for these two categories was chosen because, as for armed robbery, it represented a natural division in the distribution of cases for this variable (see Table 15) and the sums of sentence of less than three years could reasonably be regarded as short. How frequently and to how great an extent the cumulation of sentence for the 13 cases of burglary exceeds the calculated criterion of proportionality is shown in Tables 16 and 17. Cases for which the actual degree of cumulation exceeds the proportionate degree are marked with an asterisk. (The figures in brackets will be dealt with later.)

Consider, first, cases for which the sum of sentences for the secondary offences is low (<3 years) (see Table 16). Cumulation can be seen to be disproportionately harsh in six of these seven cases (the one exception being in the ‘single-multiple event’ category), and but for one of the six cases (the exception being in the ‘single event’ category) the excessive cumulation can be reasonably thought of as generally (perhaps) very substantial. For the five cases where the actual degree of cumulation clearly exceeded the proportionate degree, the mean percentage difference was 48 (72 cf. 24) and the mean quantum difference was 8.9 months (12.9 cf. 4.0).

**Table 15: Distribution of the sums of sentence for the secondary offences (in years) for burglary (n=13)**

Sums of sentence (years)	Frequency
<1	
≥1	7
≥2	
≥3	
≥4	1
≥5	
≥6	2
≥7	3 (25, 29.3, 47.8)

**Table 16: Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of burglary – sum of sentences for the secondary offences <3 years (n=7)**

Single				Escapade				Multiple				Single-multiple			
A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>
*33	28	6	5					*100	21	22	4.6	*52	25	6.5	3.1
*43	25	6	3.5					*67	24	12	4.3	14	22	3	4.7
*(100)	(26)		(1.6)									*100	25	18	4.4

Note: A% actual percentage

P% proportionate percentage

A<sub>m</sub> actual quantum (in months)

P<sub>m</sub> proportionate quantum (in months)

**Table 17: Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of burglary – sum of sentences for the secondary offences ≥3 years (n=6)**

Single				Escapade				Multiple				Single-multiple			
A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>
								*31	22	24	16.8	*50	25	24	12
								2	8	6	27.4				
								2	9	6	26.6				
								5	5	31	30.7				
								12	17	9	13.1				

Note: A% actual percentage

P% proportionate percentage

A<sub>m</sub> actual quantum (in months)

P<sub>m</sub> proportionate quantum (in months)

**Table 18: Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of burglary – sum of sentences for the secondary offences <3 years (n=7)**

Single			Escapade			Multiple			Single-multiple		
PES <sub>m</sub>	EC <sub>m</sub>	EC	PES <sub>m</sub>	EC <sub>m</sub>	EC	PES <sub>m</sub>	EC <sub>m</sub>	EC	PES <sub>m</sub>	EC <sub>m</sub>	EC
		PES			PES			PES			PES
23.0	1.0	4				*7.4	17.4	235	*27.1	3.4	13
30.5	2.5	8				*10.3	7.7	75	–	–	–
*(28.6)	(4.4)	(15)									
									*16.4	13.6	83

Note: PES<sub>m</sub> proportionate effective sentence (in months)

EC<sub>m</sub> excessive cumulation (quantum in months)

EC

PES excessive cumulation as a percentage of the proportionate effective sentence

Now to the second, stricter, criterion against which to assess the degree of injustice: the degree of cumulation in relation to the effective sentence. The data relevant to Table 16 are presented in Table 18; they are, as before: the quantum of excessive cumulation ( $A_m - P_m$  in Table 16); the proportionate effective sentence, that is, the total of the sentence for the principal offence (taken directly from the analysis in Part 1) and the proportionate quantum of cumulation ( $P_m$  in Table 16); the quantum of excessive cumulation as a percentage of the proportionate effective sentence. This information is given in the table for each of the six cases for which the immediately preceding analysis revealed excessive cumulation. (To facilitate comparisons across Tables 16 and 18, data relating to a particular case are located in the corresponding positions in both tables.) From this perspective, then, cumulation may be regarded as excessive (actually, generally to a very substantial degree) in four of the seven cases. (The four are marked with an asterisk.) This is to be compared with the findings for the same cases considered from the first perspective, where cumulation was thought to be clearly excessive in five of the seven cases.

This analysis now turns to consider the findings for those cases for which the sum of sentences for the secondary offences is high ( $\geq 3$  years). Referring to Table 17, cumulation can be seen to be disproportionately harsh in two of the six cases, one being in the 'multiple event' category and the other being in the 'single-multiple event' category. And the excessive cumulation is substantial indeed: the mean difference between the actual and the proportionate degrees of cumulation being 17 (41 cf. 24) per cent, representing a quantum of 9.6 (24.0 cf. 14.4) months. But what about the degree of cumulation in relation

to the effective sentence? Turning to Table 19, it can be readily apprehended that the relevant data do not warrant a change in the conclusion of excessive cumulation of a substantial degree in two (of the six) cases.

For the record, the quantitative relationship between the effective sentences and the sentences for the individual component offences for the 13 offenders in the burglary sample, and shown in Figure 4, is re-presented in Figure 11. However, here the graphical representation of judicial practice is modified somewhat: the points for the six offenders, for whom cumulation was determined to be excessive, are plotted as in Figure 4 (that is, according to the actual degree of cumulation ordered by the judge) but in addition according to the degree of cumulation defined as proportionate in this analysis.<sup>14</sup> (These points appear in Figure 11 as circles for the actual degree of cumulation and as crosses for the proportionate degree of cumulation.)

Again, there is the potential for error in the data in Tables 16, 17, 18 and 19 for some of the offenders. It is where all or some of the offending comprised a single event and the sentence for a separate transaction connected with a burglary (for example, a false imprisonment) was made concurrent with the sentence for the burglary. As explained for armed robbery, under these circumstances, it is not clear whether concurrency was ordered to avoid excessive cumulation or because the seriousness associated with the connected offence was taken account of in the sentence for the burglary. Where the latter alternative represents the judge's thinking, the sentence for the connected offence should not be incorporated in

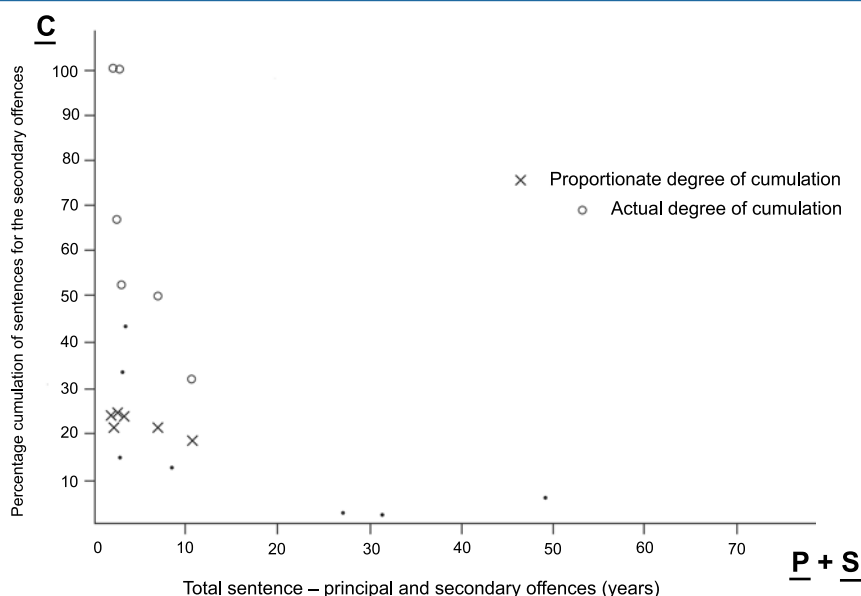
**Table 19: Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of burglary – sum of sentences for the secondary offences  $\geq 3$  years (n=6)**

Single			Escapade			Multiple			Single-multiple		
PES <sub>m</sub>	EC <sub>m</sub>	EC PES	PES <sub>m</sub>	EC <sub>m</sub>	EC PES	PES <sub>m</sub>	EC <sub>m</sub>	EC PES	PES <sub>m</sub>	EC <sub>m</sub>	EC PES
						*64.8	7.2	11	*48.0	12.0	25
						–	–	–			
						–	–	–			
						–	–	–			
						–	–	–			

Note: PES<sub>m</sub> proportionate effective sentence (in months)  
 EC<sub>m</sub> excessive cumulation (quantum in months)  
 $\frac{EC}{PES}$  excessive cumulation as a percentage of the proportionate effective sentence



**Figure 11: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) showing the effect of excessive cumulation – burglary (n=13)**



the calculations of the sum of the sentences for the secondary offences or of the mean of the individual sentences for these secondary offences. Since in none of the relevant instances did the sentencing judge remark on this aspect of sentence determination, it could not be known whether the data carried this error. Accordingly, it was necessary to redo the calculations for the relevant offenders. (This adjustment could apply to one or more connected offences and one or more burglaries for a particular offender.)

There was only one offender in this burglary sample whose sentences are potentially subject to this error. The figures from the redone calculations for this offender are shown in brackets in Tables 16 and 18 – the affected tables. In fact, the above conclusions require little modification. With respect to the degree of cumulation, there is no change. And from the perspective of the degree of cumulation in relation to the effective sentence, cumulation now appears as excessive.

### *Rape*

This sub-sample, it will be recalled, comprises 24 offenders. To assess whether or not the cumulation of sentence in a particular case was disproportionate, the actual degree of

cumulation was compared with the degree of cumulation defined as proportionate. Again, there are the same two measures of the degree of cumulation. These are:

- the quantum of sentence added to the sentence for the principal offence; and
- this quantum as a percentage of the sum of the sentences for the secondary offences.

Data relating to actual cumulation were taken directly from the analyses in Part 1. Proportionate cumulation was calculated using the two formulae derived in the theoretical analysis above. Since the criterion of proportionality depends on the sum of the sentences for the secondary offences and the mean of the individual sentences for these secondary offences, it varies with the particular case and, for this reason, must be calculated separately for each of the 24 cases.<sup>15</sup> The relevant data are presented in terms of a one-way classification: the categories of the circumstances of the offences comprising a case – ‘single event’, ‘escapade’, ‘multiple event’, ‘single-multiple event’ (see Part 1). (For armed robbery and burglary, it will be recalled, there was a second classification by way of the sum of the sentences for the secondary offences— <3 years, ≥3 years. This was not used here because of the paucity of sentences falling in the lower levels of the distribution for this variable – see Table 20.) How frequently and to how great an extent the cumulation of

**Table 20: Distribution of the sums of sentence for the secondary offences (in years) for rape (n=24)**

Sums of sentence (years)	Frequency
<1	
≥1	
≥2	4
≥3	1
≥4	2
≥5	1
≥6	4
≥7	3
≥8	
≥9	2
≥10	1
≥11	
≥12	2
≥13	1
≥14	3 (25.5, 30.5, 38.5)

sentence for the 24 cases of rape exceeds the calculated criterion of proportionality is shown in Table 21. Cases for which the actual degree of cumulation exceeds the proportionate degree are marked with an asterisk. And the entries for those offenders deemed by the court to be serious sexual offenders are underlined. The figures in brackets will be dealt with later.

**Table 21: Actual and proportionate degree of cumulation as a percentage and a quantum (in months) for the four categories of rape (n=24)**

Single				Escapade				Multiple				Single-multiple			
A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>	A%	P%	A <sub>m</sub>	P <sub>m</sub>
*36	23	14	8.9					*41	22	12	6.5	*40	25	12	7.5
												*(67)	(28)		(5.1)
10	10	48	46					*100	29	24	7	*19	16	18	15.1
15	22	12	16.8									*13	9	48	32.7
												*(14)	(9)		(32.1)
20	33	12	20									*38	16	42	17.8
												*(57)	(20)		(14.9)
6	14	18	42.8									12	13	18	19.6
*24	21	21	18.5												
17	25	12	17.9												
*36	20	30	16.5												
*26	20	21	16.1												
17	35	12	24.8												
*65	22	33	11.4												
*63	22	32	11.4												
11	21	12	22.6												
17	20	24	29.1												
*23	20	36	31.2												
12	22	4	7.5												
10	25	12	29.8												

Note: A% actual percentage

P% proportionate percentage

A<sub>m</sub> actual quantum (in months)

P<sub>m</sub> proportionate quantum (in months)

The data for serious sexual offenders are in italics.

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Cumulation can be seen to be disproportionately harsh in 13 of these 24 cases (all but one of the 11 exceptions being in the 'single event' category), and but for three of the 13 cases (two of the exceptions being in the 'single event' category and the other being in the 'single-multiple event' category) the excessive cumulation could be reasonably thought of as generally very substantial. For the 10 cases where the actual degree of cumulation clearly exceeded the proportionate degree, the mean percentage difference was 25 (46 cf. 21) and the mean quantum difference was 13 months (27 cf. 14).

Now to the second, stricter, criterion against which to assess the degree of injustice: the degree of cumulation in relation to the effective sentence. The data relevant to Table 21 are presented in Table 22; they are, again: the quantum of excessive cumulation ( $A_m - P_m$  in Table 21); the proportionate effective sentence, that is, the total of the sentence for the principal offence (taken directly from the analysis in Part 1) and the proportionate quantum of cumulation  $P_m$  in Table 21); the quantum of excessive cumulation as a percentage of the proportionate effective sentence. This information is given in the table for each of the 13 cases for which the immediately preceding analysis revealed excessive cumulation. (To facilitate comparisons across Tables 21 and 22, data relating to a particular case are located in the corresponding positions in both tables.) From this perspective, then, cumulation may be regarded as generally very substantial in up to eight of the 24 cases (the eight are marked with an asterisk). This is to be compared with the findings for the same cases considered from the first perspective, where cumulation was thought to be clearly excessive in 10 of the 24 cases.

For the record, the quantitative relationship between the effective sentences and the sentences for the individual component offences for the 24 offenders in the rape sample, and shown in Figure 5, is re-presented in Figure 12. However, here the graphical representation of judicial practice is modified somewhat: the points for the eight offenders, for whom cumulation was determined to be excessive, are plotted as in Figure 5 (that is, according to the actual degree of cumulation ordered by the judge) but in addition according to the degree of cumulation defined as proportionate in this analysis.<sup>16</sup> (These points appear in Figure 12 as circles for the actual degree of cumulation and as crosses for the proportionate degree of cumulation.)

Again, there is the potential for error in the data for some of the offenders. For armed robbery and burglary this potential error arose where all or some of the offending comprised a single event and the sentence for the separate transaction connected with the armed robbery/burglary (for example, a false imprisonment) was made concurrent with the sentence for the armed robbery/burglary. Under these circumstances, it is not clear whether

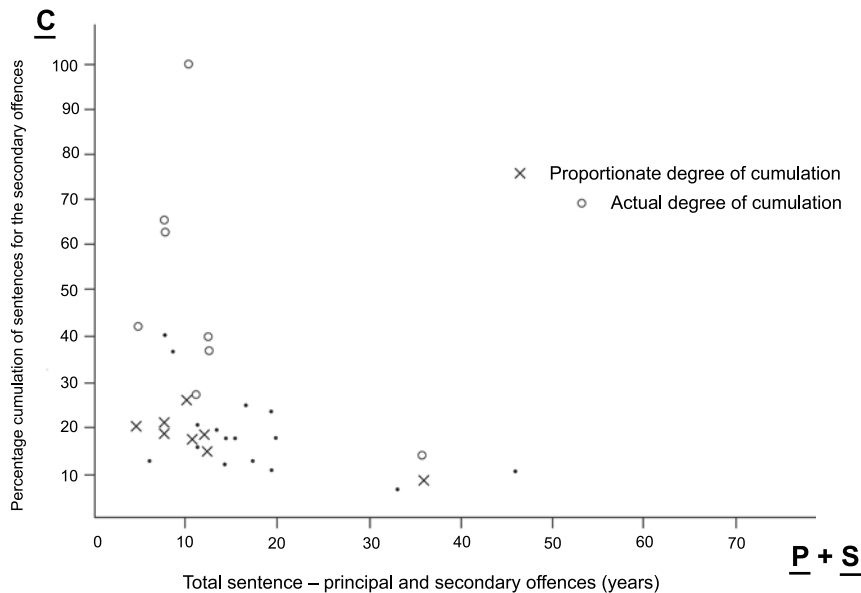
concurrency was ordered to avoid excessive cumulation or because the seriousness associated with the connected offence was taken account of in the sentence for the armed robbery/burglary. Where the latter alternative represents the judge's thinking, the sentence for the connected offence should not be incorporated in the calculations of the sum of the sentences for the secondary offences or of the mean of the individual sentences for these secondary offences.

**Table 22: Excessive cumulation (quantum in months) as a percentage of the proportionate effective sentence (in months) for the four categories of rape (n=24)**

Single			Escapade			Multiple			Single-multiple		
PES <sub>m</sub>	EC <sub>m</sub>	EC PES	PES <sub>m</sub>	EC <sub>m</sub>	EC PES	PES <sub>m</sub>	EC <sub>m</sub>	EC PES	PES <sub>m</sub>	EC <sub>m</sub>	EC PES
68.9	5.1	7				*30.5	5.5	18	67.5 *(65.1)	4.5 (6.9)	7 (11)
–	–	–				*103.0	17.0	17	75.1	2.9	4
–	–	–							*92.7 *(92.1)	15.3 (15.9)	17 (17)
–	–	–							*53.8 *(50.9)	24.2 (27.1)	45 (53)
–	–	–							–	–	–
126.5	2.5	2									
–	–	–									
*76.5	13.5	18									
*58.1	4.9	8									
–	–	–									
*47.4	21.6	46									
*50.4	20.6	41									
–	–	–									
–	–	–									
103.2	4.8	5									
–	–	–									
–	–	–									

Note: PES<sub>m</sub> proportionate effective sentence (in months)  
EC<sub>m</sub> excessive cumulation (quantum in months)  
EC  
PES excessive cumulation as a percentage of the proportionate effective sentence

**Figure 12: Percentage cumulation of the sentences for the secondary offences as a function of the total sentence (in years) showing the effect of excessive cumulation – rape (n=24)**



Since in none of the relevant instances did the sentencing judge remark on this aspect of sentence determination, it could not be known whether the data carried this error. For rape, it will be recalled, the same problem manifests itself somewhat differently. It arises where all of the one or more associated offences – these include any non-principal rapes – were made concurrent, in regard to a single incident involving one victim. Accordingly it was necessary to redo the calculations for the relevant offenders. (The adjustment is made for all the associated offences.) There were three offenders in this rape sample whose sentences are potentially subject to this error. The figures from the redone calculations for these offenders are shown in brackets in Tables 21 and 22 – the affected tables. In fact, the above conclusions require little modification. With respect to the degree of cumulation, there is no change. And from the perspective of the degree of cumulation in relation to the effective sentence, there is one additional case (this being in the ‘single-multiple event’ category) for which there is the possibility of the excessive cumulation being significant.

## The incidence of disproportionately severe cumulation

In the three samples of armed robbery, burglary and rape there are in total 64 offenders. When the broad criterion of degree of excessive cumulation was applied to these offenders' sentences, 31 – just under one half – were found to be disproportionately harsh. How these were distributed in respect of the type of offence and the two case characteristics is shown in Table 23. On the basis of these data, the following is suggested, although tentatively in view of the small numbers. Across offences, there is no striking variation in the incidence of disproportionate harshness. However, within each of armed robbery and burglary, the incidence tended to be greater where the sum of sentences for the secondary sentences was lower. Similarly, between the four categories of the circumstances of the offence, disproportionate harshness was somewhat more frequent for the offenders falling in either the 'multiple event' or 'single-multiple event' categories: across the three offences 18 of 33 for these two categories as against 13 of 31 for the 'single event' and 'escapade' categories; although the trend was solely attributable to rape.

