SENTENCING VALUES AND SENTENCING STRUCTURES

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I. SENTENCING VALUES AND SENTENCING STRUCTURES

It may seem strange, even ominous, to begin a presentation on sentencing by referring to nuclear weapons, but I do so with a purpose. Some years ago, the General Assembly of the United Nations sought an advisory opinion from the World Court as to whether the use or threat of nuclear weapons was in any circumstances permitted by international law. By the narrowest of majorities, the Court said that the use of such weapons would generally be contrary to international law, but it could not reach a conclusion about the legality of using nuclear weapons in extreme circumstances of self-defence when the survival of a state was at risk. In a dissenting opinion in which she disagreed with the Court's analysis, Judge Higgins said:

> The judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect. In the present case, it is the physical survival of peoples that we must constantly have in view.[1]

This memorable statement provides a useful analytical starting point for sentencing discourse as well. Here too, there are several competing norms, perspectives and interests, and here too, the lodestar must be the values animating the penal

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[1] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) 35 I.L.M. 809 at 938.

process. Sentencing values may not be so starkly obvious as the protection of life identified by Judge Higgins in the Nuclear Weapons case. But that should not deter us from seeking some consensus on the matter. What I propose are the traditional, so-called Enlightenment values of legality, openness, justice, equality and coherence. Critical legal theorists might fault this approach for preferring form over substance. A central plank of critical theory, and one of its more valuable contributions to contemporary policy debate, is that apparently neutral concepts such as equality before the law, due process and proportionate punishment often serve to mask underlying structural inequalities and social injustice.[2] Rhetorical commitment to neutral, equality-based principles tends to sustain the status quo and seldom does much to address cycles of disadvantage. Had critical theory been able to construct a viable alternative to present orthodoxy, an alternative that gave heightened recognition to pervasive power disparities, many of us would gladly embrace it. That it has so far failed to do this should not deter us from injecting as much substantive justice as possible into existing liberal values.

In our present endeavour to review the jurisdiction of the criminal courts, we must grapple with that awkward triangular relationship between substance, procedure and structure. Delivering justice of the highest quality possible must be our ultimate aim; that is the main issue of substance. The challenge is to devise procedures and structures that will best ensure the achievement of that aim. As the history of the common law shows, even when tempered with equity, substantive justice can easily be trumped by procedural and

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[2] The vast literature on this topic includes Hunter, Ingleby and Johnstone, *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law*, Chapter 4; Frug, "A Critical Theory of Law" (1989) 1 *Legal Education Review* 43; Unger, "The Critical Legal Studies Movement" (1983) 96 Harvard L.R. 561; Tushner, "An Essay on Rights" (1984) Texas L.R. 1363; Kairys (ed.), *The Politics of Law*: *A Progressive Critique*; Kennedy, "Legal Formality" (1973) 2 *Journal of Legal Studies* 351.

structural considerations. This is perhaps more evident in civil than in criminal proceedings, but in all areas of law we must be sensitive to the limiting impact of structural concerns. It is equally true, of course, that effective structures are essential for delivering substantive justice, and this is certainly very true of sentencing. For this reason, the present paper is divided into two broad sections, the first dealing with justice issues and the second with structures. Needless to say, and as will become painfully obvious, I can only skim the surface of many important issues in the time available, but some of the points raised will hopefully generate discussion. It is, after all, seldom enough that judges, lawyers and other interested parties have the opportunity to discuss sentencing issues at the same forum. For this reason, I will try to touch on more issues that would otherwise be prudent in a short paper like this.

At the outset, however, it is necessary to dwell a little on where we are now, and on why some sentencing reform is needed. As it happens, the first issue for consideration is a structural one, namely the modern legislative approach towards defining criminal offences. The present tendency is to create broadly defined offences with reasonably high maximum sentences, thereby leaving more specific evaluations of guilt to the sentencing stage of the criminal process. One could imagine a different approach as reflected in certain nineteenth century statutes such as the Summary Jurisdiction (Ireland) Act, 1851 which, in sections 9 to 12 alone, creates more than 40 specific offences, mainly of a public order nature, and each with its own specific penalty. Thus, a person who allowed pigs to wander on a public road was liable to a fine not exceeding two shillings, while a person who built a house within thirty feet of the centre of a public road was liable to a maximum fine of ten pounds and a continuing fine of ten shillings a week until the house was demolished. Specific offences of this kind are not unknown today, but the predominant tendency is reflected in statutes

such as the Criminal Justice (Theft and Fraud) Offences Act, 2001 and the Criminal Damage Act, 1991.

