



## Original Article

## Quasirational models of sentencing

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## ABSTRACT

Cognitive continuum theory points to the middle-ground between the intuitive and analytic modes of cognition, called quasirationality. In the context of sentencing, we discuss how legal models prescribe the use of different modes of cognition. These models aim to help judges perform the *cognitive balancing act* required between factors indicating a more or less severe penalty for an offender. We compare sentencing in three common law jurisdictions (i.e., Australia, the US, and England and Wales). Each places a different emphasis on the use of intuition and analysis; but all are quasirational. We conclude that the most appropriate mode of cognition will likely be that which corresponds best with properties of the sentencing task. Finally, we discuss the implications of this cognition-task correspondence approach for researchers and legal policy-makers.

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## 1. Introduction

According to the normative legal model, the judge, in an unbiased way and directed by the law, carefully attends to all of the available information in a case, weighs it according to its significance for the issue at hand, and integrates it to make a decision. The judge is thus expected to perform a *cognitive balancing act* between factors for and against a specific decision. A judge's ability to perform this feat when making highly consequential decisions is accepted as a given: when judicial decisions are challenged, this is rarely on the basis of a judge's poor or biased decision-making but often on some misapplication of law or procedural mistake (Cohen, 2006). Judges, themselves, are highly confident in their decision-making abilities (Dhmi & Ayton, 2001). After all, they are appointed on the basis of their "sound judgment" (e.g., see [Judicial Appointments Commission, 2011](#), p. 66).

Past psychological research, however, demonstrates that judges may find it difficult to perform this cognitive balancing act. For instance, they may be unduly influenced by extra-legal factors in a case and may ignore or take insufficient account of legal factors (e.g., Dhmi, 2003; Dhmi & Ayton, 2001; English, Mussweiler, & Strack, 2006; Goodman-Delahunty & Sporer, 2010; Guthrie, Rachlinski, &

Wistrich, 2001; Manning, Carroll, & Carp, 2004; Mitchell, 2005; Rachlinski, Johnson, Wistrich, & Guthrie, 2009; Turner & Johnson, 2006; von Helversen & Rieskamp, 2009). This results in disparities which erode public confidence in the criminal justice system (e.g., Smith, 2007).

Laws and legal policies (i.e., those translating laws into some form of guidelines) often prescribe how judges should make decisions. In the present paper, we use the context of criminal sentencing to discuss how legal models in this domain prescribe the use of different modes of cognition, with the assumption that these can help judges perform the *cognitive balancing act* required. Sentencing represents a key stage of the criminal justice process, and one that has significant ramifications not only for individual offenders and the public, but also for the wider justice system. We compare models of sentencing practice that currently exist in three common law jurisdictions (i.e., Australia, the US, and England and Wales), and show how each of these prescriptive models places a different emphasis on the use of intuition and analysis; but all are quasirational. We argue that in the absence of an evidence-based approach that shows which sentences (and which models) lead to which outcomes, the most appropriate mode of cognition for sentencing will likely be that which corresponds best with properties of the sentencing task. Finally, we discuss the implications that the above has for future research and for efforts to improve sentencing decisions. Before presenting our thesis, we provide a brief review of the literature on modes of cognition, followed by a description of the sentencing domain.

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## 2. Modes of cognition

According to cognitive theorists, there are different modes of cognition that have distinct properties. In particular, dual process theorists (e.g., Epstein, 1991; Evans & Over, 1996; Sloman, 1996; Stanovich & West, 2000) have been preoccupied with the cognitive modes of intuition and analysis (see also Evans, 2008 and Osman, 2004). For a more critical perspective on dual process theories, see e.g., Gigerenzer & Regier, 1996; Keren & Schul, 2009; Marewski, Gaissmeier & Gigerenzer, 2010).

Intuition (often also referred to as System 1, experiential, heuristic, and associative thinking; see also Glöckner & Witteman, 2010 for different types of intuition), is said to be acquired through a long history of evolution, human development and experience, and is visual (or non-verbal). It is generally considered to be an unconscious, implicit, automatic, holistic, fast process, with great capacity, requiring little cognitive effort. Intuition involves associative thinking and parallel processing that is affected by context. It is independent of education or intelligence, and is unaffected by the limits of working memory, but is dependent on prior experience.

By contrast, analysis (often also referred to as System 2, rational, analytic, and rule-based thinking) is generally characterized as a conscious, explicit, controlled, deliberative, flexible, slow process that has limited capacity and is cognitively demanding. It is more recent in human evolution and uses language. Analysis involves rule-based thinking and sequential processing that can operate in abstract or solve logical problems. The use of analysis depends not only on formal education and intelligence, but also on the capacity of working memory.

However, according to Hammond's (1996, 2000) cognitive continuum theory, there are modes of cognition that lie in-between intuition and analysis (see also Dhami & Thomson, 2012). These are called quasirational modes of cognition. As Hammond (2010, p. 331) points out, the term 'quasi' does not mean that quasirational modes of cognition are the result of "improper cognitive activity". Rather, quasirationality comprises different combinations of intuition and analysis, and so may sometimes lie closer to the intuitive end of the cognitive continuum and at other times closer to the analytic end (see also Sloman's 1996 view that intuition and analysis are interactive).