By way of comparison, when the stricter criterion of degree of excessive cumulation in relation to the effective sentence was applied to these offenders' sentences, 21 – one third – were found to be disproportionately harsh. How these were distributed in respect of the type of offence and the two case characteristics is shown in Table 24. On the basis of these data, the following is suggested. Across offences, there is no striking variation in the incidence of disproportionate harshness. And within each of armed robbery and burglary, the sum of sentences for the secondary sentences did not appear as a factor. However, between the four categories of the circumstances of the offence there are striking

**Table 23: Relationship between the incidence of excessive cumulation – broad criterion – and case characteristics for armed robbery (n=27), burglary (n=13) and rape (n=24)**

Offence	Sum of sentences for the secondary offences (years)	Single	Escapade	Multiple	Single-multiple	Sub-total
Armed robbery	<3	6(6)	1(3)	2(2)	1(4)	10(15)
	≥3	0(2)	0(1)	1(4)	3(5)	4(12)
Burglary	<3	1(2)	0(0)	2(2)	2(3)	5(7)
	≥3	0(0)	0(0)	1(5)	1(1)	2(6)
Rape		5(17)	0(0)	2(2)	3(5)	10(24)

Note: The figures in brackets give the number of cases in each of the categories.

differences. Disproportionate harshness was largely found for the offenders falling in either the 'multiple event' or 'single-multiple event' categories. The figures speak for themselves: across the three offences 16 of 33 – one half – for these two categories as against 5 of 31 for the 'single event' and 'escapade' categories. This trend was strong for the three offences.

**Table 24: Relationship between the incidence of excessive cumulation – strict criterion – and case characteristics for armed robbery (n=27), burglary (n=13) and rape (n=24)**

Offence	Sum of sentences for the secondary offences (years)				Single-multiple	Sub-total
		Single	Escapade	Multiple		
Armed robbery	<3	1(6)	0(3)	2(2)	0(4)	3(15)
	≥3	0(2)	0(1)	1(4)	3(5)	4(12)
Burglary	<3	0(2)	0(0)	2(2)	2(3)	4(7)
	≥3	0(0)	0(0)	1(5)	1(1)	2(6)
Rape		4(17)	0(0)	2(2)	2(5)	8(24)

Note. The figures in brackets give the number of cases in each of the categories.

**Table 25: Relationship between the incidence of excessive cumulation – strict criterion – and serious sexual offenders for the four categories of rape**

Offender category	Single	Escapade	Multiple	Single-multiple	Sub-totals
Serious sexual	0(7)	0(0)	1(1)	2(4)	3(12)
Non-serious sexual	4(10)	0(0)	1(1)	0(1)	5(12)

Note: The figures in brackets give the number of cases in each of the categories.



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## **Disproportionately severe cumulation and the serious sexual offender**

In the rape sample of 24 offenders, 12 were deemed by the court to be serious sexual offenders, and for one of these the judge appeared to regard a longer than proportionate sentence as appropriate. It might be expected that these cases would largely account for the instances of disproportionately harsh cumulation according to the stricter criterion and identified empirically in the present study.<sup>17</sup> Table 25 shows otherwise. Moreover, the sentence for the one case deemed to require a disproportionate sentence did not exceed this (stricter) criterion of excessive cumulation.

## Chapter 8

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### Proportionality and the cumulation of sentence: a discussion of the analysis

What has been offered here is a quantitative investigation of the severity of effective sentences imposed on multiple offenders by Victorian judges in the mid-nineties; in particular, whether they accord with the requirements of proportionality considered as a limiting principle. The effective sentences are taken from Part 1 of the study, which presented a quantitative picture of the sentencing of multiple offenders according to the totality principle. This was based on an analysis of archival data and showing the relationship between the effective sentence imposed for a case and the sentences of imprisonment fixed for the individual component offences representing separate transactions. For this there were separate analyses for cases involving each of armed robbery, burglary and rape as principal offences.

The totality principle enjoins the judge to impose an effective sentence appropriate to the circumstances of the case viewed as a whole. For this the sentence must be both proportionate with respect to the seriousness of the case and merciful by way of not being crushing in the light of the offender's rehabilitation prospects and other circumstances such as state of health. As a matter of principle, the sentences considered appropriate to the individual comprising offences as separate transactions determine the seriousness of the case; matters relating to the offence and the offender determine what is appropriate to these offences (see generally, Fox & Freiberg 1999). Proportionality can be seen as determining and as limiting. In the present study it is applied in the latter sense (that is, the focus is whether the sentences are disproportionately harsh). From this perspective, the extension of mercy to the offender may justify an effective sentence below the proportionate limit; whether the case sentences are appropriate on this ground is beyond the scope of the present study.

There are good reasons for investigating whether the effective sentences in these samples comport with the principle of proportionality operationalised for the multiple offender. Although the totality principle incorporates proportionality and mercy, the idea of the effective sentence not crushing the offender appears, at least historically, to have been the dominant explicit reason for the constraint on cumulation in Victoria. Indeed, in Lovegrove's (1997a, 1997b) study of judges' accounts of their decision-making as they determined sentences for multiple offenders, the express policy consideration for limiting cumulation was that of the crushing sentence. This is not to say that proportionality did not play a significant, albeit implicit, role in the decision. But it may indicate that proportionality lies in the background of judicial thinking; if, in fact, this is the case, then there is a risk of disproportionate harshness. In any case, even if proportionality is a

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dominant consideration, its meaning has not been elaborated but remains an intuitive notion. Thus, to ascertain what proportionality means – or does not mean – in practice, it is necessary to compare the principle as applied against a standard derived from a principled definition.

The present study does this. Apparently the only work on proportionality as a limiting standard applying to the multiple offender is that of Thomas (1979) and Ashworth (1983b, 1992, 1995) based on English practice. In their conception, the cumulation of sentence should be constrained by the seriousness of the comprising offences as a class of offence. Without doubt, this concept represented a great step forward in the thinking on this question. But it remained somewhat underdeveloped for general use, being of practical value only in egregious instances of disproportionate harshness. So, for example, six years' imprisonment would be excessive for six one-year thefts, but what quantum would be excessive for three one-year thefts? What is required, then, is a precise standard; necessarily a numerical standard. Herein lies the significant contribution of the present study.

The ideas of Thomas and Ashworth were developed to produce a numerical standard. The product of this work is a formula for calculating what quantum of sentence should be regarded as proportionate for a particular case, this taking account of the sentences considered appropriate to the individual secondary offences comprising the case. This standard was applied to each of the cases in the three samples to determine whether the imposed effective sentence was excessive in the light of this criterion of proportionality. This test would be expected to be particularly sensitive. There are two reasons for this. First – this is a point emphasised in Part 1 – the representation of the relationship between the effective sentence for a case and the sentences for the individual component offences accords with the judicial approach to this problem. By this means, it has the potential to offer an accurate description of judicial practice in terms of the major factors determining the decision. Secondly, the numerical standard is based on a model having the same general structure as the representation underlying the description. It therefore relates directly to the description, this making for greater precision.

## General discussion

There were two criteria against which to assess the disproportionality of a cumulation order. For the first, the actual and defined proportionate degrees of cumulation were compared; regard being had at once to the quantum of sentence added to the principal sentence and to this quantum as a percentage of the sum of the secondary sentences.

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For the second criterion, what mattered was the degree of cumulation in relation to the effective sentence, account being taken simultaneously of the proportionate effective sentence and the quantum of excessive cumulation as a percentage of this.

To the first – the broad – criterion. Across the three samples of offences there were 64 offenders, and in 31 of these cases – just under one-half – cumulation was considered to be excessively harsh (in an additional six cases cumulation exceeded what was proportionate, but to a degree considered insubstantial). The legal category of offence did not appear to be a factor. However, there was some tendency, but not to a marked degree, for the incidence of disproportionality to be lower where the sum of the secondary sentences was higher and for the ‘single event’ and ‘escapade’ categories – though the small numbers do not make for reliability. In most instances the disproportionality was substantial, but ranged from the not-insubstantial to the very substantial. In fact, the overall mean difference between the actual and proportionate quanta of cumulation was 10 months. According to this evidence, too many offenders served too much unnecessary imprisonment.<sup>18</sup> An illustration of a not-insubstantial difference is the case (‘escapade’) in which sentences of 3.5 years and 1 year were imposed for offences of armed robbery and burglary, and 50 per cent or six months of the latter sentence was made cumulative; for this case the proportionate degree of cumulation was calculated to be 27 per cent or 3.2 months. This would seem to approach a real injustice. A very substantial difference is represented in the case (‘single-event’, one victim) in which sentences of 5 years, 2 years, 2 years, 2 years, and 1 year were imposed for offences of rape, indecent assault, indecent assault, threatening to kill, and causing injury intentionally, and 36 per cent or 2.5 years of the latter four sentences were made cumulative; for this case the proportionate degree of cumulation was calculated to be 20 per cent or 16.5 months. This would seem to represent a real injustice.<sup>19</sup>

All this says nothing about the appropriateness of the sentences in the 33 of the 64 cases satisfying this criterion of proportionality. The fact is, there is the possibility of hidden disproportionality. It arises thus. The court may, on the basis of the totality principle, properly reduce what otherwise would be the proportionate degree of cumulation on the grounds of factors personal to the offender (for example, rehabilitation prospects). As a result, in a particular case the actual effective sentence may be below the criterion proportionate effective sentence. Yet there is no way of knowing from the present data whether the notional effective sentence from which the reduction in effect was made was itself disproportionate. Accordingly, whether or not the figure of 31 underestimates disproportionality and, if it does, the true incidence, is beyond the scope of the present study. Clearly, any increase would come off an already substantial base.<sup>20</sup>

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Now to the second – the strict – criterion for disproportionality, in which the quantum of excessive cumulation is considered in relation to the proportionate effective sentence. Under this criterion, the degree of excessive cumulation must be significant not only of itself but also in relation to the magnitude of the proportionate effective sentence. There were, on this standard, 21 offenders whose effective sentences would be regarded as disproportionately harsh, comprising about one-third of the sample of 64. (There was no evidence that the serious sexual offenders in the rape sample made a disproportionate contribution to this finding.) This is down by 10 on the incidence for the broad criterion, but still represents a very substantial proportion of the total sample.

Thus the conclusion remains: too many offenders served too much unnecessary punishment. Nevertheless, in view of the small sample sizes the data do not provide a valid basis for estimating the extent of the problem. In regard to the two criteria, the following bear comment. First, while on the broad standard there was a tendency for disproportionality to be more common among cases falling in the ‘multiple event’ and ‘single-multiple event’ categories, this was marked under the strict criterion. Secondly, of the two cases – one an armed robbery, the other a rape – used in the present discussion to illustrate disproportionality under the first criterion, for only one – the rape – would the sentence be regarded as disproportionately harsh under the second criterion. (In fact, the sentence for this case was imposed on appeal; the original sentences for the individual offences were not interfered with, but the order for full concurrency was set aside.)

In this study effective sentences are assessed in terms of a numerical standard of proportionality. For this the only express standard was to be found in English sentencing law (see Ashworth 1995), this being operationalised numerically in the present study using appropriate Victorian sentencing data. In the validity of this standard and in the validity of its operationalisation lie the limitations of the present conclusions. Clearly, these conclusions, as expressed, must be regarded as subjective. There can be said to be substantial unnecessary imprisonment only if one accepts effective sentences as properly constrained by proportionality defined in terms of the seriousness of single offences. The validity of this standard remains open, and is beyond the scope of the present numerical analysis. Put objectively, then, the conclusion must be that the finding of effective sentences not infrequently exceeding the English standard may reflect a different standard among Victorian judges for the constraint on cumulation; a standard – necessarily intuitive because it has not been articulated – allowing for a case a proportionate effective sentence not framed by the seriousness of its comprising offences as a class of offence. Nevertheless, there is a second possible objective conclusion: Victorian judges’ sense of justice may conform to the English standard but they may experience difficulty in applying it.

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What about the limitations to the conclusions arising from the validity of the standard of proportionality as operationalised? It will be recalled that this process required of the author three personal judgments: selecting the pairs of offences framing proportionality; fixing sentences to represent their seriousness; and deciding how many offences are to be constrained within the frame. In regard to this, the criterion of proportionality will allow greater cumulation where it is based on greater differences in seriousness in respect of the first two points and, in relation to the third point, fewer offences. In the author's view, the most problematic judgment related to the constraint on cumulation for a moderate number of secondary offences each warranting 1.2 years. In determining the criterion, eight was taken to define a moderate number, but would four have not been reasonable? Certainly, the figure of eight is more consistent with the guiding principles of the *Sentencing Act 1991* (Vic), enjoining as they do, the sentencer to apply punishment parsimoniously;<sup>21</sup> moreover, as noted in the derivation of the standard, with 'four' curve 1 would have crossed the C axis in Figure 7 not at 31 but at 66 per cent cumulation – what might be regarded as an absurdly high level.<sup>22</sup>

Unfortunately, little more than this can be offered by way of justification. The problem is, the answer does not follow as a matter of logic, nor can the soundness of the judgment be tested for coherence. This contrasts with the other decisions. For example, it seemed reasonable that when a very large number of offences are to be constrained, the heartland of the constraining offence (that is, the 50th percentile sentence) set the limit on cumulation; this comports well with a low level of seriousness of the same constraining offence – this level including all but the least serious instances, and marked by the 25th percentile sentence – limiting cumulation of sentence for a moderate number of the constrained offences.

Let it not be forgotten, the validity of this analysis also turns on the validity of the description of judicial practice from which comes its database. In respect of this, there is one matter worth rehearsing. The analysis of disproportionate harshness makes an important assumption: namely, the sentences imposed for the offences comprising the case are appropriate. Some doubt over this was raised in a cautionary point on the validity of the description; there may be a tendency among some judges to offset the potentially crushing effects arising from cumulation by imposing somewhat less than appropriate sentences for comprising offences, its effect being artefactually to raise the degree of cumulation. This, of course, has the potential to give a misleadingly high incidence of disproportionate harshness. Yet, it would not withdraw the cloud now hanging over the judicial approach to this sentencing problem as a result of the present analysis. For the extent to which it was an actual problem, the findings would indicate not so much disproportionate harshness of effective sentences as disproportionately lenient sentences for offences comprising the

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cases, itself an undesirable outcome for reasons advanced by Fox and Freiberg (1999). In any case, any impact of this possible factor may be largely confined to the broad criterion of disproportionality.

Towards the end of Part 1 consideration was given to whether the conclusions drawn from the present analysis would apply to current sentencing practice. The same question must be asked again here. There, it was about the quantitative description of the cumulation of sentence. Here, it is about whether the degree of cumulation accords with the requirements of proportionality. The answer to this question depends not only on whether there have been changes in the degree of cumulation but also whether the standard of proportionality, as calibrated, remains valid. The standard of proportionality requires stability in regard to the sentences of imprisonment for single offences around the mid-range for armed robbery, rape, theft, indecent assault and murder, and at the upper levels of the range for armed robbery and rape. Relevant to the stability of the degree of cumulation are the sentences of imprisonment around the mid-range and at the upper level for rape, armed robbery and burglary, including the sentences for both single offences and for effective sentences. With respect to theft, indecent assault and murder, there have been no changes in legislation and case law likely to lead to changes in the mid-range sentences for these offences. The discussion in Part 1 dealt with armed robbery, burglary and rape; there it was concluded that sentences would be expected to have remained stable for armed robbery and burglary but may be higher for rape.<sup>23</sup>

## Concluding observations

The quality of the present quantitative description of how Victorian judges apply the totality principle – it was noted in the general concluding comments to Part 1 – is limited by the incompleteness and the imprecision of judicial sentencing policy in regard to this problem. This is because an accurate and complete quantitative description requires that the data reflecting practice be analysed according to the structure of judicial thought; but Victorian judges are yet to formulate an agreed-upon approach to the sentencing of the multiple offender. An approximation to some ideal policy had to do. Moreover, as for description, so for the investigation of disproportionate harshness, here in Part 2.

There was clear evidence of effective sentences exceeding the criterion of proportionality. But what does this mean: the judges' applying a standard of proportionality different from the criterion or having difficulty in applying the criterion? Unfortunately, the answer awaits a judicial policy on what should constitute proportionality in the sentencing of the multiple offender. In view of this lack of legal policy development, the present work is but a first step towards a more rigorous principled legal analysis of this sentencing problem. What

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then is required as a second step is a broader and more detailed sentencing policy. To this end, Part 3 of the present study presents a review of case law in regard to what is considered correct by way of approach to the sentencing of the multiple offender. This is then compared with the approach implicit in the numerical framework used to define the criterion of proportionality in the present analysis.



## Notes

1. The numerical standard of proportionality derived in Lovegrove (2000) did not include sentencing data for the year 1996.
2. Sentencing data prior to 1993 could not be used to discern current sentencing practice. In 1992 remissions for good behaviour while in custody were abolished. These could amount to one-third of an offender's sentence. To offset the effect of this change on the time prisoners would serve, courts were required by section 10 of the *Sentencing Act 1991* (Vic), when imposing sentences of imprisonment, to reduce what would previously have been considered to be the appropriate sentences by one-third (see Fox & Freiberg 1999).
3. The  $p^{\text{th}}$  percentile in a distribution of sentences is the sentence below which  $p$  per cent of the sentences fall and above which  $(100-p)$  per cent of the sentences fall.
4. 1.2 years is the average of the mean 75th percentile sentences for theft and indecent assault and 3.9 years is the average of the mean 50th percentile sentences for rape and armed robbery.
5. Note, if 'four' had been chosen as the criterion, curve 1 would have crossed the C axis in Figure 7 not at 31.1 but at 65.7, an extraordinarily harsh degree of cumulation (see Figure 7).
6. Professor Pip Pattison, Department of Psychology, University of Melbourne fitted this curve, using least squares and the modified Gauss-Newton algorithm in the BMDP 3R program; see Dixon (1990).
7. To Victorian trial judges, it will be recalled, less cumulation is warranted where the sentence for the principal offence is higher (see Part 1).
8. The official sentencing statistics for this offence are presented in two categories – 'murder' and 'murder (not life imprisonment)'. For the present purpose, the data on imprisonment for these two categories had to be combined. Appreciation is due to Mr W Johnston of the Department for providing the author with printouts of the raw data for the category 'murder (not life imprisonment)'.
9.  $\frac{7.0}{2.7} \times \frac{100}{1}$
10. In calculating this 'sum', account is taken of only the most severe sentence in a group of offences comprising a single transaction and, in determining this 'mean', regard is had to only sentences of imprisonment.
11. In fact, the degree of excessive cumulation, substantial as it is, may be an underestimate of the true value. This is the case in which other offences – in effect, five armed robberies and one attempted armed robbery – were admitted and taken into account in the determination of sentence. For the purpose of calculating the degree of cumulation, the appropriate sentence for each of the admitted offences was assumed to be the same as the sentence imposed for each of the seven prosecuted armed robberies (as explained in Part 1 – see note 10). To the extent that this overestimates the judge's view of the seriousness of the admitted offences, so the calculated degree of excessive cumulation underestimates the real injustice.
12. These values are, of course, based on S. However, they have been adjusted for their use in this figure, being based on  $P + S$ , so as to be consistent with its structure. In fact, the differences between the two sets of values are negligible.
13. See note 10.
14. See note 12.
15. See note 10.
16. See note 12.
17. Although the sentencing judge has discretion to impose a disproportionately long sentence of imprisonment on a serious sexual offender, the judgment of the Victorian Court of Appeal in *Connell* makes it clear that the discretion should be confined to exceptional cases.
18. Recall, none of this could be attributed to sentences purposely made disproportionate in respect of serious sexual offenders.
19. The offender was not deemed to be a serious sexual offender.
20. A second error may have infected the estimate of disproportionality similarly. In Part 3 it will be argued that the proportionate degree of cumulation should be less where the separate offences are connected (as are offences in the 'single event' and 'escapade' categories). But the calculated proportionate degree of cumulation as the criterion takes no account of this, since there is no basis in legal principle for quantifying the degree of connectedness.

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21. See section 5(3) and following.
  22. As a consequence of the doubt surrounding this decision, the test of disproportionality is less certain for cases whose sums of sentence for the secondary offences are low.
  23. Again, the recently updated official sentencing statistics for Victoria (see note 4, Part 1) can shed some light on this. There it can be seen that the median sentences of imprisonment for theft, indecent assault, armed robbery, rape and murder as single offences and the maximum sentences for armed robbery and rape as single offences have remained unchanged and stable. Thus, the standard of proportionality, as calibrated here, almost certainly remains valid. The data relating to the stability of the degree of cumulation for burglary, armed robbery and rape were discussed in note 31 (Part 1). There it was concluded that there now may be a greater preparedness by the courts to impose swingeing sentences for what they regard as very serious cases, particularly for rape, but also for armed robbery and burglary. If this is correct, the incidence of disproportionately harsh cumulation for burglary and armed robbery, but especially for rape, now may be somewhat greater than during the period of the present study.