The new Theft Act defines theft as the dishonest appropriation of property without the consent of the owner and with the intention of depriving the owner of it. A person convicted on indictment of theft is liable to a fine or a term of imprisonment not exceeding 10 years or both. Following summary conviction, the maximum penalties are a fine of £1,500, 12 months' imprisonment or both. Thus, a person who steals any item or amount of money, big or small, is liable, at most, to ten years' imprisonment, the amount to be determined by the sentencing judge. Contrast this with the Larceny Act, 1916 as originally enacted, the first 17 or so sections of which dealt with different forms of larceny most with their own maximum sentences.[3] Thus, stealing a dog carried a maximum sentence of 18 months' imprisonment,[4] stealing cattle or other livestock carried a maximum sentence of 14 years,[5] stealing a will carried a maximum sentence of life imprisonment,[6] abstracting electricity carried a maximum sentence of five years[7] and so forth. I do not wish to make too much of this point because, as is readily apparent, many of these maximum sentences were so high as to afford little guidance to courts and, in any event, they were all replaced with a standard ten-year maximum sentence in the Larceny Act 1990. However, what they do reveal is a different mode of defining offences. They demonstrate the possibility that in drawing distinctions between different levels of culpability, key decisions can be located at the front end of the process-by, for example, having a multitude of narrowly defined offences and/or by conferring power on prosecutors to select

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[3] For the text of the Act with the original sentences, see McCutcheon, *The Larceny Act 1916* (Dublin, 1988).

[4] Larceny Act, 1916, s. 5.

[5] Larceny Act, 1916, s. 3.

[6] Larceny Act, 1916, s. 6.

[7] Larceny Act, 1916, s. 10.

from among these offences. The modern approach, however, is to leave some of the most important evaluative decisions to the end of the process, namely at the sentencing stage. There are, to be sure, some exceptions to this pattern. Offences are still occasionally, though rarely, defined in fairly narrow bands.[8] It is also true that the DPP is increasingly being authorised by statute to elect for prosecution in a summary fashion or on indictment, which means that the prosecution decision effectively pre-determines the upper limits of the applicable punishment. However, the general pattern just outlined reinforces the significance of the sentencing decision. The verdict is a binary decision of guilty or not guilty. The sentencing judge is required to fine tune the more precise degree of guilt by selecting an appropriate sentence.

Another emerging aspect of our sentencing law is the selective intensification of punishment for certain offences. This is evident in measures such as the registration requirement attaching to convictions for certain sex offences, confiscation orders following convictions for drug offences (although not, in fact, confined to drug offences) and a range of ancillary measures introduced to assist in corporate law enforcement. These may well be socially justifiable although they do raise questions about the extent to which primary punishments, such as fines or imprisonment, should be adjusted in order to take account of the additional detriment which offenders will experience as result of ancillary measures. Finally, one might note the growing faith in the deterrent power of various kinds of disqualification orders, such as the provision in the recent Intoxicating Liquor Act for the closure of public houses convicted of serving drink to under-age customers. Bearing these factors in mind, we must

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[8] The Non-Fatal Offences Against the Person Act, 1997, for example, creates three assault offences in ascending order carrying maximum sentences of 12 months, 5 years and life imprisonment, with the possibility of a fine either in addition to or instead of imprisonment in each case.

explore the possibilities of the values mentioned at the outset of this paper as a means of structuring sentencing discretion.

I. LEGALITY

Because every accused and convicted person is entitled to the rule of law,[9] it follows that every sentence should be in accordance with law. This means, first of all, that no sentence should exceed the maximum prescribed by statute or, where applicable, the jurisdictional limits of the sentencing court. These limitations are easy to observe when fines or sentences of imprisonment are being imposed. We should recall, however, that a few offences, formerly known as common-law indictable misdemeanours, are subject to no statutory maxima. Current sentencing law is dispersed among a wide variety of statutes, old and new, and in various judicial decisions. In order to satisfy the legality requirement, a Sentencing Act or Powers of the Criminal Courts Act should be introduced. The purpose of this Act would be to set out the range of available sentences and related measures such as probation orders, as well as penalties such as confiscation and forfeiture. This would involve a consolidation of much of the existing law and the addition of some new elements. First, however, the Act should preserve the best of what we already have. For example the provision in the Probation of Offenders Act, 1907 which allows the District Court to make a finding of guilt without entering a conviction is valuable and beneficial. It is useful, for example, when dealing with first-time defendants charged with minor drug offences for whom a drug conviction might later have serious consequences in terms of occupation, emigration, travel and so forth.

There are other aspects of the sentencing system in need of statutory clarification. First among these is the suspended sentence which is currently unregulated by statute. Some firm guidance is needed, whether by statute or through appellate guidance, as to the circumstances in which a

[9] *G. v. DPP* [1994] 1 I.R. 374 at 381.

suspended sentence is appropriate. One common-law principle which is fairly widely accepted is that a sentence of imprisonment should not be increased just because it is about to be suspended. After all, the offender may end up serving that sentence as a result of breaching the terms of the suspension, and it would be unfair if he were to be imprisoned for longer than he deserved. Furthermore, every suspended sentence should consist of three elements: (1) the actual custodial sentence selected as the facially appropriate punishment, say three years' imprisonment; (2) the condition(s) on which it is being suspended, *e.g.* to be of good behaviour and/or to stay away from a particular locality; and (3) an operational period, meaning the length of time for which the conditions apply, say two years. This third element often seems to be omitted. In other words, a sentence of three years' imprisonment may be imposed and then suspended when the offender enters a bond to be of good behaviour. This raises the question, how long does the bond last? There maybe an implied assumption that the operational period lasts as long as the sentence that was suspended, but there does not appear to be any authority to support such an assumption. Nor would such an assumption always be fair. After all, the Irish courts have been known to suspend sentences as long as ten years without specifying any operational period. Does this mean that if the offender nine years into that sentence committed a public order offence, the ten-year sentence would be activated?