Whereas some dual process theorists suggest that intuition is the default mode of cognition, and that analysis overrides this only when necessary (e.g., Evans, 2007, 2008), others claim that intuitive and analytic modes compete for supremacy (e.g., Epstein, 1994; Sloman, 1996, 2002; Stanovich & West, 2000, 2002). However, for Hammond (1996, 2000), modes of cognition are determined by properties of the task (and/or expertise with the task). Others also state that decision strategies are adapted to task properties (see e.g., Gigerenzer, Todd, & the ABC Research Group, 1999). As we will discuss later, some properties are likely to induce intuition while others are more likely to induce analytic cognition. Success on a task inhibits movement along the cognitive continuum (or change in cognitive mode) while failure stimulates it. Movement along the cognitive continuum is characterized as oscillatory or alternating, thus allowing different forms of compromise between intuition and analysis (i.e., quasirationality).

Although there is a growing body of evidence on the nature and performance of intuitive versus analytic cognition (e.g., Dunwoody, Haarbauer, Mahan, Marino, & Tang, 2000; Haberstroh, 2008; Hammond, Hamm, Grassia, & Pearson, 1987; Mahan, 1994; Marewski & Mehlhorn, 2011), there is a distinct dearth of research on the operation and outcomes of quasirationality. In their recent efforts to identify the processes involved in intuitive versus analytic cognition, Glöckner and his colleagues have found some similarities and differences between these two modes of cognition (e.g., Glöckner & Betsch, 2008a, 2008b, 2012; Horstmann, Ahlgrimm,

& Glöckner, 2009; Jekel, Glöckner, Fiedler, & Bröder, *in press*. For a critical response to Glöckner et al.'s integrative approach see Marewski, 2010 and Marewski & Link, 2014). The empirical findings suggest that the two modes of cognition may operate in an integrative fashion and thus potentially shed light on different forms of quasirationality. For instance, quasirationality may allow individuals to use a lot of information fast. Other work measuring the performance of different modes of cognition, for example by Blattberg and Hoch (1990), has demonstrated that a quasirational model which combined managerial intuition (expertise) and statistical analysis repeatedly outperformed purely intuitive and statistical models in five forecasting tasks (see also Ganzach, Kluger, & Klayman, 2000). Before we consider how specific modes of cognition are prescribed in different models of sentencing practice, we provide a brief description of the generic sentencing task.

## 3. Sentencing: a goal-oriented behavior occurring within constraints

A sentence is passed on an offender who has either pleaded guilty to an offence or been convicted of one. Officially, sentencing may be geared towards achieving one or more (sometimes competing) goals. These are punishing offenders justified on the grounds of desert or retribution, reducing crime via deterrence, rehabilitating offenders, protecting the public via incapacitation, and making reparations to victims (e.g., see Australian Law Reform Commission, 2006; Seghetti & Smith, 2007; Sentencing Council, 2013b).

Sentences are often determined within a number of constraints. Offences may have fixed maximum penalties assigned to them, usually in the form of a length of custody or fine amount, and may have mandatory minimum sentences. In addition, the available sentencing options (e.g., custody, community penalty, fine, and compensation) may be restricted by offence type (i.e., more or less serious offences) and by offender age (i.e., adult or youth).

Thus, with a set of goals in mind and within certain constraints, judges must determine an appropriate sentence for an offence (and offender). Sentencing is often predicated on the principle that each case is unique and dealt with on its own merits (e.g., see Sentencing Council, 2013a; United States Sentencing Commission, 2006). Judges are expected to consider legal factors such as the nature and seriousness of the offence and the offender's criminal history, and may take into account relevant aggravating and mitigating factors (e.g., vulnerability of the victim and whether the offender was provoked or showed remorse). Judges may also have access to sentencing recommendations provided by a probation officer or other professional, who assesses the potential impact of the sentence on the offender (and victim or society). Judges may also give a discount for a guilty plea (which reduces the severity of the final sentence), and they may consider the proportionality or 'totality' of a sentence, if the offender is to be sentenced for more than one offence. Finally, judges often have to give a reason for the sentence they pass.

The decision-making model that judges can apply differs across jurisdictions depending on whether, and how, sentencing laws are translated into sentencing guidelines. Reitz (2006) suggests that sentencing (and guideline) systems lie along a continuum ranging from discretionary to rule-based. Guidelines typically limit or control judicial discretion. They aim to focus judges' attention on legal factors and reduce the impact of extra-legal ones, as well as promote consistent decision-making both in terms of process and outcomes. In addition, guidelines sometimes aim to achieve effective sentencing in terms of reducing crime and increasing public safety, as well as acting as a resource management tool by increasing the cost-effectiveness of sentences. Finally, guidelines may aim

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