## Part 3: The totality principle

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## Chapter 9

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### An alternative review of case law

The High Court and the Victorian Court of Appeal in their more recent judgments have said much about the totality principle applied to the sentencing of multiple offenders. This is a review of these decisions, but it is a review with a particular focus. The relevant legal principles and concepts are examined in order to understand and interpret their numerical meaning and implications. Within this focus, of interest is what is apparently settled, what remains open, and matters on which there is inconsistency. Then the author's numerical framework defining proportionate sentencing for the multiple offender is examined in the light of the legal review. Herein lies the relevance of the numerical orientation of this review. In respect of matters addressed by the law, it is important to examine whether there are points of inconsistency between the law and the framework. To the extent they share common ground, the framework can be used to give precise meaning to the application of the law, and the law used to ensure that the framework is applied correctly. Then there will be matters a part of the framework but not in the law. Some of these relate to points yet to be covered or settled, others to judicial observations whose meaning remains clouded, and yet others which are peculiar to the framework, arising by virtue of the detail inherent in numerical precision. These aspects of the framework must be identified in order that they be evaluated for their legal soundness.

The review of the law opens with an overview of the sequence of decisions to be followed by judges in applying the totality principle. Then follows a detailed consideration of three sets of principles/concepts to be found in this sequence. Finally, there is the comparison of the law and the numerical framework.

### The law

#### *Decision sequence for the totality principle*

##### Case law

The following six steps, in order, define the sequence of decisions and judgments to be made when applying the totality principle:

1. impose sentences for each of the offences comprising the (offender's) case;
2. identify those sentences which, as a matter of principle, should be made fully or partially cumulative;
3. determine the degree to which each of these sentences should be made cumulative;

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4. calculate the total sentence: sum the contribution of each sentence according to the concurrency/cumulation orders;
  5. determine what quantum of sentence is required under the totality principle;
  6. if the total sentence offends the totality principle, it is to be reduced by way of:
    - full or partial concurrency where at least some or greater cumulation otherwise would be appropriate; or
    - lesser sentences for some or all of the offences comprising the case than otherwise would be appropriate.

It is an error first to determine an effective sentence and then determine (impose and adjust), in the light of this effective sentence, the sentences for the individual offences. Nevertheless, the orders for concurrency/cumulation may be made with an eye to the resultant effective sentence.

This statement, in its own words, brings together what is to be found in the Court of Appeal's judgment in *Grabovac* (see also, *Lomax*). Relevant observations are also to be found in the High Court's judgments, particularly *Mill*, *Pearce* and *AB*.

## General comments

There is no one statement of the decision sequence. Rather, segments are to be found throughout the relevant judgments, presented in more or less detail and expressed variously; moreover, sometimes (generally) the relevance and place in the sequence of an element is express, other times it is implicit. Hence, the phrases inserted above: 'own words' and 'brings together'. This notwithstanding, there would not appear to be much room for contention in the interpretation of the judicial observations.

In respect of the decision sequence, *Grabovac* is more detailed and comprehensive in its observations than is the High Court. Indeed, the High Court has not expressly addressed the matter of a decision sequence. But there is a problem with this decision sequence. Clearly, step 6 envisages cases in which the total of the sentences is not greater than what is appropriate under the totality principle and, accordingly, which does not require reduction. In the body of this review it will be argued that all total sentences must be reduced to some extent under the totality principle in order to avoid disproportionality between cases. Of interest in this respect are the observations in the High Court of Dawson and Gaudron JJ in *Postiglione*. This judgment does not deal directly with a decision sequence. However, it makes observations on the application of the totality principle. These can be interpreted as being underpinned by an implicit logic consistent with this alternative view of what is correct by way of a decision sequence.

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There is another matter worthy of comment. The term ‘totality principle’ as it is used in the decision sequence above incorporates the concepts of proportionality and of the crushing sentence. This seems appropriate since subsequent reviews of case law clearly indicate that the effective sentence must be proportionate and not crushing. *Grabovac* (and also *Lomax*), it would seem fair to say, use these three terms/concepts somewhat inconsistently; incidentally, in *Grabovac* most common is the reference to totality and crushing, and in *Lomax* totality is the term most favoured.

Finally, the rationale underlying the proposed decision sequence in *Grabovac* makes sense: namely, the final judgment is more likely to be sound if it is the result of individual judgments, each made in accordance with the logical sequence of decisions and independently of subsequent judgments. In the light of this, the Court’s concession, that the concurrency/cumulation orders may be made with an eye to the resultant effective sentence, represents a slippery slope, especially since the sequence is intended to correct what has probably been the customary tendency of many judges. No, it is preferable that a clear demarcation be maintained between steps 3 and 6: what are thought to be the appropriate cumulation/concurrency orders should be made, and then, and only then, should the result be tested against the totality principle. Moreover, quite different considerations underlie the making of the concurrency orders in each of steps 3 and 6: in the former it is to reflect the relatedness of the comprising offences; in the latter it is to give effect to the totality principle while, as far as is practicable, not losing sight of the distinctions warranted under steps 2 and 3. Lastly, it is an unnecessary concession.

Now follows a detailed consideration of the three sets of principles/concepts to be found in this sequence: namely, sentences for the individual offences (step 1); the cumulation of sentence (steps 2, 3, and 6); and the totality principle (steps 4 and 5).

### *Sentences for the individual offences*

#### Case law

In the first step of the decision sequence, the sentences imposed in the offender’s case must be, when considered individually, proportionate and appropriate to the circumstances of their respective offences (and, of course, the offender<sup>1</sup>). Only in this way can there be a sound foundation upon which to build the effective sentence.

However, if the total sentence is found to exceed what is required under the totality principle, the quanta of sentence as originally fixed may be reduced somewhat, but not to such an extent as to take them outside the range proportionate to their individual gravity.

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Nevertheless, to give effect to the totality principle, in general, preference is to be given to greater concurrency than otherwise would be appropriate. This preference should be reversed only when some cumulation is absolutely necessary to reflect the separateness of one or more of the offences. Certain circumstances will increase the likelihood of there being no alternative to this less desirable option of some reduction in the individual sentences (for example, numerous very serious offences comprising the case).

These principles are set out primarily in the Court of Appeal's judgment in *Grabovac* (see also *Lomax*). In effect, *Grabovac* represents an elaboration of the observations on this matter in the High Court judgments of *Mill*, *Pearce* and *AB*. Circumstances giving rise to difficulties in the application of these principles, and solutions acknowledged as representing no more than acceptable approximations to the ideal, are well illustrated in the judgments of the Court of Appeal in *McCorriston* and *RHMCL*.

## General comments

Where the device of partial concurrency is available, as a matter of principle, there will never be a need to satisfy the totality principle by way of less than appropriate sentences. But this may require numerous and subtle concurrency orders; such a course may be seen as tedious and affecting an unwarranted precision in justice.

## *The cumulation of sentence*

### Case law

This overview is presented as follows: (1) circumstances favouring cumulation; (2) presumption and discretion in cumulation; (3) cumulation by degrees; and (4) cumulation in practice. The Court of Appeal has, with one exception, delivered the judgments cited below.

1. Cumulation is favoured in either of two broad sets of circumstances. The first is for separate offences or groups of offences arising from separate events, episodes or transactions (*Grabovac*, *Mantini*). Here, separate means a discrete and distinct incursion into criminality. Often it will be a single offence representing one act. But often it will be a group of offences constituting a single incursion into criminality. The group of offences may represent either a multifaceted course of conduct comprising separate but closely related and interlinked acts (that is, one enterprise/continuing episode) or no more than technically identifiable crimes representing only one act (see for example, *McCorriston* and *Soo*<sup>2</sup>).

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In the former, cumulation will be for the sentence for the separate offence; in the latter, cumulation will be for the longest of the sentences associated with the group of offences.

The second set of circumstances favouring cumulation relates to a group of offences representing a multifaceted course of conduct. One or each of several of these offences within the group will be considered for separate cumulation (cf. concurrency with the other offences comprising the group) where:

- the behaviour giving rise to the offence clearly added to the victim's trauma and concurrency would undervalue its impact (*O'Rourke*);
- the offence is otherwise serious and clearly added to the total criminality of the offender's conduct (*Mantini*);
- the act giving rise to the offence could not be seen as blending with the other behaviour constituting the course of conduct (*Jennings and Morgan*);
- the one transaction had several (potential) consequences (*Kursunlu*).

These principles relate to step 2 in the decision sequence.

2. The preceding circumstances favouring cumulation do not represent a body of principle to be applied uncritically and invariably in every case (*Mantini*). To so view them would be wrong and unwise. This is because their application is subject to justice of outcome and practical considerations. They are, then, no more than presumptions, as a matter of practice, to be regarded as a part of a wide discretionary judgment – a discretion that is less wide in respect of the serious sexual offender (*Lomax*). Both sets of circumstances are subject to the totality principle. Both face the fact that cumulation on the longest sentence usually makes for a better-constructed effective sentence (*Mantini*). And, in respect of the second presumption, the offences, albeit serious, may be just too closely connected to justify cumulation (*O'Rourke*).
3. Circumstances warranting cumulation of sentence do not necessarily warrant full cumulation. Therefore, having opted for actual cumulation on the ground of the separateness of the offence or cumulation in principle on the ground of the seriousness of the offence, there is, under step 3, the question of how much of the sentence for that offence is to be cumulated. (Recall, in respect of seriousness, the judgment in *O'Rourke* makes it clear that it may be zero.) The answer appears to turn on the degree of separateness – (better) connectedness – of the offence, as several judgments show; for example:



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- no more than a moderate degree of cumulation for an offence forming a part of a single episode (*Yates*);
  - significant concurrency ordered because the offences were interlinked/constituted one transaction (covered a short period and were similar), but some cumulation because the offences nevertheless represented discrete acts (*Duong* and *Pilarinos*);
  - (perhaps) less cumulation for separate acts having a common psychological cause, even though the offending be over an extended period (*Ryan*<sup>3</sup>);
  - little or no concurrency because of the separateness (time and victims) of the offences (*Coffey*);
  - substantial cumulation for offences differing in kind, motive and occasion (*Ferman* and *Stoforo*).
4. In order to give effect to the totality principle, under step 6, it will often be necessary to order full or partial concurrency where at least some or greater cumulation otherwise would be appropriate. In this task, as a matter of practice, there is no attempt to reflect in the concurrency and cumulation orders every nuance in the separateness, seriousness and the connectedness of the offences, made in respect of steps 2 and 3,<sup>4</sup> as these factors relate to case seriousness. It is apparent that orders so made would be unnecessarily pedantic. Cumulation, therefore, will be made according to the more important distinctions, relative to the case or, if there are no obvious differences between offences, by way of representative offences. Judgments such as *Grabovac*, *Lomax*, *Best*, *Bolton* and *Barker* and *Rich* well illustrate the practice of prioritising and otherwise selecting offences for the purpose of cumulation. As *Mantini* acknowledges, in respect of this there may be more than one reasonable solution.

The following characteristics, relating to separateness and seriousness, have been raised in the justification of cumulation. However, as would be expected, courts in the making of cumulation orders as a matter of practice often do not distinguish steps 2 and 3 from step 6. Accordingly, the various characteristics as illustrated in the cases below do not necessarily apply to both aspects of cumulation. Nevertheless, there would seem to be no reason why they should not apply to both. The following offence characteristics serve as illustrations: grave sexual or violent (*O'Rourke*); otherwise serious (*Otene*); multiple victims (*Duong*); breach of trust (*Loguancio*); multiple similar offences (*Bulfin*, *Cotham*); relevant prior

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convictions (*Lepore*); central to culpability (*Lepore*); extended period of offending (*Glen*); separate occasions (*Bain*, *Denysenko*); variation in nature (*Ferman and Stoforo*); not connected (*Ferman and Stoforo*); variation in method (*Grabovac*).

## General comments

The determination of total case seriousness (sentence) requires due account be taken of the individual seriousness of the offences comprising the case. That is the point of the principle related to step 1 above. But this determination also demands that due regard be had to the seriousness of the offences considered together. The principle associated with steps 2 and 3 is intended to take care of this. How well does it do this?

What, among a series of offences, is separate and what is single is critically vague. The distinction between offences as separate incursions and those as a part of a continuing episode (see Fox & Freiberg 1999) can, in many factual situations, be given almost any interpretation according to personal preference. The openness of these concepts – the terms do not even approach what could be regarded as operational definitions – to disparate interpretations can be seen in judicially expressed equivocation in decisions relating to the singleness/separateness of offences (see for example *Grabovac*, *Bain* and *Soo*).

The broad scope for individual judgment on this question has been readily and widely acknowledged by the courts. The wide discretion is there partly because of appellate practice but more particularly because of legal principle. In regard to the former, there are those judgments which tend to concentrate on the effective sentence (see for example *Mai* and *Duong*). This orientation is to be discouraged, since it is inimical to consistency of approach, running counter to the rationale underlying *Grabovac*, namely, a sound decision logic as a prerequisite to a just and appropriate case sentence. In any case, only the individual sentences and the concurrency/cumulation orders can be the subject of appeal (*Lomax*). In part, this problem arises because the final sentence to some extent represents a blending of steps 2 and 3 with step 6.

Now to the second reason for the wide discretion, namely, legal principle. There is at the core of legal argument the view that many factors bear upon the appropriateness of cumulation and cases vary infinitely in their circumstances. What readily follows from this is that any practicable attempt to lay down guidance would overlook so many factors, the inevitable result would be injustice. There are no rigid rules, or no one correct answer, so it is said (*Martin*); the process is not born of an exact science (*Pearson*). What is required, therefore, is a sound discretionary judgment peculiar to the circumstances of each case (*O'Rourke*). This is, of course, somewhat at odds with the sentiment expressed in *Grabovac*, since there the process of judgment matters.

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What is the rebuttal of this argument? The first point: terms like 'rigid' and 'exact' are used here inappropriately to justify a needless sloppiness of thought. 'Rigid' and 'exact' are not absolute but relative concepts. There are, of course, practical limitations on how far rule can be pursued; and, when a set of rules that can never be comprehensive is treated as such, serious injustice is inevitable. Yet, equally troubling to judges for the reason of injustice should be concepts that, in the absence of rules, can be applied largely according to individual predilection in the particular circumstances of a case.

But is more detailed principle practicable? Clearly, the thinking behind the nihilistic conclusions on this in *O'Rourke* and *Mantini* is that it is not. After all, crimes vary infinitely in their circumstances. As well, there are a number of relevant legal considerations (offence separateness, seriousness and connectedness, the problem of technical offences, and the totality principle) as well as practical considerations, and they may point in opposite directions. Viewed in this light, the task of rule-making would seem overwhelming. But to a high degree, crime is characterised by recurring patterns of circumstances, relating both to the offence and to the offender. Yet the relevance of this fact to the possibility of more detailed principle will emerge only when what is separate and what is serious and what is connected are each thought of in offence-specific terms (that is, in respect of a category or sub-category of offence). Moreover, there can be no possibility of rule-making, when relevant legal considerations are confounded: what is serious differs from what is separate; cumulation/concurrency orders in relation to seriousness and separateness differ from cumulation/concurrency orders in regard to the totality principle. Finally, each of these matters must be interrelated in an orderly and logical sequence as a means to more detailed principle. Current legal thinking confounds these distinctions critical to consistency of approach.

The discussions on this question in *O'Rourke* and *Mantini* attest to the strength of the judges' wariness over, indeed opposition to, a more systematic approach to cumulation. Yet, in the current review of case law relating to the decision sequence and the circumstances favouring cumulation appears hope. There can be discerned the beginnings of a foundation offering the possibility of less intuitive thought in regard to the separateness and seriousness of offences as they relate to cumulation. In this respect, the observations in *Jennings and Morgan* are illustrative and to be welcomed. There the judgment goes beyond the immediate circumstances of the case and contemplates circumstances under which concurrency may be inappropriate in relation to a sentence for burglary; these include, *inter alia*: the ulterior offence is a rape or a serious assault; the effects of the burglary *qua* burglary extend beyond the intended victim of the burglary. This deals with what is serious.

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In regard to connectedness – step 3 – it is not just a question of whether there be full or partial cumulation. Explicit in the section on cumulation by degrees is that there are degrees of connectedness (separateness) for which there should be corresponding discriminations in the degree of cumulation, whether cumulation be justified on the grounds of separateness or seriousness. This is to be contrasted with step 2, where the implication is of offences being either single or separate. This distinction is not readily apparent in the Court's somewhat vague use of the concept of separateness. Clearly, what is required is that separateness and connectedness be distinguished, and the latter placed in a framework against which degrees of connectedness of the offences comprising a case can be adjudged.

### *The totality principle*

The following analysis elaborates steps 4 and 5 in the decision sequence. For this purpose the overview of case law and the general comments upon it are better presented together than separately. The discussion proceeds as follows: (1) the elements of totality; (2) the meaning of proportionality; (3) the concept of the crushing sentence; and (4) the application of the principle. First comes the High Court's contribution, followed by that of the Court of Appeal.

#### High Court

1. On balance, it would appear, the totality principle in its application invokes the concepts of both proportionality and mercy. Thus, the effective sentence should reflect the seriousness of the criminality of the offending in its totality yet not be so severe as to crush the offender. This is clear in the three relevant judgments (Dawson and Gaudron JJ, but particularly, McHugh J and Kirby J) in *Postiglione*. In that case reference is made to the leading case of *Mill*. *Mill*'s contribution is to be found primarily in an extract from Thomas (1979). In the quoted passage the idea of proportionality is readily apparent yet not made explicit, but there is no reference to the crushing sentence. In a subsequent passage Thomas explains that both proportionality and mercy are involved in totality; however, the judgment makes no reference to these elaborations.
2. But what does proportionality mean? In *Mill* the clear implication is that the proportionate effective sentence will often be less than the sum of the contributions of each sentence according to the concurrency/cumulation orders. Put another way, the totality of the criminality normally will be less than the total seriousness as

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measured by this sum. However, it is also implied that the proportionate sentence may be equal to this sum. But how it relates to this sum remains open. This, of course, would require a definition of the proportionate sentence (or the totality of the criminality), but none is attempted.

In respect of this, Kirby J's approving reference in *Postiglione* to a passage from the Canadian legal commentator, Ruby, is of interest. The passage is clearly heavily based on a conclusion of Thomas (1979: 59) but the idea is better expressed in the original: the sentence should not be '...longer than the upper limit of the normal bracket of sentences for the category of cases in which the most serious offence...would be placed.' The significance of this passage is that in it there is to be discerned a basis for interpreting the meaning of proportionality as it applies to the multiple offender: namely, the effective sentence should be proportionate to the seriousness of the class (or sub-class) of the offences comprising the case. In other words, this level of seriousness determines the totality of the criminality. In view of this approach of Kirby J to the meaning of proportionality, it is not clear why he concludes that what is appropriate as an effective sentence is more readily determined by whether it appears crushing than seems disproportionate. To be sure, 'totality' in this legal formulation is not precise, but 'crushing' is less so. In any case, Kirby J states that *Mill* remains the authority, even though it does not go as far in explicating the meaning of proportionality.

McHugh J in *Postiglione* appears to offer two views of the meaning of proportionality. One is taken from a passage to be found in a Federal Court decision. Strict justice – presumably meaning the truly proportionate sentence – appears to mean the sum of the sentences for the offences comprising the offender's case, and accordingly the totality of the criminality viewed as a whole is measured by this sum. The other is as in *Mill* (see above). Clearly, the proportionate sentence on the first view will normally be greater than on the second. It is thus not clear why McHugh J introduces the latter as an apparent explanation of the former.

To Dawson and Gaudron JJ in *Postiglione*, by implication, the greater the sum of the sentences for the offences comprising the offender's case, the greater the proportionate sentence; but this sum does not define the proportionate sentence, which is something less.

What proportionality means as a matter of principle is yet to receive significant attention. As far as something has been said, the views do not represent complete or precise formulations but, to the extent they have been developed, would appear disparate. Yet, clearly, the meaning of proportionality to be discerned in *Mill*, as

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well as in Dawson and Gaudron JJ's and McHugh J's judgments in *Postiglione*, would admit of a more severe sentence than that entertained by Kirby J in his judgment in *Postiglione*, namely, proportionality as the level of sentence regarded as proportionate to the seriousness of the class (or sub-class) of the offences comprising the case.