This is where the legality principle comes into play. Just as it is a constitutionally-protected principle that criminal offences should be clearly and specifically defined,[10] so it is imperative that every sentenced person should know the exact nature and extent of the punishment imposed. In particular, any conditions attaching to a sentence should be clear and the offender should be aware from the outset of any consequences, such as the activation of a suspended sentence, that will flow from the breach of a condition. Until recently

[10] *King v. Attorney-General and the DPP* [1981] I.R. 233.

serious problems were being caused by the imposition of part-suspended and reviewable sentences whereby lengthy sentences were being imposed but with a review date, sometimes set quite early. In Cork Circuit Court some years ago, a sex offender was sentenced to 36 years' imprisonment, but given a review date once he had served 12 months. The judgment of the Supreme Court in *The People (DPP) v. Finn*[11] has hopefully brought this practice to an end. Some courts are now adopting the practice of giving long prison sentences and then suspending the last year or more as a reward to the offender for having pleaded guilty. This raises a number of questions. Are these terminating periods of suspension being imposed with or without conditions? There is, I would suggest, no such thing as an unconditionally suspended sentence. The essence of such a sentence is that a period of imprisonment is held in abeyance–one often sees references to the Damocles sword in this context–so long as the conditions specified in the bond are observed. If, on the other hand, terminating suspended sentences are being imposed subject to conditions, presumably meaning that the offender at some point undertakes to observe specified conditions for one year or longer after being released from prison, one wonders if this is in accordance with principle. After all, it is a firm principle of sentencing that a guilty plea merits a reduced sentence and that an early admission of guilt, followed by a guilty plea, is a significant mitigating factor.[12] If the only reward for an early guilty plea is a conditionally suspended sentence, which may, after all, be eventually served if a condition is breached, this is arguably insufficient. All of these matters should be regulated by statute.

Right now, there appears to be no formal limit on the range of conditions that may be imposed as part of a suspended sentence. It seems, for example, that curfew orders are occasionally imposed as a condition of suspension. In

[11] [2001] 2 I.R. 25.

[12] *People (DPP) v. Tiernan* [1988] I.R. 250.

many cases, this may be an effective way of reducing the possibility of re-offending. Yet when it is considered that in other jurisdictions, including England and Wales, curfew orders were introduced only after considerable discussion and pilot testing, it is strange that they emerged here as a result of decisions made by individual judges. Some might query whether there is any need for statutory regulation in the absence of any obvious evidence of difficulties arising from such judicial innovations. In response to this, I would make two points. First, conditions imposed as part of a suspended sentence should be subject to reasonable limits, and their possible drawbacks as well as their possible advantages should be carefully thought through. Secondly, there should be pre-defined limits on the range of permissible conditions. Suppose, just for the sake of argument, that a judge decided to impose a "scarlet letter" sentence, whereby as a condition of suspension, an offender was required to wear a badge or some similar notice saying, "I am a robber" (or a drug dealer, or a drunken driver or whatever). Would that be treated as acceptable? Hopefully not, but right now there is, in so far as I can see, no formal prohibition on such a condition being imposed, all of which strengthens the case for more formal sentencing regulation.

Community service has also occasionally given rise to difficulties, largely because of failure to abide by the upper limit of 240 hours[13] and the prohibition on combining community service with another sanction. Here reform as well as clarification may be needed.[14] For example, should the present 240-hour limit be increased? Consideration might be given to a limited form of combination order.[15] For

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[13] Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland*.

[14] The *Final Report of the Expert Group on the Probation and Welfare Service* recommended, at p. 46, that community service should be available both as an alternative to imprisonment and as a sanction in its own right.

[15] See, for example, the provision for combination orders introduced in

example community service might be combined with a fine or with probation supervision. Community service should not, however, be combined with a suspended sentence, as the entire purpose of community service is to operate as an alternative to imprisonment. Another matter in need of clarification is the general power of a court to impose a fine when a statute provides for imprisonment only–other than a mandatory prison sentence.

II. OPENNESS

The Constitution requires that justice must, as a rule, be administered in public. Sentencing decisions are generally announced in open court. Even when sex offences must by statute be tried otherwise than in public, the verdict and sentence must be announced in open court. However, open decision-making requires more than open courts. It also requires that decisions be supported by announced reasons. I am fully aware of the constraints under which the District Court in particular must operate, because of its extensive caseload. But the idea of requiring reasons for certain sentences, say prison sentences of less than six months which might be replaced with community-based penalties is worth discussing. Another matter which arises under this heading is the practice of approaching a judge in chambers in the hope of getting an indication of the possible sentence. This has now been firmly discouraged, and I understand that there is a directive from the DPP to the effect that prosecuting lawyers should not engage in such discussions. Sentence indications can cause problems and have done so. Therefore, it is just as well to discourage them. However, they should not be outlawed entirely because exceptional circumstances may arise where some matter might be better brought to a judge's attention other than in open court.