3. The concept of the crushing sentence is not well developed. What can be said is that it introduces considerations which will act to limit or reduce what otherwise would be the proportionate effective sentence. But the substance of these considerations varies across the three judgments in *Postiglione*: to Dawson and Gaudron JJ, it is the offender's record and prospects; to McHugh J, it is mercy in the face of a swingeing sentence; to Kirby J, it is to hold out hope of and to give encouragement to reform. The first appears to relate to the idea of giving weight to an offender's rehabilitation prospects, and would seem to have particular relevance where the calculated total sentence is shorter rather than longer. The second, by definition, applies to very long total sentences. The third can perhaps be regarded as embodying both these meanings – particularly the former – and therefore having more general application. In any case, what can be said is that they represent complementary interpretations of the concept of the crushing sentence. These ideas, of course, nowhere nearly approach an operational definition.
4. The consensus seems to be that the totality principle applied to the determination of an effective sentence requires a balance to be struck between what is proportionate to the totality of the criminality of the offending and what would not crush the offender.

In Dawson and Gaudron JJ's reasoning in *Postiglione* is to be discerned most clearly, albeit largely implicitly, the considerations involved in the striking of the balance. The greater the sum of the sentences for the offences comprising the offender's case, the greater will be the reduction in this sentence required under the totality principle; nevertheless, as the total sentence is greater, so the effective sentence must be more severe, to reflect the greater criminality. Consider the consequences of this for the application of the totality principle. Since harsh total sentences must be reduced so as to avoid a crushing sentence, it follows that all total sentences, whether they be high or low, must also be reduced. Unless this is observed, the inevitable outcome will be disproportionality between effective sentences. Say a total sentence of 40 years is reduced to 30 years so as to lessen its crushing effects on the offender; it follows that a total sentence of 30 years for an offender having similar personal circumstances must be reduced to some extent

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so as to reflect the difference in the totality of the criminality of each offender. This, of course, has implications for the content of the decision sequence. Step 6 would become something like: 'to the extent that the total sentence offends the totality principle, it is to be reduced...' This is to be contrasted with the decision sequence, as originally stated, requiring a reduction in the total sentence only if this quantum offends the totality principle, there being an implicit assumption that the total sentence will not always exceed what is appropriate under the totality principle.

What is missing from Dawson and Gaudron JJ's offering is the relative weight to be assigned to proportionality and the avoidance of a crushing sentence in the striking of the balance. It would admit of both harsh and lenient effective sentences. Moreover, even if they had addressed the matter of relative weights, a problem would remain. There is no framework for making the required judgments in an internally consistent way across a wide range of calculated total sentences. This is not surprising in view of the absence of a definition of proportionality as it relates to the multiple offender.

Kirby J's conception of the problem, again in *Postiglione*, is not well developed, but clearly implies a balance between proportionality and what is crushing. Also noted is that this judgment is more readily made in regard to the latter (see the discussion above). This view would appear to represent a dangerous course, since it risks disproportionate leniency. In regard to this, Kirby J also notes that disproportionate leniency may on occasions be warranted on the ground of the crushing sentence. Finally, he observes in this judgment that the striking of the balance defies precise formulation.

In McHugh J's version of the totality principle, in *Postiglione*, what is involved is a downward adjustment from the sum of the individual sentences comprising the case, when this sum as an effective sentence would be crushing. He, too, invokes the notion of a balance between the truly proportionate sentence and the sentence that could not be considered crushing. Thus, McHugh J's position, while apparently less developed than that of Dawson and Gaudron JJ is, to this extent, consistent with it.

Yet in respect of the application of the totality principle, there appears to be an important difference between the view of Dawson and Gaudron JJ and the views of Kirby J and McHugh J. The latter's positions explicitly envisage cases for which the sum of sentences is not crushing and, accordingly, a reduction in sentence is not necessary. As explained above, this cannot be. For if total sentences above what is crushing are reduced so as not to exceed this level, while at the same time

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maintaining proportionality between them, then total sentences below the level must also be reduced; the two sets of sentences otherwise would be disproportionate. Importantly, in respect of each of these two views, the role of the totality principle is different: in the latter it is merely limiting; in the former it is determining.

*Mill* gives no indication of a balance being struck between proportionality and what would not be crushing, since reference is not made to the latter concept. Rather, the severity of the effective sentence is directly determined by the seriousness of the criminality viewed in its totality. Again, there is no framework for determining what this should be in the circumstances of a particular case, otherwise than it will normally be less than the sum of the contributions of each sentence according to the concurrency/cumulation orders.

Across the judgments in *Postiglione*, then, totality involves a balance between proportionality and rehabilitation/mercy. Nevertheless, the emphasis seems to be on the avoidance of a crushing sentence. This, of course, does not mean that the latter is given more weight than proportionality in striking the balance; it may simply be that for the circumstances of the offending in this case, the importance of punishment is obvious, while the claims under what is crushing are less apparent; or it may be that judgment in respect of totality is made more readily in terms of the latter. In any case, no indication is given on how the balance between the two is to be struck.

## Court of Appeal

1. The effective sentence should be proportionate to the totality of the offender's criminality (*Connell*), make due allowance for the offender's prospects of rehabilitation (*Bolton and Barker*), and not extinguish all hope of a future useful life (*Maguire*). This much is clear. Moreover, it is consistent with the High Court. But what is not clear is whether all of these matters are incorporated in the totality principle or, if not, which ones are; this seems to vary within and across judgments. In *Grabovac* regard is had to totality and proportionality in one part of the judgment, and to totality and the crushing sentence in another; in *RHMcL* there is a reference to proportionality and totality and to the crushing sentence. *Cunliffe* equates totality with the crushing sentence, but *Graham* contradicts this, and in *Sanders* totality appears to mean proportionality. There are numerous other examples illustrating the confusion in nomenclature. This, in itself, means little. But if it bespeaks of disparate understandings of the meaning of the totality principle, then inconsistency



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of approach is risked. What, however, can be said is that the decision sequence discerned in *Grabovac* would require the totality principle to incorporate proportionality and the avoidance of a crushing sentence.

2. In regard to the meaning of proportionality, the Court has said nothing directly which would facilitate the assessment of whether or not a particular effective sentence is proportionate. It will be recalled that in Dawson and Gaudron JJ's judgment in *Postiglione*, the sum of the sentences for the offences comprising the offender's case was identified as a factor: the greater this sum, the greater the effective sentence. Although in the Court of Appeal's judgments the role of this factor is not spelt out, there perhaps is to be discerned a second factor to be taken into account when determining a proportionate effective sentence. The contemplated second factor is the seriousness of the individual offences: the more serious the individual offences (that is, the greater the individual sentences), the greater the effective sentence.

Let it be clear what is meant here. Consider two offences, one individually warranting a sentence of six years and the other two years. Say 25 per cent of each one is made cumulative, then the addition to the sentence will be 1.5 years for the first and six months for the second. Accordingly, with a constant degree of cumulation, the more serious offence contributes more to the effective sentence. This accords with case law. *Grabovac* requires that the degree of seriousness of each separate offence or separate group of offences be reflected in its contribution to the effective sentence. And it follows from *Connell* that any increase in an individual sentence over what otherwise would be appropriate (for example, to protect the public in the case of a serious sexual offender) must be taken into account in determining the effective sentence. Clearly, this can, as illustrated, be achieved by a constant degree of cumulation across offences of different individual seriousness. But should the degree of the contribution to the effective sentence of offences individually differing in seriousness be different? Should there be a greater percentage cumulation for greater seriousness? An argument in support of this was made in Part 1 and Part 2. It went along the lines of the following illustration: the case of an offender who in addition to an armed robbery warranting five years also committed twenty 1-year thefts would intuitively appear to be less serious than a comparable offender who committed five 5-year armed robberies; the latter's proportionate sentence should therefore be greater. But this would not be achieved with a constant degree of cumulation; it requires that the degree of cumulation be greater for the more serious secondary offences in the second case.

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Yet there is no express reference to differential cumulation in respect of seriousness in case law. But there is perhaps a hint of it. It is to be found in the judgment in *Taylor*. There, in offering an interpretation of *Mill* in regard to the totality principle, it was said that, in determining the sentence proportionate to the seriousness of the overall criminal conduct, of relevance is the gravity of each individual offence. It is perhaps not too much to read this as meaning that there is more to overall case seriousness than the sum of the sentences for the individual offences comprising the offender's case. This, of course, leaves open the question of how cumulation is affected by greater seriousness. Step 4 in the decision sequence does not recognise this adjustment.

3. In regard to the concept of the crushing sentence, the Court of Appeal in its judgments adds nothing.
4. This final matter concerns how the totality principle is to be applied to the determination of an effective sentence. In respect of the Court of Appeal's judgments, two matters are worth commenting on in regard to what has been said about this in the High Court. In *Grabovac* the total sentence – the sentence to which the totality principle is applied – may be the sum of part-sentences (of those sentences to be made cumulative) as a result of cumulation and concurrency orders reflecting the connectedness of the comprising offences considered separate or serious. By way of contrast, the High Court in its references to the total sentence has not emphasised this point. The role of concurrency orders is consistent with the High Court's judgment in *Mill*, but in that case the device of partial concurrency did not arise. Both these things are not made clear in the judgments of Dawson and Gaudron JJ and McHugh J in *Postiglione*, which could easily be taken to imply that the total sentence is the simple sum of the individual comprising sentences. The *Grabovac* emphasis would appear to be significant as a matter of principle. This follows if it is accepted that a case is more serious when the sum of the sentences for the comprising offences is greater, and a partly connected offence adds less seriousness than a fully separate offence. Clearly, in many cases, full cumulation of relevant comprising sentences would overestimate the total seriousness of the case.

Secondly, the judgment in *Grabovac* envisions cases not requiring an effective sentence less than the total sentence; this may arise when this sentence is not considered crushing. This accords with McHugh J's and Kirby J's judgments in *Postiglione*, but for reasons already given would appear to be wrong.

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## Case law and the numerical framework

What has been said in case law about the application of the totality principle to the multiple offender was the point of the preceding review. In doing this, it identified gaps and inconsistencies requiring the attention of the Court of Appeal in Victoria and, ultimately, the High Court. In the following discussion, the content of this law is compared with the content of the author's numerical framework defining proportionality for the sentencing of multiple offenders (see Part 2). One matter of importance arises in respect of their common ground: to the extent that they cover common matters, are the two consistent? A second matter of importance arises from the greater coverage of the numerical framework consequent upon the precision inherent in the numerical approach: to the extent that the framework goes further, what does it say that case law does not? Finally, there is a brief consideration of what aspects, if any, of the totality principle as it applies to the multiple offender are not open to numerical analysis.

The structure of the discussion here parallels that of the review of case law: namely, decision sequence; individual sentences; cumulation of sentence; and totality principle.

### *Decision sequence for the totality principle*

The numerical framework principally covers steps 1 to 5 of the decision sequence. These are the steps concerned with the application of the concept of totality as a matter of principle. In numerical terms they are about determining what percentage of the sentences for the secondary offences should be added to the sentence for the principal offence. The model attempts to offer a numerically precise answer to this problem. Step 6, by way of contrast, covers how as a matter of practice the totality principle is to be applied by way of the concurrency and cumulation orders (or, as a last resort, somewhat lesser individual sentences). Here, orders of cumulation are made so as to reach the quantum of sentence representing the seriousness of the offending in its totality; orders of concurrency are made to reduce the total sentence determined under step 4 so as not to crush the offender. Case law permits sentences in principle requiring cumulation to be made concurrent, and cumulation to be made according to the more important distinctions between offences as observed in appellate practice. In this respect, numerical precision is not unreasonably regarded as pedantry. There is no point in trying to represent every nuance between offences in respect of seriousness, separateness and connectedness. The aim of the numerical framework does not relate to this step and would be well satisfied as long as the effect of the orders is the calculated quantum.

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In order to compare and contrast the decision steps inherent in the numerical framework and in the decision sequence as it was discerned in case law, it is as well to recall what the framework does and how it does it. The product of the algebraic model, as calibrated, is the proportionate effective sentence. More specifically, it is the percentage of the sentences for the separate secondary offences to be added to the sentence for the principal offence, thus determining the proportionate effective sentence. In calculating this percentage, what is taken into account is the seriousness of the separate secondary offences, comprising the offender's case, considered individually and together (that is, the greater the average and the total of the individual sentences, the more serious is the case). In the light of this, the decision sequence appropriate to this framework will be seen to differ from that discerned in case law in four respects.

First, in case law, as interpreted, the total sentence is the sum of sentences for the separate (and serious) offences comprising the case, regard being had to the degree of connectedness of these offences (all of the sentence for each fully unconnected offence contributes to the total, but only part of the sentence is added for a partly connected offence). By way of contrast, in the numerical framework, offences are classified as separate or not, and the total sentence is the sum of the separate sentences. Now, this total is a determinant of the seriousness of the case in its totality and, hence, a determinant of (but not equal to – in fact, greater than) the proportionate effective sentence. A series of partly connected offences makes for less total seriousness than fully separate offences. Accordingly, the calculated proportionate sentence under the framework – strictly, the calculated proportionate degree of cumulation for the secondary offences – should be reduced according to the connectedness of the secondary offences. In respect of this, the implications for the decision sequence according to case law are thus: the framework does not cover step 3, but as a consequence requires an additional step in regard to step 5 so as to make due allowance for partial separateness. Why the disparity between the framework and case law in respect of the decision sequence? The reasons are solely practical.

The framework was constructed as a means of assessing whether judicial practice was disproportionately harsh against a numerically precise standard. But there was no basis for quantifying the degrees of connectedness of the comprising offences, as required under case law. Hence, there was no alternative but to ignore this in the calculation of the total sentence and, consequently, of the proportionate sentence, and, because of this, to treat this standard as an upper limit not a determining value. If there were a framework for assessing degrees of connectedness in the determination of the total sentence, then the proportionate sentence calculated under the framework would be determining. Yet, is this theoretical ideal also the practical ideal? The problem is that a separate framework for

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judging the connectedness of offences – as foreshadowed in the discussion above on rules in respect of the connectedness of offences – may be regarded as tediously complex in relation to the gains in accuracy. As an alternative, the calculated proportionate sentence – actually, the percentage cumulation for the sentences for the separate secondary offences – under the numerical framework, itself can be used to frame the allowance to be made for partial connectedness. This calculated sentence, of course, is proportionate only in circumstances where all the sentences contributing to the total sentence are for fully separate offences. The true proportionate sentence will be less where the offences are partially connected. This may offer a more ready means of allowing for connectedness. How this would be achieved will be developed later.

Secondly, in case law the totality principle requires the effective sentence to reflect the seriousness of the criminality in its totality yet not to be so severe as to crush the offender. The former element invokes proportionality, the latter, mercy and rehabilitation. What the framework does, therefore, is give a numerical value – actually, an upper limit, since connectedness is not in the calculation – for one of these two elements, not both as required under step 5 of the decision sequence according to case law. Therefore, a (second) additional step must be introduced; in this case, one in which allowance is made for the calculated sentence's potentially crushing effects (the first additional step being the adjustment for connectedness).

Thirdly, in the review of case law on the totality principle, it was concluded that the total sentence (step 4) would always be greater than the quantum appropriate under the totality principle and, hence, to some extent require reduction. On this basis the original statement of the decision sequence was modified. The approach underpinning the numerical framework fits this modified statement.

Finally, the decision sequence does not recognise the adjustment, in the numerical framework, allowing for differences in the individual seriousness of the offences comprising a case. Yet there was some evidence for this factor in the case law on proportionality.

In the earlier discussion on the decision strategy as discerned in case law, the judgment in *Grabovac* was regarded as opening the door to a confounding of steps 3 and 6, thus allowing an intuitively determined outcome to influence a judgment related to a step supposed to underlie and determine that outcome – what was regarded as a slippery slope. The framework offers a bulwark against this, since it determines what ought to be on the basis of elements of the decision, the final judgment not being a matter of trial and error in relation to tentative component judgments.

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### *Sentences for the individual offences*

The framework requires that the individual sentences on which the calculated proportionate sentence is based be individually proportionate and appropriate. As the framework formed a bulwark against false judgments under step 3, so it does – and for the same reasons – against false judgments under step 1.

### *Cumulation of sentence*

Before comparing and contrasting case law and the framework on this matter, a brief summary of the earlier discussion of case law will be helpful. Cumulation is warranted under two broad circumstances: (1) offences or groups of offences representing separate events, episodes or transactions; (2) offences which are a part of a single event but serious. And, for an offence warranting cumulation, the degree depends on the connectedness of the offence to the other separate offences or to the other (less serious) offences within the same event. But this leaves what is to be regarded as separate and what is to be regarded as single critically vague. There is, perhaps, in this matter not being taken further, a failure to recognise the degree to which crime is characterised by recurring patterns of offending. There is a particular risk of not seeing this when these matters are not addressed in (principal) offence-specific terms.

More generally, more detailed principle requires due distinctions to be drawn between cumulation/concurrency in relation to separateness as opposed to seriousness, separateness/singleness as opposed to degrees of connectedness, and separateness/seriousness as opposed to the practical requirements of totality. These things case law has not done. These things the present analysis does. What immediately follows relates to cumulation/concurrency in relation to separateness, seriousness and connectedness, not totality.

Perhaps the major problem in this area of case law is its apparent reliance on the concept of the (continuing) episode as a means of understanding singleness. It can refer to events occurring at about the one time in a particular location; but it can be used in connection with events spread over time and across locations. Similarly problematic is the related concept of one incursion into criminality. This may be applied to a single act or to multiple acts in some way connected, but perhaps separated in time and location. All this makes for multiple disparate interpretations of singleness according to personal predilection. What adds to the confusion is that the ideas of separateness and singleness have categorical connotations – offences are either separate or they are not, for which there is cumulation or concurrency. Yet in reality there are degrees of separateness, and the use

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of the device of partial cumulation recognises this. In fact, what is separate and what is single is a matter distinct from degrees of connectedness. Before there can be useful rules, this mess must be disentangled.

To this end, the qualitative rules identified empirically in Part 1 of the present study are helpful. An examination of them reveals the following underlying distinctions and principles. Let it be said parenthetically, the scope and detail of these rules should be understood to be limited by the characteristics of the database, namely, three relatively small samples of cases whose principal offence was either armed robbery, burglary or rape.

### Separateness and seriousness

Separateness is defined principally by the concept of the act: generally, single acts represent single transactions. So, an armed robbery and a false imprisonment in support of it represent separate transactions, as do two armed robberies committed at different times and locations. (The exception to this is where the scope of one act would generally be regarded as encompassed by the other; for example, a theft as the purpose of the armed robbery.)

But if a second offence (act) is committed at the same time and location and is of the same nature as the first, then it represents a separate transaction only if it clearly added to any victim's trauma, or was otherwise serious, or (potentially) had additional consequences, or could not be regarded as blending with the other criminal behaviour. So, the false imprisonment of multiple victims of an armed robbery normally represents a single transaction, but significant injuries to multiple victims would be separate. Thus, seriousness is related to separateness in that, under certain circumstances, it modifies what otherwise would be a single transaction.

These rules would need to be illustrated in offence-specific terms, covering common circumstances in sufficient detail, so as to meet the requirements of consistency of approach.

### Separateness and cumulation

All separate transactions (offences or groups of offences) require some degree of cumulation in that they add to the seriousness of the offender's criminality. Whether cumulation should be partial or full depends on the transaction's degree of connectedness to other transactions.

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## Degree of connectedness

Time and location are the principal determinants of connectedness. Clearly, transactions are most connected if carried out at the same time and location; for example, a false imprisonment in association with an armed robbery. By way of comparison, offences committed on different days/in different locations are highly unconnected.<sup>5</sup> The exception to this is something done in support of a (principal) offence, but carried out sometime before or after it, the locations and victims being different; for example, the theft of a motor car as a getaway vehicle for an armed robbery and several days earlier.

The empirically derived qualitative rules distinguish between offences to be regarded as separate and single transactions. What they do not do for the former is give guidance on the relationship between connectedness and the degree of cumulation. In the empirical study this was handled only descriptively – qualitative categories reflecting variations in the circumstances of offences as they related to connectedness – ‘single event’, ‘escapade’, ‘multiple event’ (and ‘single-multiple event’). But connectedness as it bears on cumulation requires a metric.