III. FAIRNESS

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the U.K. by the Criminal Justice Act, 1991, and continued in force by the Powers of the Criminal Courts (Sentencing) Act, 2000.

As to what fairness in sentencing means, it is often a case of *quot homines tot sententiae*. To begin with, we must consider the purpose of the criminal law itself although this, too, is a disputed question. However, one clear characteristic of the criminal law is that it selects certain wrongs to which the appropriate response is prosecution, usually by an agency of the state, as opposed to a civil remedy granted at the suit of an aggrieved party. One widely accepted interpretation of legal history is that the criminal law served what Gardner and others have described as a displacement function.[16] In other words, it displaced or replaced private retaliation by the person who had been injured by the offence. Some have interpreted this as amounting to an appropriation of the dispute constituting the crime from the primary parties and from the victim in particular.[17] In its early years, the criminal law would have concerned itself largely with offences that were *mala in se* and which therefore had identifiable victims. One clear purpose of the replacement of private retaliation with public adjudication was to ensure that punishment was selected in accordance with objective criteria rather than in response to the desires of individual victims. What these objective criteria should be is in itself the subject of an inconclusive debate. Utilitarians believe that punishment cannot be justified unless it serves some forward-looking goal such as deterrence, rehabilitation or incapacitation. Retributivists, taking a deontological stance favoured by Kant and others, believe that punishment should be imposed because it is deserved. Modern retributivist theory can, in turn, be divided into two broad categories: determining retributivism which holds that punishment must be proportionate to the crime, and limiting retributivism which holds that proportionality should function as an upper limit

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[16] Gardner, "Crime: In Proportion and In Perspective" in Ashworth and Wasik (eds.), *Fundamentals of Sentencing Theory*, Chapter 2; Horder, "The Duel and the English Law of Homicide" (1992) 12 *Oxford Journal of Legal Studies* 419.

[17] Christie, "Conflicts as Property" (1977) 17 Brit. J. Crimin. L.

on permissible punishment while allowing that less punishment may be appropriate in specific cases in order to promote rehabilitation or some similar goal. [18]

Irish courts have held that punishment must be proportionate to the gravity of the offence and the personal circumstances of the offender.[19] This has now become a firm principle. But it is also clear that we do not yet have a theology of proportionality, of the kind that certain writers, notably von Hirsch, would like to see enshrined in legal systems.[20] We continue to value rehabilitative possibilities, at a rhetorical level at least. Although there is no explicit judicial statement to this effect, we appear to be following a policy of limiting retributivism or limiting just deserts. In other words, while the courts have made it clear that sentences must be proportionate, they have not discounted the possibility that a less than proportionate sentence may be imposed in appropriate cases. Terms such as retribution and just deserts are sometimes treated with suspicion because they may suggest vengeance. In fact, as Bottoms has pointed out, modern just deserts philosophy emerged largely as a liberal principle.[21] It was designed to ensure, at a minimum, that offenders received no more punishment than they deserved. The essence of a just system of punishment is that it should be just to the particular offender. Sentencing is part of an unconcluded trial, and the Constitution demands that every person charged with an offence is tried in due course of

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[18] For a short, modern account of the main sentencing theories, see Ashworth, "Sentencing" in Maguire, Morgan and Reiner, *The Oxford Handbook of Criminology* (3rd. ed., 2002), Chapter 29. For more detailed readings, see von Hirsch and Ashworth (eds.), *Principled Sentencing* (2nd ed., 1998).

[19] *The People (DPP) v. M.* [1994] 3 I.R. 306; [1994] 2 I.L.R.M. 541.

[20] von Hirsch, *Censure and Sanctions*.

[21] Bottoms, "The Philosophy and Politics of Punishment and Sentencing" in Clarkson and Morgan (eds.), *The Politics of Sentencing Reform*, pp. 17 *et seq*.

law.[22] Justice also requires, as I will say again presently, that there be consensus over what constitutes aggravating and mitigating factors. A key question in assessing the punishment for every offence should be the degree of rationality with which the offence appears to have been committed. Obviously, when it comes to determining criminal responsibility for the purpose of verdict the concept of rationality must assume quite specific meanings. At the sentencing stage, it calls for judicial evaluation. Calculated offending deserves the heaviest punishment. Factors which reduce the subjective culpability of offenders should be treated as mitigating.

The offender's circumstances at the time of sentence may be significantly different from what they were at the time of the offence. The manner in which the proportionality principle has been formulated by the courts would seem to indicate clearly that circumstances at the time of sentence should be taken into account. One of the biggest challenges facing our system at present is how to deal with those who have reached old age, sometimes extreme old age, by the time they come up for sentence. The experience of imprisonment is likely to be much more onerous for them than for young able-bodied persons who, until recently, formed the vast bulk of the prison population. A research project on the sentencing of child sex abusers which I am currently engaged in shows that a significant number of offenders are aged between 60 and 80 by the time they come up for sentence. Victims sometimes express disappointment when leniency is shown to such offenders. But we must, I suggest, be quite adamant that what matters, first and foremost, is justice to the offender, bearing in mind the underlying purpose of the criminal law.