As foreshadowed in the discussion of the decision sequence as it relates to the numerical framework, allowance for the connectedness of separate offences could be made as a part of the calculation of the total sentence or by way of a reduction on the calculated proportionate sentence under the numerical framework. In regard to the former, fully unconnected offences require 100 per cent cumulation. But what about fully connected separate offences? There would appear to be no principled answer; perhaps something like 50 per cent appears reasonable. In respect of the allowance for connectedness by way of the calculated proportionate sentence, recall, the calculated proportionate sentence applies to fully unconnected offences. When thinking about the adjustment for connectedness by way of this alternative, it is better to think in terms of the intermediate step in this calculation, namely, the calculated proportionate percentage cumulation (cf. calculated proportionate sentences) for the sentences for the separate secondary offences. This percentage will be, of course, well below 100 (see for example, Figure 7). Again, there is no obvious principled basis for quantifying the reduction in cumulation for connectedness, but for fully connected separate offences the degree of cumulation would have to be above zero and a not-insubstantial proportion of the value for fully unconnected offences, since separate offences, even if highly connected, generally require significant cumulation.

What the above demonstrates is that useful guidance, at least in respect of the circumstances under which cumulation is warranted, is practicable. On this matter, then, what was described above as the nihilistic conclusions of *O'Rourke* and *Mantini* are



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unjustified. Yet to do this it was not necessary to sweep aside what the courts have said about cumulation and concurrency. In fact, nothing in the above rules patently contradicts case law. Indeed, obviously they are heavily based on it. All that has been done is to present what has been judicially said and done in a more orderly fashion, made possible by introducing precision to some aspects previously characterised by generality. Of course, these rules cannot be otherwise than presumptive, thus requiring discretion in their application. But in the empirical study, experience showed that what was correct by way of classification in respect of these rules, illustrated by way of concrete, offence-specific examples, mostly seemed readily apparent. Their power is due to the patterned nature of offending and their having been founded on a database of actual cases.

### *The totality principle*

Totality in case law requires consideration to be given to proportionality and the avoidance of a crushing sentence. The numerical framework gives a calculated value for the proportionate percentage cumulation for the separate secondary sentences and, by means of this, the associated proportionate quantum and, thence, when this is added to the sentence for the principal offence, the proportionate effective sentence. If the total sentence on which this calculation is based were to incorporate a discount for the connectedness of the separate secondary offences, then so would the calculated percentage (and quantum) and the proportionate sentence. But the numerical framework, as developed to date, does not. Accordingly, the calculated proportionate sentence – actually, the proportionate percentage cumulation – must be reduced to allow for connectedness. This will give the true proportionate percentage cumulation and, in turn, proportionate effective sentence. Remember, this sentence must be greater than the sentence for the principal offence – indeed, significantly greater relative to the unadjusted proportionate effective sentence – since sentences for separate offences, even though they be highly connected, normally require not-insubstantial cumulation on the ground of proportionality. At this point, consideration is appropriately given to whether this true proportionate sentence would be crushing in view of the offender's circumstances. Therefore, as the calculated proportionate sentence under the framework structures the allowance to be made for connectedness, so it also frames the effect for the potentially crushing effects of the sentence. It represents the circumstances of minimal connectedness and no especial allowance for mercy and rehabilitation prospects. The lower limit is, of course, the sentence for the principal offence (that is, zero cumulation of the sentences for the separate secondary offences); this represents the circumstances where any degree of cumulation would be crushing.

There are two ways to approach the meaning of proportionality: what factors determine it and what levels of seriousness define it. The numerical framework takes a precise position

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on both. With respect to the first, there are two determining factors: (1) the greater the sum of the separate sentences, the greater the total case seriousness and, hence, the proportionate effective sentence; (2) the greater the seriousness of the individual sentences (for a constant sum of sentences), the greater the total case seriousness and, hence, the proportionate sentence. The factor of the sum of sentences is most discernible in the High Court judgment of Dawson and Gaudron JJ in *Postiglione*; in respect of the other judgments, there is no obvious discernible alternative, and the sum of sentences as a factor is not inconsistent with anything said in these other judgments. Average sentence, as a factor, is more uncertain. It is in the framework because an argument was made that justice requires it. There is a Court of Appeal judgment in *Taylor* perhaps alluding to it, but apparently nothing in other judgments contradicting it – little more can be said.

With respect to what level of seriousness defines proportionality, case law leaves the matter open. The framework takes the English position – proportionate seriousness is the level defined by the seriousness of the offences comprising the case as a class (sub-class) of offence. Under this definition, the sum of the separate sentences will obviously exceed the proportionate effective sentence at high levels of total seriousness. Accordingly, all total sentences have to be reduced to maintain proportionality between cases across the range of total seriousness. As has been said before, the courts are largely silent on this idea of proportionality. *Mill* is founded on what Thomas (1979) interprets as proportionality between classes of offence, but does not run with the idea, and Kirby J in *Postiglione* could be said to entertain this idea as a definition. Nonetheless, case law leaves itself open to higher levels of sentence for multiple offenders than are allowed under this strict definition. This aspect of the numerical framework is clearly its most contentious as an operational interpretation of case law on the totality principle.

In regard to the application of the totality principle, the weight of case law says there is a balance to be struck between what quantum of sentence is proportionate to the totality of the criminality of the offending and what would not crush the offender. In the light of this, the court has to determine a sentence proportionate to the case, and then what proportion of this quantum the offender could be expected rehabilitatively to cope with and mercifully to bear. If these two levels of sentence are disparate, finally, the court must strike a balance. What the numerical framework does is provide a formula for calculating the value of the proportionate sentence. It does this, having regard to the sum of the individual sentences for the separate secondary sentences and the average of these sentences. Moreover, it constrains cumulation within limits set by the seriousness of the comprising offences as a class of offence, yet within these limits discriminates between cases in an internally consistent way according to differences in their seriousness as determined by the two factors. What it does not do is quantify the allowance to be made for any degree of

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connectedness between offences or, in respect of the result of any reduction in sentence made for this factor, it does not quantify the striking of the balance between proportionality and rehabilitation/mercy.

The framework thus structures the effects of the major determinants of proportionality. Its value in this respect is surely obvious. The interrelationship of these factors is very complex and due allowances for the cross-currents of these effects is almost certainly beyond the reach of most human minds. This it does with precision. Moreover, it frames, with respect to limits and orders of magnitude, the necessary judgments relating to connectedness and what might be crushing. In both these things it represents an operational framework promoting consistency of approach. And it facilitates a considered approach, as required by *Grabovac*, in which the global judgment is determined by the component judgments.

Could the framework be profitably taken further, as a matter of principle and having regard to what is practicable? In regard to the allowance for connectedness, greater precision is almost certainly feasible. In regard to what is crushing, numerical precision as to what is appropriate by way of a balance is patently inappropriate. What is crushing is not a quantitative problem. Rather, it is about indicators of appropriateness, and what is significant will vary with an individual's personal history and circumstances. What might be possible by way of guidance on both these matters is developed in the next chapter.

Kirby J, in his judgment in *Postiglione*, regarded the balance between what is proportionate and what would not be crushing as defying precision. In this he is surely right. But it would be a pity if this statement were interpreted as applying to the whole process. Rather, it is to be hoped that the present numerical framework as an interpretation of case law is seen as testimony to the contrary. This, let it be clear, is not to say that there is one correct (proportionate) sentence, nor is it to say that there is not a discretion to be exercised judicially even in regard to those factors incorporated in the calculation let alone in regard to other considerations. Indeed, individual judgments are required for each step in the decision sequence. But it is to say that the application of the totality principle admits of greater precision than has hitherto been envisaged by the judicial mind.

## Conclusion

This completes the review of case law and the comparison between the content of case law and the content of the author's numerical framework for the sentencing of multiple offenders. The two share much in common. Since the framework is an attempt to represent case law numerically, as it is open to be discerned, this is to be expected. Nevertheless, there are some matters on which there may well be differences. But the framework goes

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further by virtue of its numerical character in being more detailed and more comprehensive. In these two respects, the framework is more than just offering numerical precision and a decision structure for what is. It is also challenging the law on what should be. Yet there is no presumption here, for the High Court has yet to think through the topic. If it does, as foreshadowed by Kirby J in his judgment in *AB*, the present framework may aid the Court in its understanding of the detail and scope of the problem and in resolving what is correct by way of approach.

The final part of the present study – Part 4 – takes this review of case law and the numerical framework and offers a draft elaborated policy for the sentencing of the multiple offender. It does this as a means to guidance for consistency of approach. This raises the matters of how the guidance is to be developed and whether its use would represent good legal decision-making.

## Notes

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1. Circumstances relating to an offender will normally be constant across offences within the case, but not necessarily so; for example, there may be relevant prior convictions for only one (or some) of the offences.
2. See the judgments of Kenny and Phillips JJA; but see the judgment of Tadgell JA.
3. In the High Court.
4. Nevertheless, the importance of maintaining these distinctions in steps 2 and 3 cannot be over-emphasised; the total sentence under step 4 is the sum of the contribution of each sentence according to the concurrency/cumulation orders.
5. Of course, acts very separate in time may be connected by motive. Whether this is mitigating may depend on the motive; some would say that the drug-addicted have a claim to have their multiple criminality viewed less seriously, whereas the greedy do not. But all this should be regarded as a separate consideration.

## Part 4: Principled numerical guidance

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## Chapter 10

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### Guidance for totality

The purpose here is to offer a policy for the sentencing of the multiple offender, yet one generally consistent with sentencing law as it is to be found in the appellate decisions reviewed in Part 3. This is done with a view to guidance. In scope, the policy is limited to what is proper by way of approach to determining quanta of sentence from case facts. In this, the case facts are imposed sentences for the comprising offences and the circumstances relating to the separateness and degree of connectedness of these offences. In nature, the policy will have both qualitative and quantitative aspects. This is taken as an imperative. Principle is required to justify the numerical, and to govern and facilitate its application. Number is necessary to test the principle's numerical coherence and completeness, and for precision in the application of the principle. (Let it be said parenthetically, this is not regarded generally as a self-evident proposition: the means of guidance is envisaged by Bottoms [1998] as a choice between principle and number, with the former having the edge; and McHugh, Hayne and Callinan JJ in their High Court judgment in *Pearce* seem similarly to hold principle and number to be disjunctive.) In content, the policy is elaborated. This is because much sentencing law relating to the multiple offender remains open, being in contention among judges, yet to be properly covered, or yet to be covered in detail sufficient to numerical precision. But numerical precision requires closure; thus, the need for elaboration. Hence, the above qualification of the policy as 'generally consistent' with sentencing law – matters expressly or implicitly inconsistent with or outside the bounds of judicially settled policy should never be regarded as a part of what is considered correct by way of approach. Finally, in status, as a consequence of this authorial initiative in policy, the policy cannot be regarded as more than a proposed draft, as grist for the appellate mind.

The policy comprises the numerical framework and the rules associated with its application. The framework, it will be recalled, serves the purpose of:

1. calculating the proportionate effective sentence for separate offences, having regard to the seriousness of these offences considered individually and together;
2. calculating the discount/framing the discretion in respect of the adjustment to the proportionate sentence, so as to allow for any partial connectedness among the separate offences; and
3. framing the discretion in respect of the allowance to be made for possible crushing effects of the proportionate sentence.

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The rules associated with the application of the framework incorporate the steps in the decision sequence and the principles covering the separateness and connectedness of the comprising offences. In fact, connectedness also requires a numerical framework. The means by which this is to be achieved was not resolved in the last chapter: one possibility is by way of less than full cumulation of the separate secondary sentences in the calculation of the total sentence (a calculated adjustment); the other possibility is by way of a downward adjustment in the proportionate effective sentence calculated on the basis of full cumulation of the sentences for the separate secondary offences (a discretionary adjustment).

The principles on which the numerical framework is founded are taken from appellate case law, with its disparities of approach, gaps and generalities, as resolved in the review presented in the last chapter. The basic structure of the framework was formulated and calibrated in Part 2, but is developed here for the purpose of guidance. Since the framework reflects legal principle, it is a numerical statement of what ought to be; it thus offers prescriptive guidance.<sup>1</sup> This goal raises three matters: what the guidance is to look like; how it is to be used; and what steps need to be taken to introduce it.

Guidance built on policy brings added burdens. In an individualised system of justice, guidance can never show more than the effect on the quantum of sentence of the major factors and factor combinations, consistent with sentencing principle. Accordingly, it also has to act as a standard against which to consider the effect on sentence of the less common case circumstances, according to principle. Guidance as a description of policy must be accurate, and make clear what factors are covered by it and their effect in combination. There is no place for the broad brush here. Moreover, guidance as a standard must facilitate the accurate allowance for the extra against the existing.

What the guidance would look like can be only illustrative, of course, since it is based on a draft policy. And since the framework is envisaged as a tool of the courts, the underlying policy awaits judicial evaluation. If, as a result of this, the framework required significant structural change, its representation and usage would require reconsideration. To the problem of translating draft policy into operational guidance, the proposed solution follows. But first, a few general comments are in order.

As implied above, the process of development is not unidirectional, although predominantly so. Sentencing law gives the framework its principled base, but in teasing out the numerical implications of principle, generality, previously unseen matters of importance, and disparity of approach are identified, thus forcing these matters to be confronted. Indeed, this desirable effect of translating general principle into specific principle, a necessary task in the development of guidance, would have been apparent in the development of the



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numerical standard of proportionality (see Part 2). Thus, the analysis of policy for guidance has the indirect consequences of clarifying thought, and encouraging new insights, with the potential for a more just, rational and consistent approach to this sentencing problem. With the judicial evaluation of the draft policy, the achievement of these goals would come closer to realisation.

## The representation of the guidance

This description of the guidance commences with a statement of the sentencing principle associated with the application of the numerical framework. This is taken from the last chapter. The description then moves on to the representation of the numerical framework in the form of tables, graphs and equations.

Before this, however, a general matter needs to be canvassed. Of those points in the guidance not concluded as a matter of judicial policy, and accordingly necessarily resolved tentatively in the draft policy, there are three significant elaborations. The first is the idea of proportionality for multiple offences being framed in terms of the seriousness of single offences as classes and sub-classes of offence, rather than in terms of a standard allowing harsher punishment. The High Court has not said that proportionality is not based on the former, and indeed the leading judgment in *Mill* is based on Thomas (1979) who subscribes to that standard. Nevertheless, the court has not gone that far, expressly or impliedly; in fact, it has not offered a standard defining proportionality. Undoubtedly, this elaboration of case law would be regarded as seriously contentious.

The second elaboration is the mechanisms canvassed as means of dealing with the effect of the partial connectedness of separate offences on total seriousness. Under what is the theoretically correct approach, total seriousness is not simply the sum of the (full) sentences for the comprising separate offences, despite their degree of connectedness; rather, the full sentence for an offence is cumulated only for fully unconnected separate offences, the cumulation for partially connected offences being only a proportion of their (full) sentences. This is the theoretically correct approach because the total seriousness of a case determines the proportionate sentence, and total seriousness itself is determined by the seriousness (and, hence, sentences) of the comprising offences. Nevertheless, as non-separate offences do not contribute to the total seriousness, so partially connected separate offences should contribute only a part of their individual seriousness to the total seriousness of the case. What this requires, of course, is a separate numerical (sub-) framework relating degree of connectedness to the proportion of the sentence to be added to the running total.

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The third elaboration is the more detailed definitions relating to separateness. These latter two policy developments would be expected to be less contentious, not least because any reasonable alternative approach is unlikely to result in a significantly different proportionate sentence. With this background, there now follows the description of the numerical framework and the associated body of principle.

First, the principle. This comprises the steps in the decision sequence and the rules covering the separateness and connectedness of comprising offences. The steps in the decision sequence are as follows:

1. impose proportionate and appropriate sentences for each of the offences comprising the (offender's) case;
2. identify those offences (or groups of offences) that should be regarded as separate;
3. of those offences (or groups of offences) treated as separate, determine quantitatively their degrees of connectedness;
4. identify the principal offence and the secondary offences; the sentence for the former is the sentence on which the sentences for the latter are cumulated, and is usually the highest sentence (or one of the equal highest sentences);
5. sum the contributions of the sentences for the comprising separate secondary offences, having regard to their degrees of connectedness, to determine their total seriousness;
6. calculate the proportionate degree of cumulation for the secondary offences, having regard to this sum and the average (mean) sentence of these individual separate secondary offences;
7. add the proportionate degree (quantum) of cumulation to the sentence for the principal offence, to determine the (proportionate) effective sentence;
8. determine whether this proportionate sentence is crushing, having regard to the offender's circumstances;
9. if the proportionate sentence is crushing, reduce it so as to achieve the appropriate balance between proportionality and the matters of rehabilitation and mercy;
10. if this appropriate sentence is greater than the sentence for the principal offence, determine the cumulation orders so as broadly to reflect the separateness and the relative seriousness and connectedness of the secondary offences.

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The rules covering the separateness and connectedness of the comprising offences are, in summary, as follows:

- single acts represent separate transactions;
- if a second act is committed at the same time and location as the first, then it represents a separate transaction only if it clearly added to any victim's trauma, or was otherwise serious, or (potentially) had additional consequences, or could not be regarded as blending with the other criminal behaviour; and
- time and location are the principal determinants of the connectedness of separate acts; acts committed at the same time and location are highly connected, and will be seen as less connected with the passage of time and change of location (the exception to this being acts done in support of a principal offence but at a different time and location).

These rules relate to the second and third steps of the decision sequence and their application would be illustrated in terms of offence-specific case circumstances. (Recall, these rules are taken from Part 1 of the study: the database there comprised three relatively small samples of armed robbery, burglary and rape as principal offences. The rules may require modification for different principal offences.)

Principle having been dealt with, consider now the numerical framework. The major numerical framework (relating to proportionality) applies to step 6 of the above decision sequence and the numerical sub-framework (relating to connectedness) applies to step 3. Since the latter precedes the former in the determination of sentence, it will be covered first. What is required of this quantitative guidance is the relationship between levels of connectedness, defined in terms of case circumstances, and the percentage contribution of the sentence for an offence of this degree of connectedness to the total seriousness of the separate secondary offences (the sum of these sentences, allowing for connectedness). For the purpose of defining levels of connectedness, the qualitative categories – empirically derived in Part 1 – reflecting variations in offence circumstances, serve a useful basis here. The guidance might appear as in Table 26.

The number of categories for the degree of connectedness is five. These distinctions should reflect what is felt to be compelling, being neither too crude nor artificially fine. Four may be more appropriate. While the 'single event' and 'escapade' – (the two) offences committed on the one day and/or night – categories probably speak for themselves, the three distinctions for the 'multiple event' – (the two) offences committed within one week, within one month, and over a period greater than one month – may be excessive. In any case, the number of levels – and, indeed, the percentage contribution deemed to be

**Table 26: Numerical guidance: relationship between offence connectedness and the percentage contribution of sentence to total seriousness**

Degree of connectedness	Defining case circumstances (a)	Percentage contribution of sentence
Full	single event	50
High	escapade (b)	70
Moderate	multiple event $\leq$ week (b)	80
Low	multiple event $\leq$ month (b)	90
Minimal	multiple event $>$ month (b)	100

(a) See the operational definitions, separately for armed robbery, burglary and rape as principal offences, in Part 1.

(b) The period of time since the preceding offence.

appropriate – may be thought to depend on the category of the principal offence; the above being based on what appeared useful for distinguishing between typical cases in which rape, burglary or armed robbery were principal. In respect of the figures for the percentage contribution of sentence, there is considerable arbitrariness. Clearly, 100 per cent is appropriate to fully unconnected offences; but little can be said about the degree for full connectedness, save that it normally should be substantial but significantly less than 100 – say, 50 per cent; with this decision, the die is more or less cast for the percentages for the intervening levels. For present purposes, however, little matters, so long as they are not wildly in error. As such, they are useful for the purposes of illustration and as starting points for considering what otherwise might be appropriate.