A. Deservedness and Dangerousness

The difficult relationship between deservedness and dangerousness has been well canvassed in the international

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[22] Article 38.1.

literature on sentencing,[23] but one aspect of that relationship has a particular practical significance in Ireland. Anyone who observes sentencing practices in our courts will be aware of the number of offenders who suffer from a variety of problems including mental illness, personality disorders, alcohol and drug dependency and so forth. My concern here is with those offenders suffering from mental disability, mental illness and personality disorders of various kinds, but who do not (and, with good reason, might not wish to) qualify for a guilty but insane verdict. When an accused in this category is found guilty of a violent offence including, perhaps, manslaughter, judges will be understandably concerned to ensure, as best they can, that members of the public are protected from a possible repetition of the offence. Often, the only effective way of achieving that goal is to impose a sentence of imprisonment and, perhaps, a longer sentence than might be appropriate were it not for the perceived risk of recidivism. There is a contradiction here. In many instances, the offender's disorder might properly be treated as a mitigating factor on the ground that it reduces his level of subjective guilt. Paradoxically, however, this mitigating factor may lead to an aggravated sentence. This is not the fault of the courts as they have to balance justice to the offender with some degree of social protection. The fault lies squarely with the political branches of government for failing to empower the courts to make direct hospital or treatment orders. They have also failed to provide appropriate treatment facilities. At present, all a court can do is to make a recommendation that an offender in this category receive appropriate treatment or be moved to an appropriate facility– assuming that one exists.

This is an area in urgent need of reform and one of the issues that should be addressed in the context of a Sentencing

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[23] See, for example, von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, and van den Haag, "Punishment: Desert and Crime Control" (1987) 85 Michigan L.R. 1250 (a review of von Hirsch).

Act. Of course, there is far more involved than simply making the necessary legislative provision. Of far greater importance is the establishment of appropriate facilities. The health authorities will obviously have a vital role in this regard and they should be involved from the outset in devising appropriate facilities. Certainly, we must be sensitive to the constraints under which health boards and similar authorities are currently working, and the many demands on their resources. But it must also be made clear to everyone involved, including the appropriate health authorities, that the establishment of appropriate facilities is no longer a virtue; it is a necessity. Providing treatment in prison, in so far as such is likely or possible, is not an inadequate response to the problem at issue here. Irrespective of the facilities, therapeutic or otherwise, they may provide, prisons are for punishment. And, offenders should not be detained in prison for any longer than a proportionate sentence requires.

IV. Equality

Although one of the most widely esteemed of social values, equality is also one of the most difficult to apply and implement. An egalitarian theorist might argue that the nature and severity of a sentence should not be influenced by the gender, race, religion, ethnic origin, marital status, or sexual orientation of an offender. Some might go further and argue that age, employment status, and socio-economic background should not matter either. One might debate these matters at great length. All I can do here is to point out that one of the most enduring debates among legal, social and political theorists in modern times has centred around the competing claims of liberty and equality. One version of liberalism argues that society should be so ordered as to allow people to pursue their own goals, and to use any opportunities and talents available to them to maximise their wealth or whatever desired goal they have in view. So long as they obey the Millian injunction not to harm others, they need not

worry about the impact of their activities on others. Egalitarians, on the other hand, while acknowledging the centrality of liberty as a precondition for human flourishing, place at least as much emphasis on equality of outcome.

Aristotle claimed that the worst form of inequality was to treat unequals equally. This might be a useful starting point for generating equality in sentencing, but there remains the difficulty of identifying unequals. One might start with the proposition that sentences should aim for equality of impact. In other words, the very same sentence may have a different impact on different persons. A person who is visually impaired or confined to a wheel chair may find the experience of imprisonment more onerous that one who does not have such a disability. Irish courts, including the Court of Criminal Appeal, have said that imprisonment may be more onerous for non-nationals than for nationals. These are, at least, defensible propositions. More difficult questions arise when it comes to assessing the appropriate weight, if any, to be given to the consequences that a sentence (or, indeed, conviction) may have for certain offenders in terms of loss of employment, loss of pension rights, diminution of social status, breakup of family and so forth. At first blush, it might appear that such factors should be taken into account when assessing the overall impact of conviction and that primary punishments should be reduced accordingly. The problem is that the only offenders who suffer in this way are those who have jobs, pension entitlements and other advantages that may be unequally distributed. There is a dilemma here. On the one hand, any measure which will reduce the frequency and length of prison sentences should be encouraged. On the other, such measures should not be implemented at the cost of perpetuating injustice. One way out of the conundrum, although it is not a complete answer, is to ensure that nobody is given a heavier sentence that they deserve because they are homeless, unemployed or otherwise disadvantaged. It bears repeating again that prisons are there to punish and it would be wrong to use them as a means of solving other social

problems. Addressing these problems is, of course, a political, rather than a judicial, function.