Consider, now, the effect of the guidance in Table 26 on the determination of the proportionate sentence. It operates through step 3 and, then, steps 4 and 5. Consider two cases. In each there is an armed robbery, three assaults and the theft of two motor cars, for which the appropriate sentences are, in years, respectively, four and two, two and two, and one and one. Armed robbery is principal in both, and all are separate offences. But in one case they are all a part of the one armed robbery; and in the second case, each offence is separated by a period of at least one month. For the second case, all the offences being fully unconnected, the sum of the secondary sentences as a measure of total seriousness would be eight; for the first case, all of the offences being fully connected, the sum would be four. This demonstrates the effect of connectedness, across its range, on the sum of sentences for the comprising separate secondary offences as a measure of their total seriousness. The quantitative effect of connectedness on the proportionate degree of cumulation is shown below.

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The major numerical framework applies to step 6, and is used to calculate the proportionate degree of cumulation for the separate secondary offences. It is in three parts: the degree of cumulation as a percentage; the adjustment to this percentage so as to allow for the average (mean) seriousness (sentence) of the individual separate secondary offences; the adjusted degree of cumulation or a quantum. Although the framework is best thought of graphically, the underlying algebraic functions are more suited to the purpose of calculation.

The degree of cumulation as a percentage:

$$P_{1.2} = \frac{31.1}{1 + 0.104 S} \dots(1)$$

where:

$P_{1.2}$  is the percentage cumulation of the sentences for the separate secondary offences, discounted for connectedness; and

$S$  is the sum of the sentences for the separate secondary offences, discounted for connectedness, in years.

This assumes an average (mean) separate secondary sentence of 1.2 years.

The adjustment to  $P_{1.2}$  so as to allow for an average (mean) seriousness (sentence) of the individual secondary offences different from 1.2:

$$CP_{1.2} = 16.6 \ddot{S} + 80.1 \dots(2)$$

where:

$CP_{1.2}$  is the degree of cumulation as a percentage of  $P_{1.2}$  and

$\ddot{S}$  is the average (mean) individual sentence for the separate secondary offences, in years.

The adjusted degree of cumulation as a quantum:

$$Q = \frac{CP_{1.2}}{100} \times \frac{P_{1.2}}{100} \times S \dots(3)$$

where:

$Q$  is the proportionate degree of cumulation for the sum of the separate secondary offences, discounted for connectedness, and adjusted for seriousness, in years.

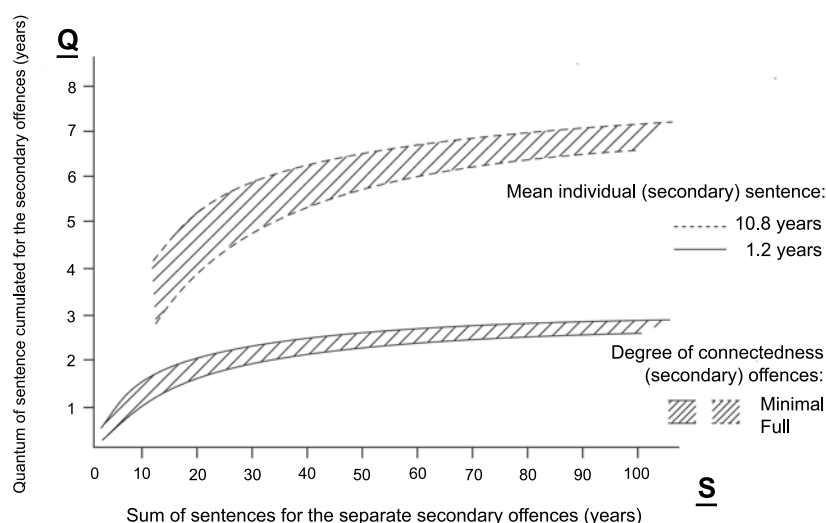
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The proportionate effective sentence is the sum of the sentence for the principal offence and Q (this is step 7).

The general form of the graphical representation of these equations and, hence, the numerical framework, is to be found in Figures 7 and 8. They show the relationship between the degree of cumulation as a percentage and as a quantum, respectively, and the sum of the sentences for the separate secondary offences. They also demonstrate the effect of the adjustment for the average seriousness (mean sentence) of these separate secondary offences. What they do not show is the effect of the discount for connectedness, since they assume fully unconnected separate secondary offences. This is shown in Figure 13. It is a graph of the quantum of sentence to be cumulated for the separate secondary offences as a function of the sum of sentences for these offences (cf. Figure 8). The effect of the discount is shown across the range of connectedness (that is, from minimal connectedness – each separate secondary sentence contributes 100 per cent to the sum – to full connectedness – each separate secondary sentence contributes 50 per cent to the sum). In fact, the operation of this factor can be readily observed in the two shaded areas – the upper boundary of each representing minimal connectedness and the lower boundary representing full connectedness. So as to facilitate comparison across degrees of connectedness, the quantum of cumulation for full connectedness is plotted for the sum of sentences appropriate to minimal connectedness, even though the sum for the former is half that for the latter. Of course, these two pairs of curves in Figure 13 are two of a potentially infinite number, since each level of average seriousness of the separate secondary offences requires its own representation.

As would be expected (and required), higher connectedness makes for less cumulation of sentence. However, it is not a uniform effect across the sum of sentences. This, even though the allowance for connectedness by way of the contribution of the separate secondary sentences to total case seriousness is independent of the sum of these sentences. In fact, the quantum of cumulation for full connectedness (50 per cent contribution) as a percentage of the quantum for minimal connectedness (100 per cent contribution) ranges from a theoretical low of 50 per cent to (in effect) zero across the range of the sum of the sentences for the separate secondary offences. Nevertheless, within the more common levels of the sum of sentences, full connectedness makes for a substantial reduction in the degree of cumulation. Clearly, non-uniformity arises because the effect of connectedness on the percentage contribution of sentence operates indirectly through the framework. Recall, in the framework, sentences for additional offences have increasingly less effect on the proportionate quantum of cumulation and, accordingly, this will be reflected in the effect of the allowance made for connectedness.

**Figure 13: Framework for the proportionate sentencing of multiple offenders: relationship between the quantum cumulation and the sum of the secondary sentences by mean individual sentence and degree of connectedness**



Also shown in Figure 13, for the effect of connectedness is the comparison between two levels of the average seriousness of the separate secondary offences – low (mean individual sentence = 1.2 years) and high (mean individual sentence = 10.8 years). In fact, the percentage effect of connectedness is the same for both levels of this factor.

The numerical framework for assisting the determination of proportionate cumulation is probably best presented in the form of Figure 13 (that is, the quantum of cumulation – not the percentage cumulation – as the dependent variable). This, for the following reasons. In determining an effective sentence, judges should first consider the appropriate individual sentences together with their separateness and degree of connectedness (see the judgment of the Victorian Court of Appeal in *Grabovac*). From my reading of appellate sentencing judgments, there is a tendency among judges, as a matter of practice, to think in terms of an appropriate effective sentence in the light of the secondary sentences as tentative sentences, rather than determining the effective sentence formally through the degree of cumulation (see also, the judgments in the Victorian Court of Appeal in *Lomax*, as well as in *Duong* and in *Mai*). Since the effective sentence is the sum of the sentence

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for the principal offence and the quantum cumulated in respect of the sentences for the separate secondary offences, the numerical guidance would appear to be more helpful if it presented this quantum rather than the more abstract percentage cumulation. Now, Figure 13 gives the quantum of cumulation. Yet, it is based on the seriousness and connectedness of the separate secondary offences, as they relate to the degree of cumulation, thus being consistent with what is correct, as a matter of principle, by way of judicial approach.

The numerical guidance in Figure 13 takes the form of pairs of curves. This was done to show the effect on the quantum of cumulation of the degree of connectedness across the full range of this factor (that is, from full connectedness – 50 per cent contribution to seriousness – to minimal connectedness – 100 per cent contribution to seriousness). In practice, it will often be the case that some separate offences are fully connected and some are minimally connected, or whatever, and there may be different numbers of each. In such cases, the contribution to the total seriousness of the sentences for the separate secondary offences must be determined having regard to each offence's sentence and connectedness. For example, consider a case comprising five separate offences: the sentence for the principal offence is four years and for each of the other offences it is two years; one of the secondary offences forms a 'single event' with the principal offence; a second secondary offence is part of an 'escapade' with these two; and the other two constitute an 'escapade' occurring two months later. The sum of the sentences for the separate secondary offences, allowing for connectedness, would be 5.8 years<sup>2</sup> (cf. eight years for full connectedness – that is, 73 per cent of full connectedness).

What has been described above can justly lay claim as satisfying the requirements of a numerical framework. It shows the effect, individually and in combination, of what can be regarded as the three major determinants of the proportionate degree of cumulation for the separate secondary offences – the sum of these sentences as a measure of their total seriousness, the average seriousness (sentence) of these offences, and the discount for their connectedness in respect of this sum. Moreover, the framework can be used readily to gauge the relative effect on cumulation of these three factors – in Figure 13, just compare the magnitude of the change in the quantum of cumulation for a mean sentence of 10.8 as against one of 1.2 years, full connectedness as against minimal connectedness, and any two relatively extreme values of the sum of the secondary sentences. This structure thus acts to minimise the likelihood of too little or too great an allowance being made for factors not incorporated in the framework or for factors in the framework but not capturing the circumstances of the particular case adequately. In regard to the former, there is the allowance which might need to be made for mercy/rehabilitation. With reference to Figure 13, this would require a further discount on any discount already made for



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connectedness; indeed, the curve incorporating connectedness frames the allowance for what might be regarded as crushing. Regarding case circumstances perhaps not fully captured: the factor of the mean seriousness of the separate secondary offences offers an example. Clearly, this factor captures the circumstances best when all these offences are equally serious (that is, have the same sentence), but may over- or under-estimate seriousness when there is a wide variation.

So much for the theoretically correct approach of dealing with connectedness. A second, and what may be regarded as a more practical method was also canvassed in the review of case law. In this alternative, the calculated proportionate quantum of cumulation for minimally connected separate offences – the upper boundary of each pair of curves in Figure 13 – frames the allowance to be made for partial connectedness. Curves representing greater degrees of connectedness will fall below this curve but, since the connectedness is for separate offences, normally should describe a path well above zero cumulation.

The major difficulty with this approach will be readily apparent in the light of the just-described theoretically correct approach. Recall the assumptions underlying the latter: the sum of sentences for the secondary separate offences is a measure of the total seriousness of these offences (and a determinant of proportionate cumulation); and, connectedness of an offence lessens its contribution to total seriousness. If this be accepted, then the discount for connectedness should be made by way of this sum of sentences. Now, as Figure 13 shows, connectedness does not have a uniform effect on cumulation; rather, it interacts with the sum of sentences (the greater this sum, the less the discount for connectedness). Put this to one side and consider the more practical method, in which the allowance for connectedness is made directly in respect of the quantum of cumulation. For this purpose, it might be thought that 50 per cent quantum of cumulation is proportionate for fully connected, separate secondary offences. (After all, in the theoretically correct analysis, for full connectedness, the sentence for an offence makes a 50 per cent contribution to total seriousness – see Table 26.) However, Figure 13 demonstrates that the discount for this should not be uniform across the sum of sentences – rather, the value of 50 only applies to the (theoretically) lowest level of the sum of sentences (namely, zero), and with increases in this sum the discount should lessen. But in the absence of the theoretical analysis, this non-uniformity would not be readily apparent, nor would the magnitude of the variation across the sum of sentences.

Moreover, this apparently more practical approach runs into problems when the multiple separate secondary offences are not all equally connected. Under these circumstances, making intuitive allowance for the discount to cumulation in respect of connectedness would be patently a tenuous approach. Finally, the more convenient method does not

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conform to the approach to dealing with connectedness as set out in the judgment of the Victorian Court of Appeal in *Grabovac*. (This is covered in what has been labelled in the review of case law as step 3 in the decision sequence.) There, allowance for connectedness is not made by way of a discount on the proportionate quantum of cumulation, but rather it is to be made directly by way of the cumulation of the individual sentences; the degree of cumulation reflecting the degree of connectedness.

Nevertheless, on one matter the theoretically correct approach seems, at least at first blush, to clash with *Grabovac*. There, no express mention is made of the degree of cumulation proportionate to connectedness being less for greater sums of sentence; indeed, the implication is one of no difference. But further thought quickly reveals this is more apparent than real. For the sum of the separate secondary offences (step 4) may exceed what is proportionate under the totality principle (step 5), thus requiring a reduction in the degree of cumulation initially made under step 3 (step 6). Moreover, the degree of the reduction in cumulation will be greater for higher sums of sentence – in fact, cumulation approaches zero at the limit. Accordingly, under *Grabovac*, the discount for connectedness necessarily will be less with higher sums of sentence, approaching zero at the limit (see Figure 13). But all this is not an immediately apparent consequence of *Grabovac*.

A numerical framework has two manifest and important consequences – one relating to principle, the other to practice. In respect of the former, it teases out the numerical consequences of policy represented in words. This is illustrated in the discussion immediately above. To appreciate the latter, recall the results of the analysis of the judicial application of the totality principle in practice (Part 1). In that study, four qualitative categories – ‘single event’, ‘escapade’, ‘multiple event’ and ‘single-multiple event’ – were established so as to reflect the circumstances of offences as they relate to connectedness. However, the data revealed no systematic effect, across offences, of less cumulation for the greater connectedness of the ‘single event’ and the ‘escapade’ categories. Now, a system of numerical guidance would ensure a factor of significance in policy was given its due effect in practice. Having considered what the guidance should look like, now to the next question.

## Use of the guidance

The application of the numerical framework is best illustrated by way of an example. Consider an offender who has been found guilty of three armed robberies, two acts of false imprisonment, two thefts of a motor vehicle, two burglaries and two acts of resisting lawful arrest. For each armed robbery, false imprisonment, theft, burglary and resisting arrest, there are sentences of imprisonment of five years, one year, one year, one year, and six months, respectively. In the first two robberies a victim was tied up and a motor

car was stolen as a getaway vehicle. These two events were one week apart. One month later, the offender committed the third armed robbery. The two burglaries occurred a further two weeks later, both on the same day. In respect of the robberies, thefts and burglaries, the victims and locations were different. About two months after the burglaries, when two police officers attempted to arrest to offender, he tried to fight them off.

All offences may be regarded as separate, save for the two acts of resisting arrest, which together represent a single transaction separate from the other offences. For the separate offences, their degrees of connectedness and associated percentage contributions to the total sentence, having regard to Table 26, are as follows:

Offence	Connectedness	Contribution
First false imprisonment	full	50
First theft	full	50
Second robbery	moderate	80
Second false imprisonment	full	50
Second theft	full	50
Third robbery	low	90
First burglary	low	90
Second burglary	high	70
Resisting arrest	minimal	100

The first of the armed robberies may be regarded as the principal offence.

The sum of the sentences for the separate secondary offences, having regard to their degrees of connectedness, is:

$$(1 \times 50/100) + (1 \times 50/100) + (5 \times 80/100) + (1 \times 50/100) + (1 \times 50/100) + (5 \times 90/100) + (1 \times 90/100) + (1 \times 70/100) + (0.5 \times 100/100) \text{ years}$$

That is, 12.6 years.

(Note: the sum of these sentences without regard to connectedness is 16.5 years; 12.6 is 76.4 per cent of 16.5.)

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The next step is the calculation of the proportionate degree of cumulation, having regard to the sum of the sentences for the separate secondary offences, discounted for connectedness, and the mean sentence for these offences. The discounted sum is 12.6 years, as calculated above; and the mean sentence is:

$$\frac{1 + 1 + 5 + 1 + 1 + 5 + 1 + 1 + 0.5}{9} \text{ years}$$

That is, 1.83 years.

The degree of cumulation as a percentage, for mean individual secondary sentences of 1.2 years, according to the first formula above, is:

$$\frac{31.1}{1 + (0.104 \times 12.6)}$$

That is, 13.5 per cent.

The (percentage) adjustment to this percentage so as to allow for a mean individual secondary sentence of 1.83 years, according to the second formula above, is:

$$(16.6 \times 1.83) + 80.1$$

That is, 110 per cent.

Therefore, the proportionate quantum of cumulation, according to the third formula above, is:

$$\frac{110}{100} \times \frac{13.5}{100} \times 12.6 \text{ years}$$

That is, 1.87 years.

The proportionate effective sentence is: the sentence for the principal offence (5 years) plus the calculated proportionate quantum of cumulation (1.87 years); that is, 6.87 years.

Once this sentence has been determined, it is a question of whether it can be regarded as crushing, having regard to the history and circumstances of the offender. Let it be assumed that the offender's rehabilitation prospects are poor and there are no especial claims to mercy. The sentence of 6.87 years, therefore, stands. (There is the potential for no cumulation; this would apply if maximum weight was given to the factor of the crushing sentence.)

Finally, there are the cumulation orders to be made; these must broadly reflect the separateness and the relative seriousness and connectedness of the secondary offences. Thus, say: six months of the second armed robbery, nine months of the third armed robbery, six months of the first burglary, and two months of the resisting arrest, made cumulative (that is, one year 11 months, or 1.92 years).

But is this quantum of cumulation adequate to proportionality? And what, if any, adjustment should be made to it so as to allow for factors not adequately covered in the numerical framework? For this purpose, it is helpful to consider the effects on the quantum of cumulation of two of its major determinants in combination, namely, the mean sentence of the individual separate secondary offences and the degree of connectedness of these offences. This information is given in Table 27. The choice, for the categories in this table, of a mean secondary sentence of 1.83 years and a 76.4 per cent contribution of these sentences to the total sentence speak for themselves. For the range on the mean sentence, 5.5 years was chosen because it represents three armed robberies of almost equal seriousness to the principal armed robbery and with a total sentence of 16.5 years; again, this latter figure speaks for itself. For the range on the degree of connectedness, 100 was chosen because it represents the upper limit on this factor, namely, minimal connectedness.<sup>3</sup> Clearly, the factor of mean secondary sentence, having regard to the range under consideration, exerts a significant effect on the proportionate quantum of cumulation.<sup>4</sup>

In the light of this, it may be thought that the factor of mean secondary sentence has not been adequately allowed for under the numerical framework. Recall, the seriousness of the individual separate secondary offences represented an average of two five-year sentences, and seven other sentences of one year or less. Perhaps their mean of 1.83 years was unduly influenced by the more numerous less serious offences, this undermining the significance of the two armed robberies as serious offences. Should this be the case, then proportionality would require a greater degree of cumulation than 1.87 years. But

<b>Table 27: Effect on the quantum of cumulation (in years) of the degree of connectedness and the mean secondary sentence (illustrative case)</b>		
<b>Mean secondary sentence (years)</b>	<b>Degree of connectedness (per cent contribution)</b>	
	<b>100.0</b>	<b>76.4</b>
1.83	2.09	1.87
5.5	3.24	2.91

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how much greater? Table 27 gives guidance on this. Now, if the 16.5 years of secondary offences had comprised three 5.5-year armed robberies, then 2.91 years cumulation would have been proportionate. Accordingly, cumulation should be less than this; but perhaps midway between the two (that is, 2.4 years).

As an operational system, the calculation of the proportionate degree of cumulation as a quantum and the representation of the effects of the factors in the framework, as illustrated in Figure 13 and Table 27, would be computer-generated. There would also be an interactive – a ‘what if?’ – facility. This could be used to guide the adjustments to be made to the calculated proportionate quantum of sentence according to any mismatch between case circumstances and their representation in the framework, as just demonstrated.

In respect of this, the calculated (and adjusted) value for the quantum of cumulation does not take into account its potentially crushing effects when added to the sentence for the principal offence. In fact, this is not a matter open to calculation – it does not involve scaling seriousness. Rather, it is about appropriateness in the light of indicators to be discerned in a offender’s history and circumstances (see Lovegrove 1989). Guidance for this may be given profitably by way of listing the more common relevant considerations – circumstances warranting mercy and characteristics indicative of rehabilitation – and their importance, but little more. This is not a matter in which a numerical decision structure can replace intuition. But importantly, what the numerical framework does is to frame this discretion, fixing upper and lower limits on the magnitude of the range available to the mitigation of the proportionate sentence’s potentially crushing effects.

## Development of the guidance

To the developing of guidance, there are four separate tasks:

1. the approval/modification of case law, as interpreted, in regard to the steps comprising the decision sequence;
2. the calibration of the major numerical framework linking the sentences for the separate secondary offences to the percentage of these sentences to be cumulated on the sentence for the principal offence;
3. the approval/modification of case law, as interpreted, in regard to the rules covering the separateness and connectedness of offences;
4. the calibration of the numerical sub-framework relating the degree of connectedness of the separate secondary offences to the percentage contribution of their sentences to total seriousness.

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The general approach adopted here to the development of policy is taken from the decision-making literature, as it has been applied previously to the development of policy and guidance in sentencing (see Lovegrove 1989, 1997a). It involves three steps. First, overall judgments as to what is appropriate by way of sentence are made for a set of cases. Secondly, judgments are made in relation to the elements of the decision, as defined in the framework, and these are aggregated according to the framework to derive a resultant sentence, this being done for the same set of cases. Finally, the two sets of overall judgments – holistic and decomposed – are compared. The trouble with the former is that within and across decision-makers the basis of the judgments is not clear; moreover, complex global judgments, as required in individualised sentencing, risk error in the aggregation process. Nevertheless, their strength is, of course, that we readily appreciate the significance of the (global) decision and ultimately it is what we must be comfortable with. By way of comparison, the trouble with analysis is that it is difficult to appreciate the effect on the overall decision of judgments made in respect of individual elements. But its strength is that decision-makers are forced to think about and reveal the basis of their decisions; moreover, aggregation according to the framework ensures the individual elements are given their due effect in the overall judgment. In the process of comparing the products of holistically and analytically reached decisions, the strength of each is captured and its dangers minimised, and with this, the basis of the decision-making and the soundness of the decisions are more open to evaluation.

For holistic decision-making, the approach is clear: an overall decision is reached more or less quickly and intuitively upon an inspection of the relevant facts. Analysis involves the following steps: (1) identify the elements and structure of the decision; (2) make judgments in respect of these individual elements as they relate to the relevant facts; (3) combine these judgments according to the structure representing their combined effect in the overall judgment. In the present study, the overall judgment is a sentence and the relevant facts are case circumstances. More specifically, the sentence is a quantum of cumulation and the case facts are sentences for the separate secondary offences comprising the case and the circumstances as they relate to the separateness and to the degree of connectedness of these offences.

The decision sequence identifies the elements and the numerical framework provides the structure of the sentencing judgment for multiple offenders. Its source is to be found in Part 3 and the results of that review of case law are summarised above in the present chapter. What is set out there requires approval/modification. Then follows the calibration of the numerical framework (see Figure 13). This, it will be recalled, was calibrated in terms of statements of proportionality (see Part 2). These took the following general form: no number (or a moderate number) of individual offences, of a certain class of offence

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and a particular level of seriousness, should be regarded as more serious in their totality than a single instance of a more serious class of offence of a particular level of seriousness. There was one statement for less serious offences and one for more serious offences. The general form of these statements gives rise to the elements of the decision requiring calibration: namely, (1) selection of pairs of classes/sub-classes of offence to be used as a basis for establishing proportionality; (2) determination of quanta of sentence to represent their seriousness; and (3) operationalisation of the terms 'no number of' and 'moderate number of' (offences) in the statements of proportionality in the pairs of offences.

The rules covering the separateness and connectedness of the offences comprising a case identify the elements of this aspect of the sentencing judgment for multiple offenders. Their source is to be found in Part 3 and the results of that review of case law are summarised above in the present chapter. What is set out there requires approval/modification. Then follows the calibration of the related numerical sub-framework. It will be (principal) offence-specific, but cover the following general matters: (1) the identification of offence circumstances representing different degrees of connectedness; (2) the number of these which ought to be recognised as separate categories; (3) the definition of these categories in terms of case circumstances; and (4) the percentage contribution of the sentence for an offence deemed proportionate to the offence's degree of connectedness (see Table 26).

The deliberations and judgments in regard to the calibration of the numerical framework and sub-framework together with the approval/modification of the associated body of principle will follow the general lines of reasoning as illustrated in Part 2, and the discussion of case law as illustrated in Part 3. But it will necessarily be by a competent body – say a group of appellate judges in consultation with trial judges (see Lovegrove 1998a) or a sentencing council of some sort appointed by government (see Ashworth 2000)<sup>5</sup> – the group's composition and method of appointment being beyond the scope of the present research. Of course, whatever the intermediate body, authority ultimately lies with the legislature or superior appellate court.

As intimated, the suggested formal mechanism for resolving policy is the comparison of holistically and analytically determined sentences. This involves determining effective sentences by combining, according to the calibrated model, sentences considered appropriate and proportionate to the separate secondary offences (the analytic approach), and, independently, intuitively determining effective sentences in the light of the same offences (the holistic approach). This would be done for a set of cases, varying systematically across the range of relevant offence and offender circumstances. Moreover,



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the data are better analysed individually across (say) trial judges, otherwise any disparity of approach between judges will be confounded with any disparity between sentences reached holistically and analytically.

With respect to the individual judge, five broad outcomes may be envisaged. First, complete congruence between the holistic and analytic, save for minor unsystematic variation. Secondly, a general systematic difference between the holistic and analytic; for example, the former being uniformly more severe across the variation in case circumstances. Thirdly, a systematic difference between the holistic and analytic, but confined to an identifiable sub-set of case circumstances; for example, the latter being uniformly less severe for cases comprising less serious individual offences. Fourthly, differences between the holistic and analytic, these not being systematic, but there being discernible coherence in the judge's holistic responses. Fifthly, differences between the holistic and analytic, but with no discernible coherence in the judge's holistic responses.

The first indicates that the judge (or whoever) has an at least implicit understanding of the policy underlying the holistic judgments and can apply it reliably. In such cases, the numerical framework and the associated rules can be taken to represent the explicit statement of that policy. As the unsystematic variation tends to be major rather than minor, so this is evidence of an existing implicit policy which the judge cannot apply reliably; in such circumstances the numerical framework is required additionally as a decision aid, so as to ensure all relevant factors are taken into account, given their due weight and proper effect, and irrelevant matters are ignored.

The second outcome indicates either systematic error in the application of the stated policy or that this policy does not capture the judge's sense of justice. In respect of the former, perhaps due allowance has not been made for the constraint imposed on cumulation by the criterion of proportionality between classes of offence. If this be so, then the framework is required as a decision aid. In respect of the latter, perhaps the criterion of proportionality between classes of offence represents greater lenience than the judge's intuitive sense of justice. If this be so, then there is a hard policy choice to be made: either the stated policy must be changed – in this example, the criterion of proportionality – or the numerical framework followed and the judge's intuitive sense of justice on this matter abandoned.

The third outcome is as the second, save that the matter in question has less general application, and the considerations applying there hold here also. Where a judge applies a coherent intuitive sense of justice but has little understanding of the matters underlying that practice or how they affect it, the result will be as described under the fourth outcome.

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The appropriate response here is to attempt to identify the policy implicit in practice and compare it with the stated policy as it is to be found in the calibrated numerical model. Then follows the hard policy choices. The final outcome – the fifth – indicates that the judge does not have a coherent intuitive sense of justice and does not apply the policy underlying the numerical framework.

All this – the reconciliation of the holistic and the analytic – relates to the individual judge. But the approach of one judge must be reconciled with the approach of the others. Without this there cannot be a commonly agreed policy in the form of a single numerical framework and associated rules; for consistency of approach this is surely a *sine qua non*. The resolution of policy between (say) trial judges would be expected to proceed most profitably by way of reasoned group discussion. For this purpose, the calibrated numerical framework and the associated rules would set the parameters for the discussion, and the mechanism for change in part would be the systematic reconciliation of the analytically and holistically determined sentences. Let it be clear, policy is not governed by the holistic-analytic comparisons, since the former does not represent a gold standard, it being subject to aggregation errors; for example, a matter deemed as a matter of principle to be significant may not be manifest in the holistic judgment. But would the numerical framework and the associated rules, as finally agreed upon, be a true representation of what the arbiters of sentencing policy think it should be?

A similar question arose in respect of the qualitative decision model as a valid representation of judicial practice (see Part 1); a similar answer applies here, and may be summarised. Sentencing policy must be what judges hold deliberatively it to be. The problem of validity, therefore, turns on whether this policy, as stated, is distorted or not fully elaborated by the techniques used to elicit it. Whether the approach here would avoid the former and ensure the latter is not open to a rigorous answer; the test of validity can be no more than one of the intuitive reasonableness of the techniques.

The holistic determination of effective sentences requires effective sentences to be imposed for cases comprising multiple offences. By way of comparison, the analytic determination of effective sentences requires sentences to be imposed for individual offences. These individual offences are then put together in various combinations forming multiple-offence cases. The numerical framework and associated rules are used to calculate and determine an effective sentence appropriate to each combination of individual offences. This calculation will be repeated across the various modifications of the rules and calibrations of the framework.

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To this end, what is required is a set of single-offence cases and a set of multiple-offence cases suited to this purpose. These single-offences will be combined so as to form a match for each of the multiple-offence cases. For example, if one of the multiple-offence cases comprised an armed robbery and a burglary, there would need to be two single-offence cases, one an armed robbery – the details of the offending and the circumstances and history of the offender being the same as in the armed robbery in the multiple-offence case – and the other single-offence case being a similarly composed burglary. It is beyond the scope of the present study to set out in detail the structure and content of these cases. What this would look like can be found in the study described in Lovegrove (1997a). Sufficient to present purposes are some observations as guiding considerations for the construction of the multiple-offence cases.

1. Variation in the factors constituting the numerical framework: namely, the sum of the sentences for the separate secondary offences, and the mean seriousness (sentence) of these individual offences, as well as their degree of connectedness. This is to test the effect of these factors on the cumulation of sentence.
2. Four levels of seriousness for each of the first two factors – one approaching each upper and lower limit and one each side of each mid-range. The values selected for the upper limits should represent realistic limits, not worst imaginable circumstances. In this way it is possible to test the normal range of the factor, yet not introduce to the set of judgments distortions; atypical and extreme circumstances risk judgments that on reflection may be seen as disproportionate. Levels around the midpoint are necessary to investigate possible non-linear effects and, should they be present, calibrate them.<sup>6</sup> For the factor of connectedness, there should be one level for each of the 'single event' and 'escapade' categories, and (say) two for the 'multiple event' category.
3. Variation in the background factors: namely, factors not incorporated in the numerical framework. The purpose of this is to test whether the numerical framework is indeed comprehensive. Factors for consideration include: nature of the principal and secondary offences (for example, person or property); particular circumstances of the principal and secondary offences (for example, whether there is a breach of trust); the seriousness (sentence) of the principal offence;<sup>7</sup> the number of secondary offences; the degree of variation in the nature of the offending across the secondary offences and between the principal and secondary offences; the period of time covered by the offending; the history, circumstances and characteristics of the offender (for example, male or female). This variation is to be within the limits set under the fourth, fifth and sixth points below. One or more of these and other factors

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may be seen by some judges as relevant to the seriousness of multiple offending viewed in its totality and to the severity of the sentence considered proportionate to it (for example, the latter may differ between male and female offenders). Since the purpose of this variation is to test the rigour of the numerical framework in respect of its comprehensiveness, the more appropriate way to proceed is first to test its structure and calibrate its elements (points 1 and 2) for a standard and common combination of these background factors. Then, once the numerical framework is agreed upon for these restricted conditions, its generality in respect of a broad sweep of background factors can be profitably explored.

4. No cases representing unrealistic or implausible (cf. somewhat unusual) combinations of these factors. Artificiality in case circumstances is off-putting: it risks the exercise not being taken seriously and, in any case, arbitrary judgments.
5. Matters involving the history and circumstances of the offender, as they relate to what quantum of cumulation would be regarded as resulting in a crushing sentence, held at a constant level. The appropriate level would be minimal rehabilitation prospects and no especial claims to mercy; for example, the offender would have a significant relevant record and not be immature or elderly or be especially physically or emotionally vulnerable. Mitigation with respect to these matters may warrant a sentence lower than what would be regarded as proportionate. But the numerical framework defines a proportionate sentence. Clearly, cases involving mitigation would confound the comparing of the holistic with the analytic determination of the effective sentence.
6. No offenders, in their history or circumstances or present offending, qualifying for disproportionately harsh sentences of imprisonment under section 6D of the *Sentencing Act 1991* (Vic). The reasoning here runs along the same lines as the preceding point: proportionate sentences as calculated under the numerical framework are not comparable with a holistically determined set of sentences, when some of these latter sentences may be, and to an unknown degree, properly disproportionate.
7. The variation contemplated under the first and second points and, especially, the third point involves a prohibitive number of combinations of facts as cases. On these grounds the ideal is impracticable. Accordingly, the holistic–analytic comparisons should be restricted to the more common offence–offender combinations, together with any combinations thought to be potentially problematic (that is, cases for which the framework may not represent proportionate justice and for this reason require modification). Thus, since this represents a less than

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fully comprehensive test of the numerical framework, its validity as a true statement of policy must to this extent be open to question. There is thus the possible dangers of quirky consequences of the numerical framework going undetected and subtle aspects of policy being missed.

These seven points, then, are the guiding considerations for the formulation of the multiple-offence cases. Hypothetical/fictitious cases would need to be composed; they must fulfill the preceding conditions relating to the structure and content of the cases for the holistic-analytic comparisons. In a small jurisdiction like Victoria, relatively few cases taken from the archival records of actual cases over more recent years would be expected to satisfy these exacting requirements. There is, therefore, no alternative to fictitious cases. What comes foremost to mind, then, is the question of the validity of sentences imposed for fictitious cases. Would the quanta and type of sentence imposed for these cases be the same as for cases having the same factual circumstances but dealt with by the judge in a court of law?

Lovegrove (1989) dealt with this question (see also Lovegrove 1997a). In respect of this, real-life cases have the following critical characteristics:

- they, by definition, present a realistic set of circumstances;
- the judge has a detailed account of the facts of the offending and of the offender; thus little is left to supposition, requiring reference to stereotypes or common patterns of offending;
- the sentence imposed is a sentence actually to be served;
- the offender is present during the sentencing hearing and inevitably forms an impression, favourable or otherwise, on the judge;
- the defence puts a construction on the facts of the case so as to support a plea for leniency;
- in some cases there is a significantly traumatised victim and frightened public to be avenged and protected.

These may be taken to be the criteria against which to assess the validity of a sentence imposed for a fictitious case. In fact, fictitious cases can be composed so as to satisfy the first two characteristics; in respect of validity, the four others are potentially problematic and present cause for caution.

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Regarding the second point, what is required is the case circumstances presented as comprehensive summary descriptions. In such descriptions all relevant facts should be set out in detail but without repetition, pleading or interpretation. Matters relating to the offender include criminal and personal history, present circumstances, personal characteristics and claims to mitigation, and relating to the offending include background events, preparation, execution and sequelae. As an illustration of the level of detail, the offender's criminal history would cover courts, dates, offences and sentences. But it would be objective: say the history supported an interpretation of momentary lapse, this would not be alluded to or its significance as mitigation raised. The first point can also be satisfied readily: what is required is that there be no improbable or implausible combinations of case facts.

It might be supposed that the effect of the third, fourth and fifth points would be fictitious sentences greater than actual sentences for similar case circumstances. Nevertheless, the particular use envisaged here of fictitious cases would be expected to militate against this outcome. The sentences are imposed for the purpose of developing guidance for sentencing judges. It is thus no academic exercise. While these sentences would not be served by actual offenders, they would be used to guide judges imposing sentences for actual offenders. In fact, appellate courts delivering guideline judgments already do just this. This relates to the third point. In respect of the fourth and fifth points, fictitious cases would be problematic where the offender did have significant mitigation to offer the court. But this does not apply here. Recall, the history and circumstances of the offender are to be held at a constant of minimal rehabilitation prospects and no especial claims to mercy.

To test all this, Lovegrove (1989) compared sentences imposed for each type of case. There, the fictitious cases were presented as comprehensive summary descriptions of actual cases. A group of judges imposed sentences for these cases, and these were compared with the actual sentences imposed in court. The principal offence was always a burglary, but across cases there was variation in offence seriousness and in the offender's history and circumstances and claims to mitigation. In general, the levels of sentence (terms of imprisonment), averaged across the judges, for the fictitious cases were of the same order as those for the actual cases. To this, however, there was an important exception. There was evidence that the strength of a significant plea was not always captured in the fictitious case presentation, with the result that some judges would impose a (sometimes) severe sentence of imprisonment for a case which in court was deemed to justify a non-custodial sentence. Nevertheless, when the circumstances of the offending were the primary consideration, the technique of fictitious cases appeared valid.

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Finally, it might be supposed that the effect of the sixth point would be a fictitious sentence less than the actual sentence. Nevertheless, the sentencing of these fictitious cases would be done by judges knowing their purpose was guidance. Clearly, Lovegrove's (1989) study did not afford a test of this, since burglary generally would not be regarded as traumatising and frightening to any significant degree.

So much for defence, now to attack. In some respects, fictitious cases can be regarded as superior to actual cases as a means of setting policy by way of levels of sentence. For the former as opposed to the latter are, in respect of policy, more pure, since the accounts of case circumstances are not confounded and complicated by contradiction and redundancy; moreover, there is no extraneous information having the potential to excite in the judge prejudice, or loathing or sympathy to an extent at odds with principle. These unwanted nasties, so apt to be characteristic of actual cases, may distort principled decision-making; of these, fictitious cases are free.

The product of the deliberations and judgments arising from the comparison of the holistically and analytically determined sentences would be a numerical framework and associated rules as an agreed-upon explicit statement of policy for the proportionate sentencing of the multiple offender. The numerical components would be expected to look a lot like Figure 13 and Table 26. But they might be calibrated differently: the author's judgment can be hardly expected to match those of a group of (say) appellate judges and, in any case, the quanta of sentence defining the seriousness of the individual offences in the statements of proportionality are based on sentencing practice for the years 1993–1996. Moreover, the associated rules themselves might require modification.

It would be important to evaluate how the levels of sentence under the numerical framework compared with the current practice. In this respect, the analysis in Part 1 as an approach to the description of practice would be informative. Recall, the description takes the form of a plot of points for cases in respect of the relationship between the degree of cumulation of the sentences for the separate secondary offences and the sum of the sentences for the offences comprising the case. What a smooth band covering the denser areas of the plot perhaps can be taken roughly to represent is the upper (and lower) limits on cumulation where there is a preponderance of aggravating (or mitigating) factors, and in the absence of exceptional circumstances. Thus, the degrees of cumulation calculated under the framework offered here for guidance should not exceed the upper boundary of the band describing current practice as presented in Part 1. Of course, the calculated cumulation made in accordance with the framework would be expected to fall well short of the lower boundary describing current practice, since the former does not take into account considerations relating to rehabilitation and mercy.

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## Conclusion

With these deliberations should come not only an accepted judicial policy but also greater clarity of thought and new insights in respect of the sentencing of the multiple offender according to the totality principle. The resulting numerical framework and associated body of principle would represent more than a statement of policy; they could be used as a decision aid for the aggregation of the major factors as they relate to a particular case. A statement of what is correct by way of approach is necessarily prescriptive. But in an individualised system of justice, even a more detailed policy cannot incorporate all relevant factors or capture adequately the relevant factors as they relate to a particular case; thus, the policy as guidance can be no more than presumptive. This aside, what is presented here appears a far cry from the traditional view of sentencing as intuitive. Does it, then, represent good or bad legal decision-making? This is the subject of the final chapter.



# Chapter 11

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## Guidance and judicial intuition

In the last chapter, the draft policy for the sentencing of the multiple offender took the form of a numerical framework and a body of principle. This framework does two things. First, it provides a basis for calculating the proportionate degree of cumulation, having regard to the sentences for the comprising offences and the degree of connectedness of these offences. Secondly, it frames the discretion available for mercy and rehabilitation. In this capacity, the framework offers numerical guidance. But it does something more fundamental than this. It makes available to judges a means of reaching their sentencing judgments by way of a structured approach as against intuition. Thus, its adoption would be contrary to current judicial wisdom: namely, sentencing cannot involve the mechanical application of qualitative and quantitative rules as a means to a precise determination of punishment (see the judgment of the Victorian Court of Criminal Appeal in *McCormack* and the judgment of the High Court in *Ryan*); sentencing cannot but be instinctive because it involves a feeling for the application of the criminal law to the particular circumstances of the case (Phillips 1983). But should these views hold sway? Are they able to withstand critical analysis? Or, does the framework have something worthwhile to offer? These issues are the focus of this, the final chapter. It starts with the idea of what constitutes good legal decision-making.