Ireland is becoming a multi-racial and multicultural society at a very fast pace. This will inevitably be reflected in the profile of defendants coming before the courts. It would, presumably, be universally agreed that no defendant or offender should suffer any discrimination, whether within the criminal justice system or elsewhere, on the ground of race, ethnic origin or skin colour. Studies in other jurisdictions have revealed the capacity of sentencing systems to discriminate on the ground of race.[24] It is improbable that courts will consciously discriminate against defendants because of their race of or other immutable characteristic. But we must be equally vigilant about indirect discrimination based, say, on unemployment or educational underachievement. For this and other reasons, it is important to monitor criminal justice decision-making in order to ensure that no such discrimination occurs, whether in relation to stop-and-search practices, arrest patterns, sentencing or imprisonment. This, in turn, underscores the need to develop reliable, ongoing information systems covering the operation of the entire system.

V. COHERENCE

I refer to "coherence" as opposed to "consistency" because the latter term is apt to create the impression that justice is best achieved by uniformity in sentencing. Even a passing acquaintance with the more rigid sentencing guidelines introduced over the past twenty years in the United States will indicate that undue uniformity creates as much injustice as undue disparity.[25] By the same token, we cannot

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[24] See, for example, Hood, *Race and Sentencing*.

[25] For a good, critical account of American sentencing reforms, see Tonry, *Sentencing Matters*. For a broader account of recent sentencing reforms undertaken in the United States and elsewhere, see Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective*.

be complacent about disparity, by which I mean treating similarly situated offenders convicted of similar offences in a markedly different way. Until relatively recently, the standard reply of judges and practitioners to allegations of disparity was that every case was different and that it would be neither fair nor feasible to impose any formal limitation on the discretion of trial judges to impose whatever sentence they considered most appropriate to the circumstances of each case. One of the more perceptible changes in sentencing thought over the past decade or so has been the growing recognition that some mechanism for structuring discretion is desirable. The pattern of defining offences in broad behavioural categories mentioned at the outset of this paper adds further weight to the argument for some form of structuring. The big question is: which kind of system best responds to our present needs?

The most obvious model may appear to be the "guideline judgment" developed by the English Court of Appeal (Criminal Division). For example, in one of its better known guideline judgments, *R. v. Billam*,[26] the Court indicated various benchmarks for sentencing rape offences, starting at five years for a contested case and moving up to life imprisonment for extreme cases. (Indeed, it is interesting that the Alverstone Memorandum[27] drawn up in 1901 also indicated 5 to 7 years as an appropriate tariff). Many other guideline judgments have dealt with drugs,[28] robbery,[29] burglary[30] and so forth. The idea of providing similar

[26] [1986] 1 W.L.R. 349; [1986] 1 All E.R. 985; (1986) 82 Cr. App. R. 347; 8 Crim. App. R. (S) 48; [1986] Crim. L.R. 347.

[27] The text of the Memorandum is to be found in Jackson, *Enforcing the Law* (2nd ed., 1971), pp. 391-399.

[28] *E.g. R. v. Aramah* (1982) 4 Cr. App. R. (S) 407; 76 Cr. App. Rep. 190. For subsequent amendments to the *Aramah* guidelines, see *Blackstone's Criminal Practice 2002,* pp. 801 *et seq.*

[29] For an up-to-date analysis of robbery sentencing, see Ashworth, "Robbery Re-Assessed" [2002] Crim L.R. 851.

[30] *R. v. Brewster* [1998] 1 Cr. App. R. 220.

guidance in Ireland was decisively rejected by the Supreme Court in *The People (DPP) v. Tiernan*[31] partly because of the absence of reliable data on prevailing sentencing practice and partly because of a reluctance to interfere with the sentencing discretion of trial judges. The absence of statistical information is a continuing difficulty. Guideline sentences pose their own problems. It can take a considerable period of time for a reasonable comprehensive set of guidelines to emerge. Furthermore, while they can work well in indicating acceptable starting points for single offences, they are not always the most effective means of indicating appropriate sentences for multiple offenders who constitute a fair proportion of those coming before the courts for sentence. How useful, for example, is it to know that five years or seven years is an acceptable starting point in a contested case of rape, when a court is faced with sentencing someone convicted on, perhaps, 12 sample counts of rape and related offences committed against one or more victims over a long period? Certainly, it is possible to have guidelines dealing with such cases, but they can be difficult to construct.

I suggest that in our present situation, we should adopt a two-pronged approach. The first is to develop appellate guidance, not necessarily in terms of indicating numerical benchmarks (that time may well come when we have more reliable data on prevailing practices), but rather by indicating appoaches to sentencing particular offences. This would include guidance on factors that are to be treated as aggravating, mitigating or neutral. It would also indicate the relative gravity of different kinds of offence situations, including the sentencing of multiple offenders.[32] Here, a

[31] [1988] I.R. 250.

[32] The judgment of the English Court of Appeal (Criminal Division) in *R. v. Brewster* [1998] 1 Cr. App. R. 220 provides a useful model for this purpose. On sentencing multiple offenders, see Wells, *Sentencing for Multiple Offences in Western Australia* and Lovegrove, "Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers" (1998) 31 *The Australian and New Zealand Journal of Criminology* 3.

structural issue comes into play. In order for the Court of Criminal Appeal to fulfil this function effectively, it should be able occasionally to group cases together, say a group of 4 or 5 robbery cases, and indicate that it will deal with them together. Each case would be argued separately, but at the same hearing and, needless to say, written submissions would be required in advance of such hearings. This would allow the court to deliver a comprehensive judgment based on a wider variety of factual situations than any one case is likely to furnish. One factor which is often overlooked in common-law developments of this kind is the role of the lawyer.[33] Good lawyering involves a commitment to exploring the law's potential to effect some degree of social transformation. An initiative of the kind being recommended here would require the active co-operation of criminal lawyers, which would hopefully be forthcoming.

Secondly, in terms of developing more specific guidance, indicating possible benchmarks, there is much to be said for employing a decisional rather than guideline framework. Again, there is an excellent model available from Scotland where sentencing experts at the University of Strathclyde developed a decision-based system where data was collected on existing cases in which sentences were imposed but which provide a reasonably detailed account of the circumstances of each case.[34] The problem with raw sentencing statistics (along the lines that X per cent. of those sentenced in the District Court got sentences of 6 months or

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[33] Lucke, "The Common Law: Judicial Impartiality and Judge-Made Law" (1982) 98 L.Q.R. 29.

[34] Tata, "Conceptions and Representations of the Sentencing Decision Process" (1997) 24 (3) *Journal of Law and Society* 395; Tata, "The Application of Judicial Intelligence and Rules to Systems Supporting Discretionary Judicial Decision-Making" (1998) 6 (2-4) *Artificial Intelligence and the Law*: *an International Journal* 203; Tata and Hutton, "What 'Rules' in Sentencing?" (1998) 26 (3) *The International Journal of the Sociology of Law* 339; Tata, Hutton, Wilson and Hughson, *A Sentencing Information System for the High Court of Justiciary: Report of the Study of the First Phase of the Implementation and Enhancement*.

less, or that Y per cent. of all robbers got prison sentences of 5 years or more) is that they are of little practical value to sentencing judges.[35] More concrete precedents are needed, so that a judge sentencing a case (or a lawyer arguing a sentence appeal) can examine how similar cases have been dealt with. To be effective, however, the data bank must include a reasonable amount of detail about the circumstances of the offence and the offender. Such a system would begin by serving a useful descriptive function, but over time could develop into a more prescriptive model.

The defining value of such a system is that it provides a fuller picture of actual cases than guidelines or guideline judgments, on their own, are able to do. It is relatively easy to construct guidelines for, say, property offences or drug offences based on the amount of property stolen or the amount of drugs in the offender's possession. Yet, this may not be the decisive consideration in sentencing particular cases. Take burglary as an example. If one burglar steals €10,000 worth of goods from a dwelling and another steals twice that much from another dwelling, does it automatically follow that the latter should get twice as heavy a sentence as the first? Few would say that he should, and for a variety of reasons. An important issue here is to identify where the gravamen of residential burglary lies. Is it in the amount of property stolen or is it in other factors? As it happens, a seminal piece of victimological research carried out at Oxford in the late 1970s by Mike Maguire showed that, when interviewed at various intervals after experiencing burglary, 63 per cent of respondents mentioned either the intrusion of privacy or emotional upset as the main effects of burglary.[36] A smaller percentage mentioned loss of property. Insights like this must eventually make their way into sentencing

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[35] Such statistics can, of course, be of great value for other policy-making purposes.

[36] Maguire, "The Impact of Burglary on Victims" (1980) 20: 3 Brit. J. Crimin. L 261.

decision-making, and they demonstrate the artificiality of crude indicators such as property values or drug quantities.

VI. Structural Issues

A. Information Systems

Clearly, the development of a decisional-model of sentencing guidance calls for the development of a sophisticated computer-based information system, but there are very useful models available. Here, however, I must refer to a more basic and more easily satisfied requirement, namely an effective way of distributing and circulating sentencing judgments of the Court of Criminal Appeal. Within the past few years, some excellent judgments on various aspects of sentencing have been handed down by the Court of Criminal Appeal and the Supreme Court.[37] It should be possible to have a website dedicated specifically to those judgments and to ensure that they are transmitted down the line to the courts for which they are designed to provide guidance.

B. Court Jurisdiction

This is obviously a central concern of the present conference. Two major issues for consideration, both with important implications for the sentencing system, are whether the jurisdiction of the District Court should be altered and how trials on indictment should be allocated between the Central Criminal Court and the Circuit Court. Personally, I do not see any major problem with the sentencing jurisdiction

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[37] See, for example, the recent judgment of the Supreme Court in *The People (DPP) v. Cunningham* (unreported, 8 October 2002) dealing definitively with the question of whether factors which come into being after a sentence has been imposed, such as the offender's good behaviour in prison, can properly be taken into account by the Court of Criminal Appeal. The Supreme Court held that the Court of Criminal Appeal, being a creation of statute, was confined to taking account of those matters listed in the relevant legislation and these matters do not include post-sentence behaviour.

per se of the District Court,[38] but I do see a need for more consensus on the circumstances in which a prison sentence is appropriate following summary conviction. It would seem far more sensible to aim for such consensus, with some degree of guidance, rather than attempt to curtail the District Court's jurisdiction which is not, after all, a magistrates' court. As to the jurisdiction of the Central Criminal Court, all I will say in the present context is that a good deal of headway has been made by that Court over the past ten years in generating coherence in sentencing for serious sexual offences. We should be wary of any changes that would diminish that, but in the event that more formal appellate guidance of the kind already described becomes available, different considerations may apply.