## Good legal decision-making

Judicial decision-making in sentencing should satisfy the prerequisites of good legal decision-making. With this, surely, there can be little disagreement? Fortunately, the criteria defining ‘good’ are to be found in judicial observations relevant to this matter.

They are as follows:

- individualised – numerous matters relating to the circumstances of the offence and the offender are of potential relevance to doing justice in the individual case (see the judgment in the High Court of Gaudron, Gummow and Hayne JJ in *Wong and Leung*);
- consistent – like cases are treated similarly and unlike cases differently (see the judgment in the High Court of Gleeson CJ in *Wong and Leung*);
- coherent – what is said is what is decided (for example, when a factor or matter is said to be important it is in fact given substantial weight) (see the judgment in the High Court of Kirby J in *Ryan*);

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- logical – judgments, if they could be analysed, would be found to conform to an underlying logic (the alternative is arbitrariness); this is implicit in the basis of the appellate process, as set out in the High Court judgment of Dixon, Evatt and McTiernan JJ in *House*; Kirby J's use of the phrase 'channels of logic' in *Wong and Leung* (at para.116) in respect of appeals is apposite here.

Those who defend intuition would not argue that by this means these prerequisites are perfectly met; but they would assert that justice is nonetheless well served by intuition. More importantly, a part of judicial wisdom on this is the passionate belief that were the discretionary sentencing judgment to be exercised analytically, the quality of justice indeed would be diminished (Supreme Court of Victoria 1998; New South Wales Law Reform Commission 1996; and the judgment of the Victorian Court of Criminal Appeal in *Young*).

## Intuition and good legal decision-making

In respect of the first matter – the adequacy of intuition – the literature is not so sanguine. Consider the following general points raised against intuition.

1. There is too much room for individual differences with respect to: levels of toughness (the severity of the sanction considered proportionate to a particular level of seriousness); and factors, as weighted, considered relevant to sentence (this relates to the prerequisite of consistency) (see for example, Ashworth et al. 1984; Lovegrove 1984; Palys & Divorski 1984; and the judgment of the Victorian Court of Criminal Appeal in *Ramage*).
2. Decision-making unaided could not be expected to cope with the inordinate demands placed on it by the requirements of individualised justice, requiring as it does the reconciliation of numerous and often conflicting matters to be considered singly and in combination (this relates to the prerequisite of coherence) (Ashworth 1983a; Lovegrove 1989).
3. Legal discourse, characterised by and emphasising the expression of ideas and arguments in terms of words, does not lend itself to bringing a sound logic to sentencing decisions, which involve complex scaling in terms of qualitative and quantitative variables and relationships (this relates to the prerequisite of logic) (Lovegrove 2001b; see Ranyard, Heberton & Pease 1994 for an illustration of the problem).

Lovegrove's (1997a) study of Victorian judges' sentencing of multiple offenders provides evidence specific to each of these three matters. And it is not favourable to the case for intuition. Recall, this study was summarised in Part 1. It comprised two parts.

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In the first part, the judges, all experienced, were required to impose effective sentences for cases and to provide a detailed record of their thinking. Each case was presented in the form of a skeleton description – sentences appropriate to the comprising offences as individual offences (for example, four-year armed robbery) and an assumed set of case circumstances (for example, offences as separate and unconnected, the offender offering nothing by way of mitigation). Here, the purpose was to investigate whether judges were able to determine the effective sentence on the basis of the individual sentences analytically and, to the extent their decision-making was analytical, an attempt was made to identify its structure and content. This is pertinent to the prerequisite of logic.

In fact, what the study demonstrated clearly is the general absence of even a broad decision logic for this task. Only two of the eight judges demonstrated more than a superficial understanding of this sentencing problem. These two had a sense of what as a general approach to the sentencing of the multiple offender they considered the major factors to be and how they should be reconciled in the aggregation process. Indeed, the current framework represents a development of the approach to be discerned in their thinking. Yet even they appeared to a significant extent to be formulating on the spot what seemed correct by way of approach. The rest of the judges at best could offer only part-strategies largely specific to particular cases. This, even though all had a ready sense in most cases of what was a just sentence. On this basis, there can be little doubt of the largely intuitive character of decision-making in the sentencing of the multiple offender. In respect of consistency, disparity was observed across the part-strategies and factors considered relevant to sentence.

In the second part of this study, four judges were presented with fictitious cases presented in the form of comprehensive summary descriptions of the circumstances of the offending and of the offender. Their task for each case was to determine sentences for the comprising offences and an effective sentence. Across the cases there was variation in the offending – number and seriousness of the comprising offences – but the circumstances of the offender were held constant as no mitigation. The resulting data are pertinent to the prerequisites of consistency and coherence.

In fact there was marked disparity between the judges in the effective sentences imposed as appropriate. Moreover, there was evidence of incoherence between principle and practice. It is readily to be observed in the courts' sentencing in multiple-offence cases that where the sum of the individual sentences is very high, the effective sentence will be well below this level but nevertheless high (see Lovegrove 1998b). This, of course, represents the application of principle – the higher the sum of the secondary sentences, the lower the percentage cumulation of them but with the constraint that the effective sentences must be greater for higher sums of sentence. What the data in the study showed

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is that the judges had some difficulty in applying these principles coherently across a sample of cases covering, as it did, low and moderate as well as high sums of sentence: with increasing sums of sentence for secondary offences there was often significant departures from the required uniform decrease in the percentage cumulation and concomitant uniform increase in the quantum cumulated.

Thus did Lovegrove's (1997a) study, in its small way, support the general points raised against intuition in the literature. For the sentencing of the multiple offender, at least, it appears that justice is not well served by intuition.

Now to the second matter – the potential of the numerical framework to enhance justice.

### **The numerical framework and good legal decision-making**

The numerical framework, as developed in the present study, is intended to overcome the perceived limitations of intuitive thought. And, at least at first blush, it has what it takes to do this: it offers a decision logic, by identifying the major case variables and formulating the way in which these elements are to be quantified and aggregated; it facilitates coherence, by demonstrating how each major relevant factor, singly and in combination, affects the effective sentence considered proportionate and appropriate; it promotes consistency, by showing the levels of cumulation proportionate to critical combinations of the major variables, as well as by framing the allowance to be made for (1) factors not captured by these determinants of proportionate cumulation but relevant to it and (2) factors not relevant to proportionate cumulation but relevant to what is the appropriate effective sentence.

But is all this illusory? In regard to these ambitions, can the framework withstand a more searching inquiry. For this purpose, it is helpful to consider judicial observations on the general dangers inherent in the use of a more structured approach to decision-making in sentencing. Those favouring traditional judicial intuition have identified seven potential dangers of a non-intuitive approach.

1. Many critical factors and factor effects will be omitted from the structure because it is impossible to take full account of the complexity of the matters potentially bearing on sentence in any formal representation of the sentencing decision (see the judgment in the High Court of Hayne J in *AB*).
2. When adjusting a notional sentence (the adjustment being within type of sentence, for example, a shorter term of imprisonment) there is a danger of the allowance for the additional matters not reflecting their true importance because the matters on

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which the notional sentence is based will dominate the process (see the judgment in the High Court of McHugh J in *AB*).

3. There will be a tendency, particularly over time, for judges to ignore matters not in the representation of the sentencing decision (see the judgment in the Victorian Court of Appeal of Winneke P in *Ngui and Tiong*).

(The above three points relate to the prerequisite of individualisation.)

4. Factors cannot be considered properly in isolation. Case facts for their significance sometimes depend on the presence or absence of other case facts (see the judgment in the New South Wales Court of Criminal Appeal of Gleeson J in *Gallagher*, and the judgment in the High Court of Hayne J in *AB*). Moreover, a particular case fact, be it aggravating or mitigating, cannot be deemed to have a constant percentage effect on sentence across cases, even in the one category/sub-category of offence; how significant it is depends on the facts of the individual case (see the judgment in the High Court of McHugh J in *Ryan*).
5. The fixing of a notional sentence in regard to only a sub-set of case circumstances invites inevitable error because it is necessarily an artificial exercise (see the judgment of the Victorian Court of Criminal Appeal in *Young*). Moreover, in applying the standard, there is the risk of actual circumstances relating to the case being ignored and in their stead abstract matters underlying the notional sentence being considered (see the judgment in the High Court of McHugh J in *AB*).

(The above two points relate to the prerequisites of coherence and logic.)

6. In cases where the notional sentence is of one sanction type (for example, imprisonment) and the appropriate sentence is of another type (for example, suspended sentence), the process of adjustment for the additional circumstances lacks a logic (see the judgment in the High Court of McHugh J in *AB*).
7. The separate consideration of relevant matters multiplies the possibility of error, since there is the opportunity of error in relation to the consideration of each separate matter by itself and then in its relation to other matters, and the effects of these errors will tend to cumulate (see the judgment of the Victorian Court of Criminal Appeal in *Young*).

(The above two points relate to the prerequisite of logic.)

These judicial observations are expressed here in my own terms so as to facilitate the present analysis with its focus on the quantitative aspects of the sentencing decision.<sup>8</sup>

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Is the current numerical framework for the multiple offender subject to these potential limitations of a more structured approach to sentencing? Perhaps it is more sophisticated than the notions of structure envisaged by the judges making those remarks? To assess this, each of the above seven points is, in turn, applied to the framework. Note, the discussion is restricted to the pertinence of these matters as they apply to the determination of effective sentences for multiple offenders, once proportionate and appropriate sentences have been determined for the individual offences comprising a case.

1. The framework covers what approaches a comprehensive range of potentially relevant case factors and factor effects; this is achieved because: (1) the framework incorporates the three major factors of the sentencing decision, namely, the sum of sentences for the separate secondary offences, the average seriousness of these offences considered individually, and the degree of connectedness of these offences; (2) the case facts relating to these three factors can be scaled for seriousness, even though they involve both quantitative (the sentences) and qualitative (the offence circumstances relating to degrees of connectedness) matters; (3) cases comprising any combination of case facts relating to these three factors can be placed within the framework so as to show their combined effect on what is appropriate by way of proportionate cumulation.
2. The framework provides a sentence (degree of cumulation) for a case. This will be proportionate to the extent that the circumstances of the case are covered by the framework. Thus, the degree of cumulation is notional. The framework serves to minimise errors associated with any attempt to make due allowance for additional matters when adjusting the notional sentence, in two ways: (1) in any one case with respect to proportionate cumulation, adjustment will be required for few if any factors, and be comparatively small in magnitude, because of the framework's broad coverage of the relevant matters; (2) since the effect on cumulation is specified for all combinations of the three major determinants of proportionate cumulation, the sentencer's proper course is well charted, thus facilitating ready and accurate extrapolation and interpolation from the framework.
3. Any tendency for judges to ignore matters not in the framework would be expected to be greater when it is not clear what the representation incorporates (and does not incorporate) and how these (included) factors relate to sentence, and the process of adjustment is obscure; with respect to these, however, the framework is transparent. Moreover, this point is less rather than more significant in view of the framework's comprehensive coverage of relevant matters.

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4. The framework provides for the fact that case circumstances cannot be considered properly in isolation. This is achieved principally by having the framework incorporate the major determinants, and these factors being, by virtue of the framework, considered in combination with all other factors. This also applies to the matter of avoiding a crushing sentence, since what can be allowed for this depends on the proportionate sentence, itself varying with the three major factors. Now, because of this feature, a particular factor will not have a constant percentage effect across cases.
  5. The form of the framework obviates the need for the (notional) proportionate sentences provided there to be determined partly in regard to a sub-set of potentially relevant case circumstances and partly in the abstract. Recall, to validate the framework, sentences are imposed holistically for fictitious cases. And the description of each case is to cover a wide range of circumstances relating to both the offence and the offender. Moreover, in the application of the framework, the risk of actual circumstances and abstract matters being confounded is reduced in view of the framework's breadth.
  6. This point is not relevant here. Since the framework applies only to cases where sentences of imprisonment are appropriate and proportionate to the comprising offences considered individually, the appropriate effective sentence will be one of imprisonment.
  7. Multiplicity of error is a possibility in the individual and sequential consideration of case facts; in this, the problem is real where there is cumulation of error towards leniency or harshness. Three of the features of the framework act in concert to avert this problem: (1) in the validation of the framework, sentences are to be intuitively determined and in regard to a comprehensive set of case circumstances considered jointly; (2) the framework facilitates the effects on cumulation of the sum of sentences, mean sentence, connectedness and mercy/rehabilitation prospects being seen in a systematic relationship, one to another; accordingly, it facilitates the judgment as to whether their effects on cumulation are in due proportion and appropriate; (3) each of the three major factors determining the proportionate degree of cumulation covers a wide range, thus confining possible effects of cumulative error.

In view of this, the numerical framework would appear not to be subject to the perceived potential dangers of non-intuitive thought in sentencing.

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## Intuition and structure in sentencing

The numerical framework (and associated principle) demonstrates what is required for decision-making in the sentencing of multiple offenders. It addresses the numerical problems currently besetting traditional judicial intuition and, in doing this, better satisfies the four prerequisites of good decision-making in sentencing – individualisation, consistency, coherence and logic. Yet the proposed framework should not be thought of as involving mechanical calculation and entailing precise determination. This is to be seen in the framework's validation and calibration, described above. This, in fact, compares with the traditional sentencing process, namely, sentences being determined for cases in terms of multiple case facts, which sentences are to be determined holistically according to a judge's feeling for the application of the criminal law to the particular circumstances of the case.<sup>9</sup> That the framework does not presuppose there to be one correct sentence in the individual case is also seen in the framework's development. Recall, it required the making of a series of judgments: one was the selection of pairs of classes of offence as a basis for establishing proportionality (thus, armed robbery and rape were used to mark the constraint on cumulation for theft and indecent assault). But these are judgments on which reasonable minds will differ. And as they differ so will the proportionate effective sentence calculated under the framework. In fact, what alone distinguishes the framework from judicial intuition is that the framework, in addition, systematically interrelates cases – and the sentences for those cases – with respect to seriousness for all combinations of relevant factors in the scheme.<sup>10</sup>

The fixing of sentences for the framework's validation and calibration clearly still involves traditional intuition in the sense of instinctive justice. But, in respect of the rest of the framework – the interrelationships between case facts, seriousness and sentence – the decision-making required of the sentencer is not intuitive in the traditional sense. Implicit here, but contrary to the decision of the Victorian Court of Criminal Appeal in *Williscroft*, is the view that allotting to each of the various elements its proper part is considered to be not without profit. But if the decision-making under the framework is not intuitive in the traditional sense, what, then, is it? For the purpose of explanation, it may be profitable to use skilled performance as an analogy, drawing a distinction between the novice and the expert and considering the basis of skilled performance. The novice is one who brings little more than commonsense to the task: for (say) cricket, there is not a framework and rules interrelating body, bat and ball. By way of contrast, an expert is one who has this analytic knowledge base and who has practised its application to the task in all its variations. Early on, in the acquisition of a skill, decisions are made slowly and consciously, and the distinctions between the various courses of action are crude; in time, decisions are made



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readily and largely unconsciously, and actions reflect subtle distinctions, not lending themselves to explanation. Thus expert decision-making as described here would appear akin to a form of intuition characterised as functional reasoning. This has been defined as apprehending, with little mental effort and in quantitative terms, how the assessment about a set of circumstances changes as a function of variation in one or more of the comprising factors (see Abernathy & Hamm 1995; von Winterfeldt & Edwards 1986).<sup>11</sup> For the expert, intuitive thinking is based on an implicit understanding of the interrelationships between the factors relevant to the decision; it is born of a deep task involvement through practice and growing out of analysis.

This is very different from traditional judicial intuition, its virtues being championed on the basis of there being no substantial analytic foundation (or framework) for the interrelationships between the factors relevant to sentence. In respect of this, there is an absence of thought, the intuition being for want of analysis, as for the novice. Indeed, there is empirical support for this in Lovegrove's (1997a) study, summarised above. Recall, experienced judges were asked to think aloud as they determined sentences according to the totality principle for a series of cases involving multiple offending. What was clear is that they did not bring to the task even a general decision framework, and in the individual case they showed faltering thought. Their performance did not seem to demonstrate thinking capable of taking precise account of subtle distinctions between cases, of letting each case turn on its own facts. Yet these virtues are what judges claim for their intuition. Subjective experience of intuitive thought appears to be an illusory basis for judging the quality of that thought. All this is not to deny that there are judges who of their own accord have built their sentencing practice on a more principled approach; indeed, the data from Lovegrove's study suggested that there are judges exceptional in this respect.

Intuition as functional reasoning would seem to be more appropriate to rational sentencing, where decision-making involves reconciling cross-currents of aggravating and mitigating factors according to principle. The purpose of the proposed framework and its associated body of principle is to facilitate this form of thinking as a means by which judges digest the facts of a case in exercising their discretionary sentencing judgment. There is not in this, as some may say, a risk of a false precision. For sentencing is in part a numerical problem. Rather, what it does, in taking number seriously, is avoid the risk run by purely narrative approaches to sentencing policy, namely, the risk of a true impression. Therefore, it is to be hoped that the higher judiciary will press on with this proposed reform, accepting the development of more complex guidance as a challenge. Justice will not be well served if this task is seen as unnecessary, or too hard, or theoretically unachievable and

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impracticable. In the High Court case of *Wong and Leung*, Gaudron, Gummow and Hayne JJ viewed the application of a structure satisfying the necessary degree of complexity as difficult, perhaps impossible. The former is certainly true. Yet one hopes that this is not taken as reason for not attempting to develop a framework appropriate to the numerical aspects of judicial thinking in sentencing.

## Notes

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1. This is to be contrasted with the guidance spoken of at the end of Part 1—this was guidance based on current practice, namely, descriptive guidance.
2.  $(2 \times 50/100) + (2 \times 70/100) + (2 \times 100/100) + (2 \times 70/100)$  years (see Table 26)
3. The condition of connectedness 76.4 per cent and mean sentence 5.5 years would be satisfied with the following case circumstances: the second robbery committed on the same day as the principal armed robbery and the third and fourth also executed on the same day but one month after the first two; for this, the per cent contributions are  $70 + 90 + 70$  (mean = 76.7). This is only one of a number of possible sequences of four offences satisfying this level of connectedness.
4. The quanta of cumulation in Table 27 are those which would be obtained were, in Figure 13, a vertical line to be drawn at the value of 16.5 years on the sum of sentences, the curves were for mean sentences of 5.5 years and 1.83 years (cf. 10.8 and 1.2 years), and the lower curve of each pair represented a percentage contribution of 76.4 per cent (cf. 50 per cent).
5. England's Sentencing Advisory Panel would be suited to this purpose (see Ashworth 2000).
6. The effect of the sum of the separate secondary sentences on the degree of cumulation is non-linear (see Figures 7 and 8, and Figure 13).
7. To Victorian trial judges, it will be recalled, less cumulation is warranted where the sentence for the principal offence is higher (see Part 1).
8. These remarks were made largely in respect of what is known as the two-stage approach, but also can be taken to apply to judgments giving quantitative guidance, the latter representing a more developed form of the former. What matters is that a notional (or standard) sentence is fixed in the light of a consideration of only a part of the circumstances of potential relevance to the case and then allowance is made by way of an adjustment to this notional sentence for the remaining circumstances (see Lovegrove 2002).
9. This involves, in part, what has been referred to as cardinal proportionality: sentencers maintaining a proportionate general level of severity within and across categories offence. For a discussion of the concept of cardinal proportionality, see von Hirsch (1993).
10. This relates to what has been called ordinal proportionality. For a discussion of this concept, see von Hirsch (1993).
11. Nevertheless, in novel situations the functional reasoning will be more analytic than intuitive in character.

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This study examines the approach of Victorian judges to the determination of sentencing for an offender convicted of multiple offences. Justice in sentencing requires fair, coherent and openly stated policies, and their consistent application in sentencing judgments. What is offered here is a description of current practices, as well the legal principles underpinning them. Given that a substantial percentage of criminal cases involve a multiple offender and that the majority of offences are committed by repeat offenders, the sentencing of such offenders is a matter of significant public policy interest. The empirical work undertaken in this study indicates that there is a need to develop a more detailed and comprehensive set of sentencing principles and an associated numerical framework for guidance.

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