C. The Appeals System

The District Court may, in certain circumstances, impose up to two years' imprisonment. Yet the only avenue of appeal, whether against conviction, sentence or both, is to the Circuit Court where the case is re-heard in full or in part, depending on the nature of the appeal. This means that a person sentenced to, say, 18 months imprisonment in the Circuit Court may appeal (or, at least seek leave to appeal) to the Court of Criminal Appeal where the matter will be dealt with by a bench of three judges, whereas a person sentenced to 24 months in the District Court may appeal to the Circuit Court only where the matter will be dealt with by a single judge. No further appeal is permitted, and it is only if the accused can identify some viable ground for seeking judicial review that the matter can come before the High Court. Is there a case to be made for having a further appeal in certain circumstances from the Circuit Court to the High Court or to the Court of Criminal Appeal, perhaps when the case was found to involve a point of law of exceptional public

[38] The Law Reform Commission has considered the limits of the District Court's jurisdiction to impose sentences of imprisonment and made provisional recommendations in that regard in *Penalties for Minor Offences* (L.R.C. CP20-2003).

importance?[39] I merely ask the question without necessarily suggesting an affirmative answer.

As to appeals against sentence following conviction on indictment, we should examine whether there is still a need to go through the motions of applying for leave to appeal against sentence. The reality is that applications for leave to appeal are almost invariably treated as the appeals themselves. We should recall that under the Seventh Protocol to the European Convention on Human Rights every convicted person has a right to appeal against conviction and sentence. The Protocol allows for this right to be regulated by law, which means presumably that time limits and other formalities may be lawfully imposed. However, it would seem sensible to allow every convicted person a straight right of appeal, without the need for leave. The idea of re-organising the appeals system in order to facilitate the provision of general sentencing guidance has already been described.

D. Available Sentences

This is a large issue which I have conveniently left to the end, because it could form the topic of an entire conference. However, if we are to reduce dependency on imprisonment, particularly for minor and middle-ranking offences, more viable alternative, community-based measures, must be developed. The recent Law Reform Commission Report on the Indexation of Fines is a welcome beginning.[40] Clearly the expansion of other community-based sanctions depends to a great degree on the capacity and resources of the Probation and Welfare Service. Unfortunately, in recent years, there has been far more political kudos to be gained from opening new prisons than

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[39] In other words, on a ground similar to s. 29 of the Courts of Justice Act, 1924 which permits a further appeal from the Court of Criminal Appeal to the Supreme Court.

[40] Law Reform Commission, *Report on the Indexation of Fines: A Review of Developments* (L.R.C. 65-2002).

from expanding the probation service. Hopefully, these attitudes and policies will change so that imprisonment can become what it is meant to be: a sanction of last resort. I have not referred in this paper to the Children Act, 2001, which reforms the entire law on juvenile justice. This is a welcome and, in many respects, a courageous piece of legislation. But, again, its effectiveness will depend entirely on the resources made available to implement it, and once again, the Probation and Welfare service has a central role in the implementation.

VII. Concluding Comment

In 1999, the Centre for Sentencing Research at the University of Strathclyde held an international conference on sentencing.[41] Such was its success that another conference was held in June of this year, and it is good to record that a number of judges and others from Ireland attended. Hopefully, it will become a regular event. There was much to be learned from both conferences which brought together leading experts on sentencing from around the world. If there was one clear message coming through on both occasions, it was that sentencing problems are much the same in most democratic countries. The same tensions, the same dilemmas, the same policy conflicts, the same competing interests tend to manifest themselves over and over again. Ireland is no different from most other Western countries in terms of the problems associated with sentencing. Where it differs from most other countries is that it has yet to take any bold step to reform the system or introduce new structures. In retrospect, this may not be a huge loss as we can now, at least, learn from the mistakes of others.[42] But we must learn - and act, if only to the very limited extent recommended in this paper.

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[41] The proceedings are now published in Tata and Hutton (eds.), *Sentencing and Society: International Perspectives*, a book that is to be warmly recommended to anyone seeking to acquaint themselves with current international sentencing thought.

[42] Clarkson and Morgan, *The Politics of Sentencing Reform* (Oxford, 1995).

Awareness of the need to create more coherent sentencing practices is by no means new,[43] and experience tends to indicate that a gradualist approach towards reform is likely to be the most fruitful in the long run.

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[43] See, for example, Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem" (1979) 127 Univ. of Penn. L.R. 1288; Thomas, *Constraints on Judgment*: *The Search for Structured Discretion in Sentencing*.